

YEARBOOK
OF THE
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1991

Volume I

*Summary records
of the meetings
of the forty-third session
29 April-19 July 1991*

UNITED NATIONS



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NOTE

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

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

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

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

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This volume contains the summary records of the meetings of the forty-third session of the Commission (A/CN.4/SR.2205-A/CN.4/SR.2252), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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MEMBERS OF THE COMMISSION

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

OFFICERS

Chairman: Mr. Abdul G. KOROMA
First Vice-Chairman: Mr. John Alan BEESLEY
Second Vice-Chairman: Mr. César SEPÚLVEDA GUTIÉRREZ
Chairman of the Drafting Committee: Mr. Stanislaw PAWLAK
Rapporteur: Mr. Husain AL-BAHARNA

Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Mr. Vladimir S. Kotliar, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.

AGENDA

The Commission adopted the following agenda at its 2205th meeting, held on 29 April 1991:

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

ABBREVIATIONS

EC	European Community
ECA	Economic Commission for Africa
ECE	Economic Commission for Europe
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross and Red Crescent
ILA	International Law Association
ILO	International Labour Organisation
ITU	International Telecommunication Union
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNICEF	United Nations Children's Fund
WIPO	World Intellectual Property Organization

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<i>I.C.J. Reports</i>	ICJ, Reports of Judgments, Advisory Opinions and Orders
<i>P.C.I.J. Series A</i>	PCIJ, <i>Collection of Judgments</i> (nos. 1-24: up to and including 1930)
<i>P.C.I.J. Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (nos. 40-80: beginning in 1931)

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NOTE CONCERNING QUOTATIONS

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

MULTILATERAL CONVENTIONS

cited in the present volume

Source

HUMAN RIGHTS

- Slavery Convention (Geneva, 25 September 1926) League of Nations, *Treaty Series*, vol. 60, p. 253.
- Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) United Nations *Treaty Series*, vol. 78, p. 277.
- Convention relating to the Status of Refugees (Geneva, 28 July 1951) *Ibid.*, vol. 189, p. 137.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956) *Ibid.*, vol. 266, p. 3.
- European Convention on Extradition (Paris, 13 October 1957) *Ibid.*, vol. 359, p. 273.
- International Covenant on Civil and Political Rights (New York, 16 December 1966) *Ibid.*, vol. 999, p. 171.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968) *Ibid.*, vol. 754, p. 73.
- American Convention on Human Rights (San José, 22 November 1969) *Ibid.*, vol. 1144, p. 123.
- International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973) *Ibid.*, vol. 1015, p. 243.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51, resolution 39/46, annex.*
- Convention on the Rights of the Child (New York, 20 November 1989) *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49, annex.*

PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS

- Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946) United Nations, *Treaty Series*, vol. 1, p. 15.
- Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947) *Ibid.*, vol. 33, p. 261.

- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Ibid., vol. 500, p. 95.
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) Ibid., vol. 596, p. 261.
- European Convention on State Immunity (Basel, 16 May 1972) Council of Europe, *European Treaty Series*, No. 74 (Strasbourg, 1972)
- Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) United Nations, *Juridical Yearbook 1975*, (Sales No. E.77.V.3), p. 87.
- ENVIRONMENT AND NATURAL RESOURCES
- African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968) United Nations, *Treaty Series*, vol. 1001, p. 3.
- International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) Ibid., vol. 973, p. 3.
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico, Moscow and Washington, 29 December 1972) Ibid., vol. 1046, p. 120.
- International Convention for the Prevention of Pollution from Ships (London, 2 November 1973) United Nations, *Juridical Yearbook 1973*, (Sales No. E.75.V.1), p. 81.
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976) United Nations, *Treaty Series*, vol. 1108, p. 151.
- Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 17 December 1976) UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983)
- Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) UNEP, *Selected Multilateral Treaties in the Field of the Environment*, (Cambridge, England, 1991), vol. 2, p. 301.
- Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) Ibid., p. 309.
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989) UNEP document IG.80/3.
- Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa (Bamako, 30 January 1991) ECA, (Addis Ababa).
- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991) Document E/ECE/1250, 1991.

LAW OF THE SEA

- International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.
- Convention on the High Seas (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 450, p. 11.
- 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 (Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

LAW APPLICABLE IN ARMED CONFLICT

- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases (Geneva, 17 June 1925) League of Nations *Treaty Series*, vol. XCIV (1929), No. 2138.
- Geneva Conventions for the protection of war victims (Geneva, 12 August 1949) and Protocol I relating to the protection of victims of international armed conflicts (Geneva, 8 June 1977) United Nations *Treaty Series*, vol. 75, pp. 31 *et seq.* Ibid., vol. 1125, p. 3.

LAW OF TREATIES

- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) Ibid., vol. 1155, p. 331.

INDUSTRIAL PROPERTY

- Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883) Ibid., vol. 828, p. 305.

MERCENARIES

- International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989) *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49, resolution 44/34, annex.*

NARCOTIC DRUGS

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

NUCLEAR AND OTHER WEAPONS

Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5 August 1963) United Nations, *Treaty Series*, vol. 480, p. 43.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (London, Moscow and Washington, 10 April 1972) Ibid., vol. 1015, p. 163.

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) Ibid., vol. 956, p. 251.

Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) Ibid., vol. 1063, p. 265.

Convention on Early Notification of a Nuclear Accident (Vienna, 26 September 1986) IAEA, *Legal Series*, No. 14 (Vienna, 1987)

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986) Ibid.

Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (21 September 1988) IAEA, 1989.

OUTER SPACE

Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (London, Moscow and Washington, 27 January 1967) United Nations, *Treaty Series*, vol. 610, p. 205.

Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, 29 March 1972) Ibid., vol. 961, p. 187.

TELECOMMUNICATIONS

International Telecommunication Convention (Madrid, 9 December 1932) League of Nations, *Treaty Series*, vol. CLI, p. 4.

TERRORISM

Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937) League of Nations, document C.546.M.383.1937.V.

CHECK-LIST OF DOCUMENTS OF THE FORTY-THIRD SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/434	Provisional agenda	Mimeographed. For agenda as adopted see p. ix above.
A/CN.4/435 [and Corr.1] and Add.1 [and Corr.1]*	Ninth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in <i>Yearbook... 1991</i> , vol. II (Part One).
A/CN.4/436 [and Corr.1, 2 and 3]	Seventh report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	<i>Idem.</i>
A/CN.4/437 [and Corr.1]	Seventh 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.4/438 [and Corr.1]	Fifth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz-González, Special Rapporteur	<i>Idem.</i>
A/CN.4/439	Sixth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz-González, Special Rapporteur	<i>Idem.</i>
A/CN.4/440 and Add.1	Third report on State responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.456	Topical summary, prepared by the secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fifth session of the General Assembly	Mimeographed.
A/CN.4/L.457	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 23	See summary records of the 2218th meeting (paras. 23 <i>et seq.</i>), 2219th meeting (paras. 15 <i>et seq.</i>), 2220th meeting (para. 59), 2221st meeting (paras. 9-60).
A/CN.4/L.458 [and Corr.1] and Add.1	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: Parts I, II and VI of the draft articles; articles 2, 10 and 26-33	See summary records of the 2228th meeting (para. 67), 2229th meeting (paras. 12 <i>et seq.</i>), 2230th meeting (paras. 6 <i>et seq.</i>)
A/CN.4/L.459 [and Corr.1] and Add.1	Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee: Parts One and Two; articles 1-26	See summary records of the 2236th meeting (paras. 14 <i>et seq.</i>), 2237th meeting (paras. 34 <i>et seq.</i>), 2239th meeting (paras. 2 <i>et seq.</i>), 2240th meeting (paras. 2 <i>et seq.</i>), 2241st meeting (paras. 26-58).
A/CN.4/L.460	[Symbol not used]	

* The corrigenda to A/CN.4/435 and A/CN.4/435/Add.1 were combined in a single document.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.461	Draft report of the International Law Commission on the work of its forty-third session: chapter I (Organization of the session)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Forty-sixth session, Supplement No. 10 (A/46/10)</i> . The final text appears in <i>Yearbook . . . 1991</i> , vol. II (Part Two).
A/CN.4/L.462 and Add.1 [and Add.1/Corr.2 and 3], 2 [and Add.2/Corr.1], and 3 [and Add.3/Corr.1]	<i>Idem</i> : chapter II (Jurisdictional immunities of States and their property)	<i>Idem</i> .
A/CN.4/L.463 [and Corr.1] and Add.1, 2, 3 and 4	<i>Idem</i> : chapter III (The law of the non-navigational uses of international watercourses)	<i>Idem</i> .
A/CN.4/L.464 and Add.1, 2, 3 and 4	<i>Idem</i> : chapter IV (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem</i> .
A/CN.4/L.465	<i>Idem</i> : chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.466	<i>Idem</i> : chapter VI (Relations between States and international organizations (second part of the topic))	<i>Idem</i> .
A/CN.4/L.467	<i>Idem</i> : chapter VII (State responsibility)	<i>Idem</i> .
A/CN.4/L.468 [and Corr.1]	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/SR.2205-A/CN.4/SR.2252	Provisional summary records of the 2205th to 2252nd meetings	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FORTY-THIRD SESSION

Held at Geneva from 29 April to 19 July 1991

2205th MEETING

Monday, 29 April 1991, at 3.25 p.m.

Outgoing Chairman: Mr. Jiuyong SHI

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Bar-segov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, 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-third session of the International Law Commission and welcomed the members of the Commission.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN said that he had represented the Commission at the forty-fifth session of the General Assembly and introduced to the Sixth Committee the Commission's report on the work of its forty-second session.¹ In his statement on that occasion,² he had indicated the specific issues on which the Commission particularly sought the views of Governments and

¹ Reproduced in *Yearbook ... 1990*, vol. II (Part Two), document A/45/10.

² *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee, 23rd meeting, paras. 3 et seq.*

had briefly explained the draft articles provisionally adopted.

3. The General Assembly had much appreciated the work accomplished during the Commission's forty-second session, in particular on the question of a possible international criminal jurisdiction and on the Commission's long-term programme of work.¹ The many comments, ideas and suggestions voiced by delegations, which were reflected in the summary records of the Sixth Committee and in the topical summary prepared by the secretariat (A/CN.4/L.456), would certainly help the Commission to find workable solutions to the complex issues confronting it, solutions which could reconcile the conflicting positions and interests of States. However, the Sixth Committee had displayed some unease about the pace of the Commission's work on two topics: State responsibility and international liability. Some delegations would like to have a "state of the topic" report on each of those questions, a suggestion he had promised to convey to the special rapporteurs concerned.

4. With regard to the working methods of the Commission and the relationship between its legal work and the political decisions taken by Governments and the General Assembly, some delegations had stressed the importance of a close and proper interrelationship between the Commission and its parent body. The ideas and proposals put forward in that connection were of course related to the sometimes blunt criticisms made by delegations about the length of and delay in issuing the Commission's report, the topics selected, and the efficiency and productivity of its work, and they should be viewed against the background of the discussions of the report in the Sixth Committee. From certain of those criticisms, he had concluded that the Planning Group and the Commission itself must allocate sufficient time for thorough consideration and an overall assessment of the programme, procedures and working methods of the Commission, taking into account the views expressed by delegations.

5. At the forty-second session, some members of the Commission, because of various other commitments,

had agreed only reluctantly that the Commission's annual sessions should begin as early as the end of April. He had drawn the attention of the Sixth Committee to that kind of difficulty and had also raised the matter with the Director of the Conference Services Division in Geneva, who had advised that the Commission might not enjoy an adequate level of conference servicing if the crucial last week of its work coincided with the last week of the session of the Economic and Social Council. Furthermore, the calendar of meetings in Geneva was extremely heavy during the summer months and left the Division little room for flexibility, particularly in view of the drastic cuts in resources since 1990. It thus seemed that the postponement of the start of the Commission's sessions until May would run into practical difficulties, but that should not prevent it from seeking a solution acceptable to all its members.

6. He then reviewed the resolutions adopted by the General Assembly which concerned the work of the Commission. In resolution 45/41 of 28 November 1990, the Assembly had once again invited the Commission to request its special rapporteurs to attend the discussion of the topics for which they were responsible, but it also requested the Commission to report to it on the results of the arrangement allowing for two weeks of concentrated work in the Drafting Committee at the beginning of the forty-third session. However, as the Sixth Committee had itself acknowledged, such an arrangement was an internal matter for the Commission. He therefore thought that, in order to avoid any misunderstanding, matters of that kind should in future not appear in the report submitted to the General Assembly.

7. In its resolution 45/43, of the same date, the Assembly had expressed its satisfaction at the useful informal consultations held at its forty-fifth session on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the subsequent procedure aimed at facilitating the reaching of a generally acceptable decision in that respect. The consultations, which had focused mainly on articles 17, 18 and 28, would be resumed at the Assembly's forty-sixth session.

8. The third resolution which concerned the Commission's work was resolution 45/40, also adopted on 28 November 1990, on the United Nations Decade of International Law, which contained the programme for the activities that would begin during the first term (1990-1992) of the Decade. He trusted that the Planning Group, the Working Group on the long-term programme of work and the Commission itself would make their contributions to the Decade.

9. As part of its traditional policy of cooperation with other intergovernmental legal bodies, the Commission had been represented by Mr. Calero Rodrigues at the session of the Inter-American Juridical Committee, held in Rio de Janeiro in August 1990, and by Mr. Pellet at the session of the European Committee on Legal Cooperation held in Strasbourg in December 1990. He himself had attended the thirtieth session of the Asian-African Legal Consultative Committee held from 22 to 27 April 1991 in Cairo, where the discussions had produced many interesting ideas, one of which, on the topic

of the jurisdictional immunities of States and their property, merited detailed consideration by the Commission. That concerned a point emphasized by one delegation to the effect that, as the State and the State enterprise were separate entities, the freezing of the assets of one of them should not mean the freezing of the assets of the other. He had also taken part in a symposium in Geneva from 28 February to 2 March 1991 on the topic of the international law of arms control and disarmament.³

10. Prince AJIBOLA paid a tribute to the outgoing Chairman for the excellent work which he had done during his term of office and for the high standard of his statements in the various forums where he had represented the Commission.

Election of officers

11. The OUTGOING CHAIRMAN noted that negotiations were still in progress concerning the nomination of the Chairman of the forty-third session and proposed that the meeting should be suspended to allow for further consultations. For the present session, the Chairman should in principle come from the African Group and the First Vice-Chairman from the Group of Western European and Other States, with the other regional groups sharing the posts of Second Vice-Chairman, Chairman of the Drafting Committee and Rapporteur.

The meeting was suspended at 3.50 p.m. and resumed at 5 p.m.

Mr. Koroma was elected Chairman by acclamation.

Mr. Koroma took the Chair.

Mr. Sepúlveda Gutiérrez was elected Second Vice-Chairman by acclamation.

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

Mr. Al-Baharna was elected Rapporteur by acclamation.

12. The CHAIRMAN thanked the members of the Commission for the honour they had bestowed on him and announced that the Group of Western European and Other States would nominate its candidate for the post of First Vice-Chairman at a later stage.

Adoption of the agenda (A/CN.4/434)

13. The CHAIRMAN invited the Commission to adopt the preliminary agenda (A/CN.4/434).

The agenda (A/CN.4/434) was adopted.

³The report is to be found in *The international law of arms control and disarmament. Proceedings of a Symposium, Geneva, 28 February - 2 March 1991* (J. Dahliz and D. Dicke, eds.), United Nations publication (Sales No. GV.E.91.0.14).

Organization of work of the session

[Agenda item 1]

14. Mr. NJENGA, referring to paragraph 11 of General Assembly resolution 45/41 in which the Assembly

... takes note of the intention of the International Law Commission, expressed in paragraph 548 of its report, to allow for two weeks of concentrated work in the Drafting Committee at the beginning of the forty-third session of the Commission and requests the Commission to report to it on the results of that arrangement,

said that it would be useful for the Commission to discuss in a plenary meeting the manner in which the Drafting Committee should proceed.

15. Following an exchange of views in which Prince AJIBOLA, Mr. PAWLAK (Chairman of the Drafting Committee) and Mr. NJENGA took part, Mr. CALERO RODRIGUES suggested that the meeting should be suspended to enable the Chairman of the Drafting Committee to consult the other members of the Commission as to how best the Drafting Committee should conduct its work.

The meeting was suspended at 5.20 p.m. and resumed at 6 p.m.

16. Mr. PAWLAK (Chairman of the Drafting Committee) announced that the following members of the Commission had agreed to participate in the Drafting Committee: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Ogiso, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez and Mr. Shi.

17. Recalling that the Commission had agreed at its forty-second session that, in order to meet the goals it had set for itself, it should allow for two weeks of concentrated work in the Drafting Committee at the beginning of the present session, he suggested that all the members of the Commission present in Geneva should take part in the meetings of the Drafting Committee during those two weeks.

It was so agreed.

18. The CHAIRMAN announced that, from Tuesday, 30 April to Friday, 3 May, the Drafting Committee would meet mornings and afternoons and that the Commission would hold a plenary meeting on Friday, 3 May, at 10 a.m. to hear a progress report on the drafting work.

19. Mr. THIAM asked for more details about the organization of the work of the Drafting Committee, he wished to know in particular which topics would be taken up at the morning meetings and which at the afternoon meetings.

20. The CHAIRMAN said that the Commission had decided at the previous session that the Drafting Committee would start by considering the draft articles on jurisdictional immunities and then move on to another topic when the work on that priority question was sufficiently advanced.

21. After an exchange of views in which Mr. THIAM, Mr. NJENGA and Mr. CALERO RODRIGUES took

part, Mr. PAWLAK, supported by Mr. MAHIU, suggested that, in order to make better use of the available time the Drafting Committee should concentrate during the first week on the draft articles on jurisdictional immunities, the second reading of which the Commission wished to complete at the present session, and, that, then, depending on the status of the work and the rate of progress, it should devote several meetings during the second week to the question of the draft Code of Crimes against the Peace and Security of Mankind or to the question of the law of the non-navigational uses of international watercourses, before reverting to the topic of jurisdictional immunities.

22. The CHAIRMAN said that, if there was no objection, he would take it that the Commission accepted Mr. Pawlak's suggestion.

It was so agreed.

The meeting rose at 6.15 p.m.

2206th MEETING

Friday, 3 May 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Election of officers (*concluded*)

1. The CHAIRMAN recalled that the election of the First Vice-Chairman had been deferred from the previous meeting.

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

The meeting was suspended at 10.05 a.m. and resumed at 10.30 a.m.

Progress report by the Chairman of the Drafting Committee

2. Mr. PAWLAK (Chairman of the Drafting Committee) said he was pleased to inform the Commission that the Drafting Committee, which was assigned a particu-

larly important task at the present session, had made some progress thanks to the dedication and sense of responsibility of all of its members as well as of other members of the Commission. The Committee had continued the second reading of articles presented by the Special Rapporteur on the topic of jurisdictional immunities of States and their property (agenda item 3), and had provisionally adopted articles 17 and 18, subject to certain additions to article 18 that would be examined at a later stage. The Committee had now embarked on the consideration of one of the most difficult problems presented by the draft articles, namely, State enterprises, and had already made substantial headway. It had adopted part of article 2, having drafted a new paragraph 1 (b) (iii), and had started on a compromise formula for article 11 *bis*, which would probably become part of article 10. The Committee intended to pursue its work on the topic, with a brief interruption to consider articles outstanding from the draft Code of Crimes against the Peace and Security of Mankind (agenda item 4), and hoped to complete the work by the end of the following week. Finally, he proposed that Mr. Solari Tudela should be appointed to serve on the Drafting Committee.

It was so agreed.

3. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and congratulated him and all those who had participated in the Committee's work on the progress accomplished so far.

Organization of work of the session (*continued*)

[Agenda item 1]

4. The CHAIRMAN said that, since several of the Special Rapporteurs were absent, the Enlarged Bureau did not deem it appropriate at that stage to recommend a complete calendar for the present session, but merely to recommend that, when the two-week period of concentrated work in the Drafting Committee ended, the Commission should revert to its normal pattern of meetings. Accordingly, the first substantive meeting should be held on Tuesday, 14 May, and the first topic to be taken up should be the draft Code of Crimes against the Peace and Security of Mankind (agenda item 4).

It was so agreed.

5. The CHAIRMAN said he had received a letter from the Chairman of the Committee on Conferences reminding the Commission of the contents of General Assembly resolution 45/238 A, of 21 December 1990. The letter suggested various means whereby United Nations organs might make optimum use of the conference-servicing resources provided to them without detriment to the success of their work, and requested him to note the suggestions made and to inform the Commission of the contents of the letter as well as of the relevant portions of resolution 45/238 A. With the Commission's permission, he intended to reply that the International Law Commission, which had an excellent record of utilizing conference resources, had taken due note of the suggestions and would continue to do its best to main-

tain its exceptionally high rate of utilization of conference resources.

It was so agreed.

6. Mr. KOTLIAR (Secretary to the Commission), replying to inquiries by Mr. BEESLEY and Mr. CALERO RODRIGUES, confirmed that 9 and 20 May 1991 were official holidays at the United Nations Office at Geneva and that no meetings would be held on those dates.

7. Mr. PELLET expressed his protest that 1 May, which was a holiday in most parts of the world, was not observed at the United Nations Office at Geneva, whereas it closed for holidays less universal in character.

8. The CHAIRMAN said that Mr. Pellet's comment would be conveyed to the appropriate officials.

The meeting rose at 10.45 a.m.

2207th MEETING

Tuesday, 14 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Progress report by the Chairman of the Drafting Committee (*concluded*)

1. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee had used the time allotted to it to good advantage. Following two weeks of hard work, it had virtually completed its consideration on second reading of the draft articles on jurisdictional immunities of States and their property; only two points remained to be settled. The text to be submitted for consideration by the Commission contained two fewer articles than the original text, as two draft articles had been merged into one and another had been deleted. He thanked all the members of the Committee, the other members of the Commission, and the Special Rapporteur for their cooperation.

2. The CHAIRMAN thanked the Chairman of the Drafting Committee and all who had taken part in the

Committee's work. He wished the Committee every success in its further work.

Draft Code of Crimes against the Peace and Security of Mankind¹ (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT

3. The CHAIRMAN invited the Special Rapporteur to introduce his ninth report on the item (A/CN.4/435 and Add.1) containing draft article Z, which read:

Any defendant found guilty of any of the crimes defined in this Code shall be sentenced to life imprisonment.

If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 10 to 20 years.

[In addition, the defendant may, as appropriate, be sentenced to total or partial confiscation of stolen or misappropriated property. The Tribunal shall decide whether to entrust such property to a humanitarian organization.]

and a possible draft provision on the jurisdiction of an international criminal court which read:

1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security of mankind [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction upon it.

2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals.

3. The Court shall have cognizance of any challenge to its own jurisdiction.

4. Provided that jurisdiction is conferred upon it by the States concerned, the Court shall also have cognizance of any disputes concerning judicial competence that may arise between such States, as well as of applications for review of sentences handed down in respect of the same crime by the courts of different States.

5. The Court may be seized by one or several States with the interpretation of a provision of international criminal law.

together with a possible draft provision on criminal proceedings, which read:

1. Criminal proceedings in respect of crimes against the peace and security of mankind shall be instituted by States.

2. However, in the case of crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes.

4. Mr. THIAM (Special Rapporteur), introducing the ninth report on the item, said that it consisted of two

parts which dealt respectively with applicable penalties (A/CN.4/435) and with the question of the establishment of an international criminal jurisdiction (A/CN.4/435/Add.1).

5. He had discussed the question of penalties in his eighth report, which had been introduced at the Commission's preceding session (A/CN.4/430 and Add.1)³ when he had proposed a draft provision for inclusion in the statute of an international criminal court. Some members had, however, pointed out that the penalties should appear in the Code itself and not in the statute of the proposed court. Accordingly, he was now proposing a draft article Z, which would be included in the Code.

6. The applicable penalties raised delicate problems, as evidenced by the fact that, when confronted with the criticisms of Governments, the Commission had withdrawn the 1954 text of draft article 5 dealing with the question. The problems were of two kinds and stemmed principally from the diversity of legal systems. The establishment of a scale of penalties called for a uniform moral and philosophical approach that existed in domestic, but not in international, law. Penalties varied from country to country, according to the offences to be punished. In addition, there were penalties such as the death penalty and other afflictive punishments (for instance, physical mutilation) about which there was much controversy and which were not universally applied. He had therefore endeavoured to avoid extremes and to find a middle way that might be acceptable to all States. His proposal was that life imprisonment should be the punishment imposed for the crimes defined under the Code. Reservations about that kind of punishment had been expressed at the Commission's preceding session by those who considered that it precluded all possibility of the improvement and rehabilitation of the convicted person, but it seemed to be the solution that met with widest agreement. If extenuating circumstances were allowed, a penalty of 10 to 20 years' imprisonment would be possible. He called upon all members to let him know their views on the matter.

7. The second group of problems concerned the method to be adopted. Should the relevant penalty for each crime be indicated or, since all such crimes were characterized by their extreme gravity, should the same penalty be laid down, under a general formula, for all cases, with a minimum and a maximum according to whether or not there were extenuating circumstances? He had decided to opt for the latter solution, since, in his view, it would be impossible to establish a scale of penalties for each crime taken separately.

8. Members would recall that the Commission had deliberately refrained from including penalties in the 1954 draft Code. Admittedly, at its third session in 1951, it had adopted a draft article 5, which read:

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.⁴

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... 1991*, vol. II (Part One).

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

⁴ *Yearbook... 1951*, vol. II, pp. 134 *et seq.*, document A/1858, para. 59.

The drawback of that provision had been, however, that it would be left to the judge to establish the penalty to be imposed and, in the light of the strong reservations of the Governments which had communicated their observations to the Commission at that time, it had finally decided that it would be advisable to withdraw the provision.

9. The provision now being proposed was a step forward compared with the earlier provision in the sense that the applicable penalty would not be determined by the competent judge, but would be prescribed for all crimes covered by the Code. That penalty could be supplemented by an optional one which had been placed in square brackets in the report, namely, total or partial confiscation of property which the convicted person might have stolen or misappropriated. That penalty, already provided for in the Charter of the Nürnberg Tribunal,⁵ would be particularly applicable in the case of war crimes, which often involved theft or appropriation by force of property belonging to private individuals, especially in occupied territories. To whom would the confiscated property be awarded? At the national level, confiscated property went to the State; at the international level, it would be difficult to award it to one State rather than another. He was therefore proposing that it should be left to the competent court to entrust such property to a humanitarian organization such as UNICEF, ICRC or an international body set up to combat illegal drug trafficking.

10. The question of the establishment of an international criminal jurisdiction was beginning to receive the attention of the international community and of many political bodies and some recent initiatives by the Congress of the United States of America and the European Community, not to mention other isolated initiatives, had been taken along those lines.

11. At its last session, the General Assembly had unfortunately not reacted as the Commission had wished to the questionnaire-report on that subject which he had submitted to the Commission in his eighth report:⁶ refusing to decide on the proposed choices and solutions or to rule any of them out. In paragraph 3 of resolution 45/41, the Assembly had merely invited the Commission to continue its work on the question without offering any other guidelines. He had therefore continued to consider the problems on whose solution the establishment of an international criminal jurisdiction depended and had focused on two of those problems in particular: the jurisdiction of the court and the institution of international criminal proceedings.

12. With regard to jurisdiction, he had endeavoured to suggest solutions which reflected the present realities of international criminal law. The draft provision submitted for the Commission's consideration was, moreover, not intended for referral to the Drafting Committee; its purpose was to serve as a basis for a discussion from which he might draw conclusions concerning the statute of the

possible future international criminal court, which could not be drafted until the jurisdiction of the court had been defined.

13. The question of jurisdiction had been considered on several occasions in the United Nations and, in particular, by the 1953 Committee on International Criminal Jurisdiction, which had produced a revised draft statute for an international criminal court.⁷ He had used article 27 of that text, with a number of changes and additions, as the basis for his proposal.

14. Paragraph 1 of the draft provision he was proposing provided that the court was competent to try individuals or, in other words, natural persons, rather than States, and formulate a rule relating to jurisdiction *ratione materiae*. That jurisdiction might be defined in one of two ways: the court tried crimes defined in the Code or it tried crimes defined in an annex to its statute; such crimes would, of course, be far fewer in number than those listed in the Code. His own view was that it would be a mistake to be over-ambitious as far as the court's jurisdiction *ratione materiae* was concerned; all the discussions had shown that there was some hesitation in that regard. It would be better to proceed cautiously and flexibly, starting, for example, by restricting the court's jurisdiction to crimes which were dealt with in international conventions, on which general agreement therefore existed, such as genocide, apartheid, certain war crimes, certain acts of terrorism, such as attacks on persons and property enjoying diplomatic protection, and drug trafficking, and which would be listed in an annex to the statute of the court.

15. With regard to jurisdiction *ratione personae*, he said that, although he was opposed in principle to the rule of conferment of jurisdiction by States, international realities made it difficult to dispense with that rule. In the case under consideration, the rule could involve four States: the State in whose territory the crime had been committed, the victim State (or the State whose nationals had been the victims of the crime), the State of which the perpetrator of the crime was a national and the State in the territory of which the perpetrator had been found. For the latter State, the decision whether or not to extradite was, in fact, tantamount to recognition or non-recognition of the court's jurisdiction. The problem therefore arose only in connection with the other three States. The 1953 draft statute had required conferment of jurisdiction by two States, the State where the crime had been committed and the State of which the victim was a national. The draft provision now being submitted to the Commission was less rigid. Paragraph 1 unreservedly reaffirmed the principle of territoriality in the sense of requiring conferment of jurisdiction by the State in which the crime had been committed. Having established that principle, he had also wished to introduce the principle of active or passive personality, which was beginning to be widely applied. Many States conferred jurisdiction on their courts in respect of certain crimes committed abroad. To cover such cases, it was only realistic to include a provision to the effect that, over and above the

⁵ 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).

⁶ See footnote 3 above.

⁷ Report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*, annex.

conferment of jurisdiction required under the principle of territoriality, those States would also have to confer jurisdiction on the court. Paragraph 2 therefore provided that conferment of jurisdiction by the State of which the perpetrator was a national or by the State whose nationals had been the victims of the crime would be required only if their domestic legislation so required in the particular case under consideration. The fact that so many States were required to confer jurisdiction also added to the number of obstacles, but rules relating to jurisdiction were determined by States. Setting those rules aside completely might be an attractive idea in theory, but it was not feasible in practice.

16. The proposed text also provided that the court should have cognizance of any challenge to its own jurisdiction (para. 3), that it should have cognizance of any disputes concerning judicial competence as well as of applications for review of sentences handed down in respect of the same crime (para. 4) and that it might be seized with the interpretation of a provision of international criminal law (para. 5). In the last-mentioned case, the court's intervention would help to remove some uncertainties regarding terminology and to explain the meaning and content of the many principles which international criminal law, a new field, borrowed from internal criminal law.

17. The second major issue to be settled was criminal proceedings. In his view, the Security Council, although the guardian of international peace and security, was primarily a political organ with no judicial functions at all. However, Article 39 of the Charter of the United Nations conferred on the Council the power to determine the existence of an act of aggression or any threat to the peace. The text he was proposing therefore provided that criminal proceedings should be instituted by States (para. 1), but that, in the case of the crimes of aggression or the threat of aggression, criminal proceedings should be subject to prior determination of those crimes by the Security Council (para. 2). Some members of the Commission would have preferred total independence from the political organs, but the Charter was a reality which must be respected as it stood, whatever might be thought of the actions of the Security Council, which did, moreover, seem more concerned to comply with the spirit of international law.

18. If the discussion in the Commission produced a clearer picture of the areas over which the court would have jurisdiction and who would be able to institute criminal proceedings, he might perhaps put forward the statute of an international criminal jurisdiction in 1992.

19. Mr. AL-BAHARNA said that, despite the differences of opinion on the issues relating to the penalties to be applied, the idea of including a provision on penalties in the Code had unanimous support. The difficulty lay in the very different approaches which States took to penalties and in the problems of their execution. To a large extent, the present controversy merely reflected long-standing questions as to the utility and extent of the punishment of offenders: hence the lack of agreement in the Commission on the penalties themselves, their scope and their formulation.

20. With regard to the procedural difficulties referred to in the ninth report, it would be better, in order to make the draft Code somewhat flexible, to envisage a general formula or a set of provisions dealing with all cases rather than to specify the corresponding penalty for each crime.

21. The Special Rapporteur invited the Commission to choose between the two possible solutions to another problem: should the provisions on penalties be incorporated into domestic law or should they be included in the Code, which might be adopted by means of an international convention? He was to be congratulated for opting for the second solution, which had the merit of promoting uniformity. Furthermore, all of the crimes in question would fall within the scope of an international convention, whereas internal law, reflecting political and social realities, might be selective.

22. What still had to be determined was the precise content of the provisions. Draft article Z was not entirely satisfactory, since, while it was true that the crimes covered by the Code were by reason of their extreme gravity, foremost in the hierarchy of international crimes, as the Special Rapporteur had said, it was equally true that the degree of individual responsibility depended on the factors at work. To ignore those factors when sentencing the perpetrator of a crime against the peace and security of mankind, to reduce all the possible penalties to a single form of punishment and to make all the crimes subject to the maximum penalty of life imprisonment, subject only to any extenuating circumstances, would amount to a failure to take into account the actual circumstances of each case.

23. Why not have a set of provisions for the three basic modes of punishment: financial penalties, imprisonment and capital punishment, with community service as a supplementary penalty? First, financial penalties, although seemingly inappropriate, might have their uses in certain cases, especially in conjunction with terms of imprisonment. Failure to pay the fine might also entail an extension of the term of imprisonment or an obligation to perform community service under the supervision of the group of persons victims of the crimes committed by the guilty person.

24. Secondly, as far as capital punishment was concerned, the perpetrators of the most serious crimes should certainly not escape extreme punishment and the States which still had the death penalty in their criminal codes far outnumbered those which had abolished it. In order to safeguard the sensibilities of the latter group of States, the death penalty provision might be accompanied by a reservation entitling any State which instituted proceedings to request the court not to impose the death penalty in the event of conviction. Life imprisonment offered many advantages over the death penalty, if only because it was reversible and had the support of all countries. Perhaps the Commission would therefore have to adopt life imprisonment for its Code rather than the death penalty.

25. Thirdly, a set of provisions providing for financial penalties, imprisonment and community service would leave the court sufficient latitude.

26. Fourthly, such a diversity of types of punishment would take account of the basic philosophies underlying the various penalties: for example, the idea of retribution was present both in community service and in financial penalties.

27. Lastly, the total or partial confiscation of stolen property could not be regarded as a penalty. Such property ought to be restored to its true owner or to persons claiming it on his behalf or, in the absence of evidence, to a relevant international body as custodian.

28. In conclusion, he recalled the practice of leaving it to the States parties to a convention to prescribe penalties and he cited in that connection article V of the Convention on the Prevention and Punishment of the Crime of Genocide, article IV of the International Convention on the Suppression and Punishment of the Crime of Apartheid and article 5 of the draft code produced by the Commission in 1951. On the other hand, article 27 of the Charter of the Nürnberg Tribunal stated that: "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just".⁸ Thus, the historical antecedents did not establish conclusively a single principle governing penalties for international crimes. The Commission was therefore free to adopt a rule acceptable to and applicable by the international community.

29. Mr. HAYES said that, if an international jurisdiction was to be established, the need for a provision on penalties had to be acknowledged in order to avoid prejudicing the principle of *nulla poena sine lege*. If there was to be only a system of national jurisdiction, national legislation could give effect to that principle, but then disparities would inevitably appear in the penalties imposed for a similar offence. He was therefore of the opinion that the draft Code should provide for a uniform system of punishment, whether the jurisdiction was international or national. As the Special Rapporteur pointed out, that was made difficult by ethical and philosophical diversity among States; criminal penalties ranged from fines to capital punishment and included deprivation of liberty in every form, forced labour, various degrees of corporal punishment, and so forth. A uniform system of punishment was possible only with universally acceptable penalties, even if the penalties applicable to the very serious crimes under consideration proved to be less severe than those applicable in certain countries to less serious crimes. An example of such difficulties was the European Convention on Extradition, which had been in force for nearly 30 years. Despite the relative cohesiveness of the States then members of the Council of Europe, the diversity of penalties in those States at the time of the drafting of that instrument had posed problems and several States that had abolished capital punishment had, upon ratification, formulated a reservation in which they had reserved the right not to extradite an individual to a State in which the crime of which he had been accused made him liable to be sentenced to death.

⁸ See footnote 5 above.

30. In the case of the Code, if the system of punishment included penalties—not only the death penalty—that were not universally acceptable, the difficulties would be even greater, not only for the purposes of extradition, which would be a key element of its implementation, but also for the very acceptance of the Code. The expression "cruel, inhuman or degrading treatment or punishment" in the Universal Declaration of Human Rights and its later use in a number of human rights instruments was not interpreted uniformly, even for capital punishment. It followed from all those considerations that imprisonment was the most fitting penalty because it was widely accepted and because it punished the crimes being dealt with better than fines would. The Commission might wish to consider whether certain obligations that were sometimes added to the penalty of imprisonment, such as the concomitant obligation to perform a certain type of work, were widely accepted: if so, that would make it possible to graduate the types of penalties and help make them fit the crime.

31. In the relevant draft provision presented in 1954 (article 5), the Commission had proposed to leave it entirely to the competent court to determine what penalty to impose. That text had been criticized by States for not respecting the principle of *nulla poena sine lege*, for leaving too much to the court and for dealing with a question that should be dealt with in national legislation, a criticism assuming, of course, that there would be a national jurisdiction rather than an international court. In his own view, that provision complied with the letter of the principle *nulla poena sine lege*, but more specificity was required to ensure at least a minimum degree of uniformity, regardless of the jurisdiction. It would be best to establish an adequate penalty together with a minimum and a maximum length, without trying to define the penalty that corresponded to each crime, since all crimes that came under the Code were very serious. Guided by those minimum and maximum limits, the court would have discretionary power to set the applicable penalty in each case and to take into consideration not only any extenuating circumstances, but also all other circumstances.

32. That line of reasoning led him to conclude that the system of punishment should be based on terms of imprisonment and, unlike the Special Rapporteur, he believed that a definite period of time would be preferable to life imprisonment. In reality, the duration of "life" imprisonment varied from country to country. As the modern trend was to impose long prison sentences of 30 or even 40 years, the maximum penalty should be of a similar length, but the Commission needed additional information before proceeding with that question.

33. Referring to the text of article Z as proposed by the Special Rapporteur, he questioned whether it was appropriate to introduce a provision such as the one in square brackets on stolen or misappropriated property, and, if so, whether it should be included in the draft article on penalties. He did not share the Special Rapporteur's concern for the relatives of the convicted person. Depriving a criminal or his relatives of stolen property was neither an injustice nor a punishment. The Commission's main consideration should be to ensure that such property was restored to its rightful owner. Perhaps that could be done

by the procedures of ordinary law, but, in cases in which property was in the custody of the police or the court, the court must in practice see to its disposal. If such a possibility was to be envisaged in the draft Code, the Commission would have to prepare a separate, more complex provision. In any event, such property should be entrusted to a humanitarian organization only if it was impossible, for one reason or another, to return it to its rightful owner.

34. In conclusion, he was of the view that the draft Code should both provide for and specify applicable penalties; that the latter should be universally acceptable, even at the risk of having an imbalance in certain countries between penalties applicable to "ordinary" crimes and those applicable to the crimes covered in the Code; that the system of punishment should be based on imprisonment, with or without variations; and that the same type of penalty should be imposed for all very serious crimes, but with minimum and maximum limits, so that the court could take account of the degree of heinousness of the act in question. Lastly, he doubted that a provision on stolen or misappropriated property was desirable, but, if the Commission considered it necessary, it should be dealt with in a separate article.

The meeting rose at 11.35 a.m.

2208th MEETING

Wednesday, 15 May 1991, 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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... 1991*, vol. II (Part One).

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³ (continued)

1. Mr. THIAM (Special Rapporteur) said that, unfortunately, information on the situation with respect to the death penalty in Latin America had been omitted from the ninth report. A corrigendum containing a statement of the current situation would be issued.

2. Mr. SHI said the Special Rapporteur was right to affirm that the principle of *nulla poena sine lege* required that provision must be made for penalties in the draft Code. The Special Rapporteur's proposed single article on penalties, set out as article Z and covering all crimes listed in the Code, was an attempt to find a simplified solution to an extremely complicated issue. The Special Rapporteur argued that, since the crimes listed in the Code were the most serious international crimes, the heaviest penalties should be imposed and that, given the trend towards abolition of the death penalty, the heaviest penalty must be life imprisonment. It was further argued that, in view of the problem of the diversity of legal systems, the inclusion of penalties in the Code itself for adoption by States in an international convention would produce a degree of uniformity of punishment. The question was whether such a solution would be acceptable to States in general, for the "international-convention approach" would entail drastic changes in some national criminal codes with respect to penalties for crimes that were evidently less serious than the ones listed in the draft Code. For many States that would create both procedural and philosophical difficulties. The only alternative solution would be to establish an international criminal court with exclusive jurisdiction, but the problem of the acceptance of such a court by States would still arise. The issue of the provision of penalties in the Code was hard to resolve in practice.

3. Despite the difficulties, he was ready to accept the first two paragraphs of article Z. The third paragraph provided for confiscation of stolen or misappropriated property. In that regard he agreed with Mr. Hayes (2207th meeting) that the possibility of such confiscation need not be viewed with disfavour on the ground that it could punish the relatives of the convicted persons. Confiscated property should, in general, be restored to the rightful owner, and property forming part of a State's cultural or historical heritage should be restored to the State. If such restoration was not possible, the property might be entrusted to a United Nations body, UNICEF, for example, as suggested by the Special Rapporteur. Lastly, the third paragraph should, in his opinion, be presented as a separate article.

4. The approach taken by the Special Rapporteur in part two of his report, on the establishment of an international criminal jurisdiction, was certainly in conformity

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

with paragraph 3 of General Assembly resolution 45/41, for it would help to determine the feasibility of setting up an international criminal court. The point of departure for considering the issue of the jurisdiction of an international criminal court was that States were very cautious when dealing with matters that touched on their sovereignty. Accordingly, acceptance of the statute of an international criminal court did not imply consent to the court's jurisdiction. A separate expression of consent was needed by means of a convention, special agreement or unilateral declaration, as provided for in article 26 of the 1953 draft statute for an international criminal court.⁴ Safeguards were needed to allow a State to decide on national criminal jurisdiction despite its overall consent to confer jurisdiction on an international court. Nor should such consent affect the system of universal jurisdiction of national courts over certain crimes, pursuant to international conventions or agreements.

5. The Special Rapporteur was right to limit the court's jurisdiction *ratione personae* to natural persons, for at the present stage of the work on the draft Code criminal responsibility was limited to individuals. On the question of jurisdiction *ratione materiae*, the Special Rapporteur was more flexible in that he presented the alternative of having no limitation, so that the draft would gain greater acceptance by States. Under such an alternative, however, the question of the limitation of personal jurisdiction to individuals would arise, since the debate in the Sixth Committee had revealed that some States would like to extend personal jurisdiction to juridical persons, particularly for certain crimes.

6. As to the number of States required to confer jurisdiction, he agreed to the idea of combining the principles of territoriality, active and passive personality, and real protection, with priority on the principle of territoriality. Such a system had more merits than drawbacks, since it protected State sovereignty, and the principle of territoriality was the general rule in almost all States.

7. Paragraphs 3, 4 and 5 of the possible draft provision on the jurisdiction of the court were acceptable. More particularly, the idea of the competence of the court to interpret a provision of international criminal law was a good one. Concerning access to the court, he could support the ideas set out in the possible draft provision on criminal proceedings. The provision making criminal proceedings subject to prior determination by the Security Council of the existence of the crimes in question was consistent with the article on the crime of aggression provisionally adopted by the Commission.⁵

8. Mr. GRAEFRATH said that the Special Rapporteur's ninth report focused on issues that had to be settled if the draft Code was to become a useful tool in strengthening peace and international cooperation. While he agreed with the Special Rapporteur's general approach in seeking universally acceptable solutions to those issues he was unable to accept all of the conclusions.

9. With regard, first, to penalties for crimes against the peace and security of mankind, a provision on the question must indeed be included in the draft Code if the establishment of an international criminal court was being considered. Such a provision would not only satisfy the principle *nulla poena sine lege*: it would also give expression to the moral and legal values the Code sought to protect and, at the same time, serve to unify the system of punishment for the crimes enumerated in the Code. The problem was that most of the crimes in question were already offences punishable under the domestic law of many countries. Preference could, of course, be had to domestic law in order to determine the penalty for a given crime, and there were two sources of such law—the law of the country in which the crime had been committed and the law of the country of which the alleged offender was, or had been, a national at the time the crime had been committed. Yet that approach could give rise to difficulties in view of the diversity of legal systems and penalties concerned. He therefore agreed that the Commission should not take that tack. Instead, the Code itself should specify the penalties to be applied, or, rather, it should provide for a range of penalties within which the judge could exercise his discretion. One provision on penalties would therefore suffice.

10. Not only extenuating circumstances, but attempt as well should attract a lighter penalty, and that should be spelt out in the draft Code. He agreed that there should be no return to the death penalty and was also opposed to life imprisonment, which was inhuman and contrary to human rights. A 25-year term of imprisonment should be the most severe penalty. He did not favour the imposition of a minimum punishment in a code dealing with particularly serious crimes. In particular, a judge at an international criminal court should not be placed in a straitjacket but should be allowed the freedom to take account of the specific circumstances of the case and of the personality of the offender.

11. Provision should also be included in the draft Code for an additional penalty, confiscation of property, which could be particularly important in the case of crimes such as drug trafficking. The court should decide what was to become of confiscated property, but the property should in the first instance be used to compensate the victims of the crime, and provision to that effect should be included in the draft. The question of stolen or misappropriated property was a different matter and should be dealt with separately, if at all.

12. As to part two of the report, he was in general agreement with paragraphs 3, 4 and 5 of the Special Rapporteur's proposed article on the jurisdiction of the court. It would be noted in that connection that the Sixth Committee had not spoken in favour of any one specific model for an international criminal court, possibly because the consequences stemming from a decision on competence and jurisdiction might not have been sufficiently clear. The few representatives who had opposed the idea of an international criminal court had taken the view that it was premature or could jeopardize the existing system of universal jurisdiction. On the question of competence itself, opinions had been more or less equally divided, some representatives considering that the court should have competence to try all crimes cov-

⁴ See 2207th meeting, footnote 7.

⁵ For text and commentary, see *Yearbook... 1988*, vol. II (Part Two), pp. 71-73, article 12.

ered by the Code, while others preferred to leave it to States to decide over which crimes the court should have jurisdiction. The jurisdiction and competence of an international criminal court lay at the core of the political decision that would have to be taken by States if such a court was to become a reality, something that would necessarily have an effect on State sovereignty. Those in favour of an international criminal court with exclusive jurisdiction over certain crimes expected States to surrender their own right to punish those crimes. That would apply even in the case of crimes committed by or against nationals of the State concerned and of crimes committed against a State or on the State's territory. Hence, while exclusive jurisdiction could perhaps be envisaged for such crimes as aggression or genocide, it would not make for a very realistic approach. Experience showed that, by and large, States reserved for themselves the right to punish their own citizens, to engage in criminal proceedings for offences committed on their territory, and they were not prepared to extradite their own nationals. It was therefore somewhat surprising that so many States represented at the General Assembly had spoken in favour of an international criminal court with exclusive jurisdiction. States that supported such a maximalist approach often did so subject to a reservation that other States or all States should act in the same way. In practice, demand for the maximum could have the effect of thwarting achievement of the minimum.

13. The rule put forward by the Special Rapporteur envisaged concurrent, rather than exclusive, jurisdiction, though not in express terms. It was not clear from the Special Rapporteur's proposal, however, whether a State which conferred jurisdiction over certain crimes on the international criminal court would continue to have national jurisdiction or would waive it completely. Apparently, the principle underlying the proposed article was that the mere fact that jurisdiction had been conferred would not affect the law by which national criminal jurisdiction was determined, the result being that national criminal jurisdiction would remain intact. In that event, a State would not be bound to bring a specific case before the international criminal court but would have the right to choose whether to do so or to bring the case before its own courts.

14. The Special Rapporteur had said that he had taken account of the concern to ensure that the criminal jurisdiction of States was respected, and had also rightly noted that there would be no point in laying down a rule that would remain a dead letter because States were not prepared to surrender their national criminal jurisdiction. The agreement of at least three States might be required before the court could try an alleged offender—the State in which the crime had been committed, the State of which the offender was a national and the State of which the victim was a national. On the other hand, in the case of war crimes, for instance, the court would be powerless if, unlike the other States concerned, the State at whose command such crimes had been committed did not agree to confer jurisdiction on the court. The Special Rapporteur had in fact referred to those drawbacks in his report, concluding that the rule laid down in paragraphs 1 and 2 of the draft article would be only “a makeshift solution, a necessary concession to State sovereignty” and, it was hoped, “of an entirely temporary nature”. He shared the

Special Rapporteur's misgivings on that score and feared that such a rule would neither contribute to the establishment of a meaningful international jurisdiction nor provide for the effective implementation mechanism that the Code required.

15. One encouraging development was that several representatives in the Sixth Committee had supported the establishment of an international criminal court with a “review function”, which was one way of establishing a court that could unify the punishment of international crimes, while avoiding the surrender of national criminal jurisdiction and ensuring impartiality and objectivity in the prosecution of international crimes. The advantage of an international criminal court as a review body to complement national jurisdiction was that it would be able to build on the international norms governing the prosecution of international offences. Even States which favoured exclusive jurisdiction for an international criminal court might be prepared to accept a review function in regard to certain crimes.

16. A court with a review function would also perform a preventive role inasmuch as it would act as an incentive to national courts to comply with international standards. Furthermore, it would promote international cooperation in the prosecution of international crimes by allowing for a combination of the universal criminal jurisdiction of States and an international jurisdiction. The court's action could be further enhanced if it was authorized to give advisory opinions when so requested by national courts. Many of the practical difficulties connected with an international criminal court which had exclusive or concurrent jurisdiction would likewise be avoided. Some States opposed to such a model found it impossible to accept international control over judgments handed down by their courts. All existing complaints procedures in the human rights field came into play only when domestic remedies had been exhausted, and human rights courts and committees dealt solely with those cases that had been the subject of a final decision by the national courts. In other words, they merely reviewed the State practice sanctioned by the highest courts of the country concerned. If that was feasible with respect to torture or inhuman and degrading treatment, why should it not be possible in the case of the prosecution of war crimes and crimes against humanity? The idea of an international criminal court which had a review function and advisory powers was therefore realistic and should be pursued. Conversely, regarding the broadening of the range of States whose conferment of jurisdiction would be required, he did not favour the path for discussion outlined in the report, for the reasons stated by the Special Rapporteur himself.

17. So far as the relationship with the Security Council was concerned, the rule accepted under article 12 might suffice, namely, that a court, including an international criminal court, was bound to respect a decision of the Security Council as to whether or not an act of aggression had actually occurred. A decision on individual responsibility for participation in the crime, however, must be left to the court and should not depend on any Security Council decision.

18. Lastly, with regard to measures of implementation, the Commission could draw on the human rights conventions for guidance, and particularly instruments which contained specific provisions on measures relating to the halting and prevention of crimes, mutual assistance in the detection and arrest of suspects, collection of evidence and exchange of information. There remained the difficult questions of asylum and extradition, and a rule might also be needed requiring States to adopt the necessary measures to incorporate the provisions of the Code into their national law.

The meeting was suspended at 11 a.m. and resumed at noon.

19. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on a report which, although very succinct, dealt with characteristic clarity with some essential aspects of the questions of penalties and of the establishment of an international criminal jurisdiction.

20. With regard to penalties, dealt with in part one of the report, the Special Rapporteur raised the question whether a separate penalty should be provided for each crime in the Code or whether a single penalty, applicable to all the crimes, would suffice, and advocated the latter solution. That position was entirely justified. Certain crimes such as aggression or genocide could be considered more serious than others, but for the purposes of choosing a penalty it would be extremely difficult to differentiate between, say, terrorism and trafficking in narcotic drugs. However, he had doubts about the proposal to establish a standard penalty that could be reduced if there were extenuating circumstances. The court should be given leeway to take account not only of the presence or absence of extenuating circumstances but also of aggravating circumstances and, indeed, of all other relevant circumstances, including the perpetrator's personality, the occasion on which the act had been perpetrated, the seriousness of the effects, and so on. In the light of all those circumstances, the court could determine, within certain set limits, what the penalty should be, graduating it upwards or downwards as it saw fit.

21. As to the nature of those general limits, he wholly agreed with the Special Rapporteur's decision to rule out the death penalty, since it no longer existed in many national legislations and since there appeared to be a universal trend towards its abolition. However, the idea of a general basic penalty and the proposed nature of that penalty, namely, life imprisonment, was more questionable. Life imprisonment, too, had been eliminated from many legislations, including the laws of his country, Brazil, as being contrary to certain basic principles of human rights. He would therefore feel inclined to rule out life imprisonment as well and, instead, to set a lower limit of, say, 12 to 15 years, and an upper limit of, say, 30 to 35 years, on the possible term of imprisonment of a person convicted under the Code. Those figures were only tentative and further detailed discussion would certainly be necessary, but in view of the seriousness of the crime they seemed to be more or less appropriate. Furthermore, a statement should be included somewhere in the Code to the effect that the sentence was final and the prisoner should not be eligible for release under any circumstances before the full term of imprisonment had been served.

22. With regard to the passage in square brackets in the text proposed for draft article Z, he agreed with the distinction drawn by some members between confiscation of stolen or misappropriated property as a measure of simple restitution, on the one hand, and as a punitive measure, on the other. That point should be made clearer in the text; in particular, the expression "as appropriate" was somewhat misleading. It was right to say that confiscated property could be used for the purposes of making reparation to the victims of the crime.

23. He had no difficulty with paragraph 1 of the suggested draft provision on the jurisdiction of the court, which he took to mean that the court would have jurisdiction over crimes under the Code that were committed in the territory of a State party. Such a provision was necessary in order to make it clear that parties to the Code, unless the Code became a universal instrument, could not claim to exercise universal jurisdiction. He did, however, have serious doubts about the proposition contained in paragraph 2, which, by requiring conferment of jurisdiction by the State or States of which the perpetrator was a national, or by the victim State, or by the State whose nationals had been the victims of the crime, if such States also had jurisdiction under their domestic legislation over such individuals, appeared to call into question the territorial element established in paragraph 1. In his view, the court should be able to exercise jurisdiction under the Code over crimes committed in the territory of States parties independently of the position of other, what might be termed, "nationality" States. The reference to the possible existence of jurisdiction on the part of other States was particularly disturbing. States, whether or not they were parties to the Code, should not be entitled to invoke their own national jurisdictions in order to block the exercise of legally established international jurisdiction.

24. The ideas incorporated in paragraphs 3, 4 and 5 were acceptable, but they were out of place in an article on the jurisdiction of the court and should form separate articles elsewhere in the Code.

25. As to the possible draft provision on criminal proceedings, it must be made clear, in paragraph 1, that there was a difference between instituting proceedings and bringing a case to the attention of an international court. In most national legal systems, proceedings were instituted not by an individual but by the State against an individual. National legal systems had appropriate organs to take such action, and an international court must likewise be able to do so. The role of the State must be confined to calling the attention of such a court to the fact that proceedings might need to be instituted, but the State itself could not institute such proceedings. Perhaps the distinction he was making was simply a drafting matter.

26. Paragraph 2 was a special case that concerned the crime of aggression or the threat of aggression. Admittedly, the question had been dealt with, albeit insufficiently, in article 12, paragraph 5,⁶ and it was rendered more complicated by the fact that aggression could only be committed by a State, not by an individual.

⁶ Ibid.

vidual could be judged for committing aggression only if a State had been found to have committed that crime. Actually, the individual was participating in the crime of a State. Under the Charter of the United Nations, it fell to the Security Council to determine whether an act of aggression had taken place. He therefore believed that article 12, paragraph 5, should be improved: a special provision, as now being proposed, was not necessary.

27. The footnote to paragraph 1 of document A/CN.4/435, confirming the intention of the Special Rapporteur to abandon the tripartite division into "crimes against peace", "crimes against humanity" and "war crimes", was most welcome, but the Drafting Committee should be authorized to make that change in the structure of the articles at the present session, instead of waiting until the second reading.

28. In addition, the Drafting Committee should prepare an article introducing the part of the Code that enumerated the crimes against the peace and security of mankind. A complete list of such crimes should not be sent to the General Assembly until such an introductory article had been drafted.

29. Mr. TOMUSCHAT said it was important to define the penalties that would be imposed for the crimes covered by the Code. Then, it would no longer be necessary to refer to the general principles of law, as in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, to justify instituting criminal proceedings against the author of a crime that affected the entire international community.

30. The Commission should not seek to resist the worldwide trend towards abolition of the death penalty, even for the most serious crimes, such as genocide. The move away from the death penalty had been evident in legal thinking since the Nürnberg and Tokyo Tribunals. On the other hand, it was only too obvious that a fine would not be in keeping with the seriousness of the crime, and deprivation of liberty was the only appropriate punishment, despite the practical problems it raised. It was probably necessary to create an international prison for that purpose.

31. He did not concur with the Special Rapporteur that the same penalty should be imposed for all crimes against the peace and security of mankind, since not all crimes were equally serious. For example, genocide was worse than other crimes covered by the Code. Hence it was imperative to consider each crime separately, so as to determine the proper punishment. The Commission should suggest a minimum and a maximum sentence for each crime, but should not be more specific. The matter should be left to States at a future conference on the draft Code.

32. Mr. Calero Rodrigues was right to point to the need for an article to introduce the list of crimes covered by the Code. It was also essential to link the crime committed by the State and the guilty person. The Code did not establish such a link, and perhaps the Special Rapporteur could draft a suitable article.

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

[Agenda item 1]

33. The CHAIRMAN said that, on the recommendation of the Enlarged Bureau, he was proposing a tentative schedule of plenary meetings for the Commission's approval, namely:

Draft Code of Crimes against the Peace and Security of Mankind [item 4]	14 to 22 May (6 meetings)
The law of the non-navigational uses of international watercourses [item 5]	23 to 31 May (6 meetings)
Report of the Drafting Committee on jurisdictional immunities of States and their property [item 3]	4 to 7 June (4 meetings)
International liability for injurious consequences arising out of acts not prohibited by international law [item 6]	11 to 20 June (7 meetings)
Report of the Drafting Committee on the law of the non-navigational uses of international watercourses [item 5]	21 to 26 June (3 meetings)
Relations between States and international organizations [item 7]	27 June to 4 July (5 meetings)
Reports of the Drafting Committee on the draft Code of Crimes against the Peace and Security of Mankind [item 4] and on State responsibility [item 2]	5 to 10 July (3 meetings)
Reports of the Planning Group and of the Working Group on the long-term programme of work [item 8]	11 July (1 meeting)
Adoption of the report of the Commission	12 to 19 July (11 meetings)

Any time saved in plenary meetings would be allocated to the Drafting Committee, the Planning Group, the Enlarged Bureau or other bodies, as required. The proposed schedule would be applied flexibly, subject to the progress made. In accordance with previous practice, representatives of organizations with which the Commission cooperated would be invited to make statements in the course of the session.

34. He confirmed that the discussion of the report of the Drafting Committee on jurisdictional immunities (4-7 June) would be confined to consideration of the articles and that the commentaries to the articles would be examined in connection with the adoption of the report on the work of the session.

35. Mr. CALERO RODRIGUES asked whether the Commission would, as on previous occasions, be allowed a day without work before the period of twice-daily meetings set aside for the adoption of the report.

36. The CHAIRMAN said he took note of that point.

* Resumed from the 2206th meeting.

37. Mr. NJENGA asked whether a similar schedule of meetings of the Drafting Committee might be drawn up for the benefit of those members of the Commission who were not members of the Drafting Committee. He also expressed the hope that the Drafting Committee would complete its work on jurisdictional immunities by 4 June and its report on international watercourses by 21 June.

38. Mr. PAWLAK (Chairman of the Drafting Committee) said that the idea of a schedule of meetings of the Drafting Committee was attractive, but it was difficult to prepare because the Committee would meet whenever time normally set aside for plenary meetings remained unused. As to the other points raised by Mr. Njenga, he agreed that the Drafting Committee should make every effort to complete its work on jurisdictional immunities and on international watercourses in time. Lastly, he invited those members of the Commission who were not members of the Drafting Committee, or who attended the Committee's meetings sporadically, to consult him on any drafting matters pending, so as to dispose of minor queries and confine the discussion in plenary to substantive issues.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the schedule proposed by the Enlarged Bureau.

It was so agreed.

40. Mr. CALERO RODRIGUES proposed that Mr. Hayes should succeed the late Mr. Paul Reuter as a member of the informal committee for arranging the Gilberto Amado Memorial Lecture.

It was so agreed.

41. Mr. McCAFFREY, speaking with reference to the topic on international watercourses, suggested that the Commission should not yet discuss in plenary the portion of his sixth report dealing with the settlement of disputes (A/CN.4/427/Add.1),⁷ so as to expedite consideration of the concept of an international watercourse system, which was dealt with in the seventh report (A/CN.4/436).⁸ Taking up the settlement of disputes would be time-consuming, and the subject would probably not be considered by the Drafting Committee in any event.

42. The CHAIRMAN thanked Mr. McCaffrey for his clarification and said it was understood that the Commission would focus on the seventh report.

The meeting rose at 1 p.m.

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

⁸ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

2209th MEETING

Thursday, 16 May 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

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. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPporteur
(continued)

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³
(continued)

1. Mr. PELLET said that he did not think that the issues dealt with in the ninth report could be discussed until a clear-cut position had been adopted on the establishment of an international criminal court. There would be no point in working on provisions relating to the jurisdiction of the court and criminal proceedings if the court had not been established.

2. The same was true of applicable penalties and draft article Z. If the international criminal court was to be established, it would be necessary to raise the question of applicable penalties, although the answer was far from obvious: it might well be asked in that case whether it would be better to leave it to each State to determine the applicable penalties or merely to formulate some general principles or to provide for minimum penalties. None of those questions would arise, however, if the court was not to be set up.

3. He was not opposed to the establishment of such a court and was in fact inclined to favour it, but the matter was, in his view, too serious to be decided by lawyers. While the Commission had stated its views on the subject, as the General Assembly had requested it to do, by

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 . . . 1991*, vol. II (Part One).

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

indicating in its last report⁴ that examination of the question had reflected a broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court to be brought into relationship with the United Nations system—which might, moreover, have been something of an overstatement—the same was not true of the General Assembly, which, after a confused debate in the Sixth Committee, had confined itself in paragraph 3 of resolution 45/41 to referring the question back to the Commission. The latter should therefore appeal to the General Assembly's and the Sixth Committee's sense of responsibility by clearly stating that to continue with the consideration of the question was both impossible and useless so long as those bodies had not adopted a firm position on the principle of the establishment of an international criminal court.

4. Until such a position had been adopted, he would be hesitant to enter into the debate sought by the Special Rapporteur and, rather than making an in-depth analysis, he would simply give his impressions.

5. The first paragraph of draft article Z was a good illustration of the problem he had just raised. If an international criminal court was established and if it had exclusive jurisdiction to implement the Code, the principle stated in the paragraph seemed to be a good one, since in that case the death penalty had to be ruled out for two reasons: first, because its abolition was a step forward in moral terms and, above all, because the States which had abolished it would be reluctant to accede to an instrument which re-established it, if only in exceptional cases, and might even be unable to do so, since the abolition of the death penalty had become a constitutional principle in some of those countries.

6. The problem that arose if the Code was to be implemented by national courts was very different. In such a case, it might be unacceptable to rule out the death penalty for individuals tried in States which had not abolished the death penalty for far less serious crimes. Such a reversal of values would be open to strong criticism and the best course in such a case would probably be to say that national courts should apply the penalty provided by internal law for the most serious crimes.

7. Once again, however, a definite position could not be adopted without knowing which bodies would be competent to impose penalties.

8. As a secondary point, he drew the Special Rapporteur's attention to a problem of terminology relating to the use of the term "life imprisonment" in the first paragraph of draft article Z. Since internal law often used more detailed terms (French criminal law, for example, distinguished detention and rigorous imprisonment from ordinary imprisonment), it might be advisable to use more neutral wording, such as "deprivation of liberty".

9. With regard to the second paragraph of draft article Z, he said that he agreed with the possibility of adjusting the penalty, but was not sure whether the adjustment should depend solely on the existence of extenuating circumstances, since other factors, such as the accused per-

son's partial exemption from criminal responsibility, might also need to be taken into account. He was also not sure whether the court was being allowed enough choice. It was open to question whether life imprisonment was acceptable and he recalled that several members of the Commission had said that, in their view, a penalty of that kind was contrary to the principles of human rights and was prohibited in their countries.

10. As to the third paragraph of the draft article, which appeared in square brackets, the underlying idea was good, but the wording raised several problems. First, the term "misappropriated property" appeared to include "stolen property", making the second term redundant. Secondly, profits deriving from misappropriated property should also be confiscated. Thirdly, it was difficult to see why the confiscation of such property might be only partial. The argument put forward in that respect in the report was hardly convincing: neither the offender himself nor his spouse or his heirs should benefit from the misappropriated property. Fourthly, although the idea was indeed praiseworthy, it was difficult to see by what principle the court should entrust the property in question to a humanitarian organization. Stolen property must be restored to its rightful owner: that was a fundamental rule, as several members of the Commission had already stated. It was only in the very special case when the owner of the property had died without leaving any heirs that the problem of the disposition of the property would arise.

11. It might also happen that the legitimate property of the offender was totally or partially confiscated or—which amounted to virtually the same thing—that the offender was ordered to pay a fine. But, in any event, whether it was a question of misappropriated property whose rightful owner had disappeared or of confiscated property or even of the proceeds of a fine, he was not sure that it was a satisfactory solution to entrust the property to some unspecified humanitarian organization. Since a crime against the peace and security of mankind usually entailed victims, it would seem preferable, for reasons of natural justice, for the property to be used primarily for reparation—necessarily partial—of the harm suffered by the victims. That also seemed to be the basic idea of article 28 of the Charter of the Nürnberg Tribunal, which had provided for the delivery of confiscated property to the Control Council of Germany.⁵

12. The text of the possible draft provision on the jurisdiction of the court was based on the principle of the territoriality of criminal jurisdiction; however, while territoriality was indeed the basis for most national systems of criminal law, it was important to bear in mind another principle, namely, that the competence of criminal jurisdictions derived from the competence of criminal law itself: in other words, it was because criminal law was based on the principle of territoriality that the jurisdiction of national criminal courts was essentially territorial. But could that rule also be applied in the area of interest to the Commission? The question did arise, for, in that area, criminal law was "deterritorialized" and "internationalized". It consisted of international texts,

⁴ *Yearbook* . . . 1990, vol. II (Part Two), para. 155.

⁵ See 2207th meeting, footnote 5.

either the Code itself or ad hoc conventions. It did not therefore seem right to accord privileged status to the State in whose territory the crime had been committed. It was the entire international community which was affected and it seemed sufficient that the State in whose territory the alleged perpetrator was found should bring the case before the court.

13. That was, moreover, what the relevant conventions intended, for they all used the system known—no doubt wrongly—as *système de la répression universelle* (system of universal jurisdiction). If the Commission also used that system in the Code or in the statute of the court, or indeed in both instruments, it would not be taking too bold a decision, as the Special Rapporteur seemed to fear.

14. At the present stage, there did not seem to be any point in a detailed consideration of the text of the proposed draft provision, which appeared, moreover, to raise a number of problems. But it was useful to provide, as the Special Rapporteur did in paragraphs 4 and 5, that the court, if any, might play the role of a regulatory body in the event of a conflict of jurisdiction or might interpret the meaning of a provision of international criminal law if it was unclear.

15. According to paragraph 2 of the Special Rapporteur's proposed text on criminal proceedings, in the event of an act of aggression, the institution of proceedings would be subject to prior determination of the existence of the crime by the Security Council, in which that power was vested by Article 39 of the Charter of the United Nations. However, it must be remembered that the court would not be operating in the same area as the Council. First, the court would not be restoring peace and security, but trying offenders who had jeopardized peace and security, determining whether the aggression was attributable to a given individual, and proceeding accordingly. Secondly, the Security Council based its opinions on political criteria, but the court would rule exclusively on legal criteria. If the Security Council determined the existence of an act of aggression, no doubt the court would be bound by that determination. But the inverse proposition was not certain. It might well happen that the Security Council would not determine a given act to be an act of aggression even when the criteria for the crime of aggression were met. Such cases might even occur frequently, if only by reason of the right of veto. It would be shocking if, because a State had the right of veto, its leaders or those of a State which it protected were treated differently from the leaders of some other smaller or more isolated State. The practice of applying a double standard was certainly reprehensible in all cases, but it was understandable from the political standpoint; it was not understandable from a legal standpoint, and even less so from a judicial standpoint.

16. That was indeed the principle applied by ICJ in its 1986 decision in the case between Nicaragua and the United States of America.⁶ The Court had certainly not refused to consider the question whether one of the

States parties to the dispute had been guilty of an act of aggression which had not been determined by the Security Council.

17. Lastly, he wished to reiterate that he had agreed to engage in the present exercise in legal impressionism only in deference to the Special Rapporteur's wish for a debate. In his opinion, however, it would be preferable to leave it at that until the General Assembly had assumed its responsibilities, something which the Commission ought most firmly to invite it to do in its report.

18. Mr. BARBOZA said that, with regard to the question of penalties, just as the Code specified the crimes in question, it should also specify the penalties to be imposed on the perpetrators. Like the provisions on crimes, however, the provisions on penalties should reflect the feelings and values of the international community, which might differ from those of the various national communities.

19. There was also the question whether a separate penalty should be provided for each of the crimes in the Code, or a single penalty for all the crimes, or whether it should be expressly left to the court to determine the penalty. He rejected the latter solution, which had been used in the 1954 draft Code, for it was incompatible with the principle of *nullum crimen, nulla poena sine lege*, and he agreed with the Special Rapporteur that the best solution was to prescribe a single penalty: since all the crimes in question were extremely serious ones, they could not carry widely differing penalties. As in internal law, however, it should be left to the judge to adjust the penalty in the light of the facts of the case and the character of the offender.

20. As to the nature of the penalty, he was not in favour of life imprisonment. There were other possible solutions, especially since, with the passage of time and once the offender had ceased to constitute a danger, the public's desire for retribution ought to fade. Nor did he approve of the last paragraph of draft article Z, which appeared in square brackets. Property stolen or misappropriated by the offender, together with any profits which he or she might have made from it, must be restored in full to its rightful owners. There could be no question of confiscating such property. As Mr. Pellet had said, the offender's family had no right to such property either. On the other hand, if provision was made for a financial penalty, a kind of criminal fine, then it might be possible to envisage handing the money over to a humanitarian organization.

21. Turning to the question of the jurisdiction of the international criminal court, he said that paragraphs 1 and 2 of the possible draft provision were the most debatable. Paragraph 1 seemed to posit the general principle of the territoriality of criminal law and paragraph 2 the principle of active and passive personality and the so-called principle of real protection, somehow making the jurisdiction of the court subject to recognition by the laws of the State or States in question of the jurisdiction of their own courts to try the accused individuals. But what would happen if the laws of the State in which the crime had been committed were silent on the jurisdiction of its courts with regard to the act in question? Would the national courts be automatically deemed competent?

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.*

If so, what was the difference between paragraphs 1 and 2, if not that paragraph 2 stated expressly that domestic legislation must confer jurisdiction on the courts of the States concerned and that paragraph 1 did not do so? It would be useful if the Special Rapporteur could offer some clarification on that point.

22. Furthermore, many States would be required to confer jurisdiction, and their tacit option of trying the accused themselves or referring him to an international criminal court provided such scope that, given the natural tendency of States not to relinquish their jurisdiction, the court's competence would be reduced considerably.

23. Thus, under the proposed text, the international criminal court was a simple addition to the jurisdiction of each State that was called upon to have cognizance of any disputes concerning judicial competence (para. 4) and to standardize decisions in cases of divergent sentences handed down in respect of the same crime. That comment also applied to the role that the court would play if requested to give an interpretation of a provision of international criminal law. The Special Rapporteur had noted that he had tried to take account of contemporary international realities, which would appear to prohibit giving wider jurisdiction to the international criminal court. He personally would prefer retaining the principle of the territoriality of criminal law or, as had been suggested, the jurisdiction of the court of the State in which the accused had been arrested. In any event, it was important not to increase the number of options for the conferment of jurisdiction and to have a single rule, which was the most logical solution and the one most likely to be applied.

24. Paragraph 5 was interesting in that it gave the court competence to interpret, apparently *in abstracto*, the rules of international criminal law. As Mr. Graefrath had suggested at the 2208th meeting, advisory competence might also be conferred on the court in specific cases: the court would then become an instrument of international pressure that would help guide and form international public opinion. It would be a good idea for the Special Rapporteur to explore that possibility.

25. With regard to criminal proceedings, the Special Rapporteur was proposing a text which, in paragraph 1, provided that such proceedings were to be instituted by States and, in paragraph 2, that, in the case of crimes of aggression or the threat of aggression, they were to be subject to prior determination by the Security Council of the existence of such crimes. He agreed with Mr. Pellet's comments on the subject and questioned the advisability of that reservation. Clearly, if the Security Council decided that a particular act committed by a State constituted aggression or a threat of aggression, the international criminal court could not reach a different determination without prejudicing the United Nations system. He also wondered what would happen if the Security Council refrained from characterizing the act in question and confined itself to imposing sanctions or formulating recommendations. In sum, the Security Council was only a political body whose permanent members had the right of veto. It was empowered not to characterize a given act as aggression or a threat of aggression,

but to restore peace if it had been breached, to avert threats to the peace and to oppose acts of aggression.

26. It was unacceptable for the decision of a judicial body to be subject to a prior determination by the Security Council. On the other hand, if the Security Council had not ruled on an act of a State, the international criminal court would have full freedom to determine the existence of an act of aggression or a threat of aggression, where appropriate. Lastly, if for one reason or another, the Security Council was to make a determination on that act after the international criminal court had done so—a highly improbable case, since action by the Security Council would have had to become less urgent—it would not consider itself to be bound by the decision of the court. In any event, the point was that the action of the international criminal court and that of the Security Council took place at different levels: the court's role was to punish a criminal act, whereas the Security Council's was to take measures to solve problems and avert threats to peace and international security.

27. Mr. MAHIOU commended the Special Rapporteur on the clarity and conciseness of his reports and noted that the ninth report focused on four questions.

28. First, should the draft Code provide for penalties? The answer to that question was definitely affirmative and derived primarily from the principle of *nulla poena sine lege*, the validity and scope of which had been demonstrated by the Special Rapporteur and other members of the Commission. Other solutions had been envisaged in the past, particularly that adopted by the Commission in 1951,⁷ to leave it to the court to decide on the applicable penalty. That solution might be chosen, provided that the court adopted a scale of penalties before exercising its jurisdiction, but it did not appear to be desirable for at least two reasons: it was important to ensure that the wording chosen by the Commission did not give rise to doubts and discussions which would only weaken the Code, and, above all, the Code would be incomplete if it merely made certain acts a crime without stating what the consequences would be for the guilty parties.

29. The second question was what type of penalties there should be: a penalty for each crime or one single penalty applicable in all cases? In theory, the ideal solution would be to have a penalty for each crime because, although all the crimes under the Code were characterized by their extreme gravity, their degree of gravity could vary. Justice and fairness required that the crime should be punished according to its degree of gravity and the degree of responsibility of its author. In the case under consideration, however, that ideal solution was probably impossible to apply and it would also entail endless debates to determine each of the crimes, their gravity and the corresponding applicable penalty. Thus, in practice and to be realistic, the Commission would appear to have no other choice than to establish the principle of a single penalty for all crimes. It might therefore follow the course the Special Rapporteur had taken in draft article Z, but only in part. Providing only for life imprisonment, even if mitigated by extenuating circumstances, would be too rigorously binding for the

⁷ See 2207th meeting, footnote 4.

judge, who must be allowed more freedom to decide than he would have by taking extenuating circumstances into account. To that end, there might be a minimum term of imprisonment—10 years—and a maximum term—life imprisonment—which would replace capital punishment, a penalty that it would be difficult for the Commission to adopt, in view of its abolition in certain countries and the growing abolitionist movement, and also in view of the Commission's moral authority and the influence it could and should bring to bear in making the rules of law more humane, even in the case of punishments. It should also be noted that most of the countries that had abolished capital punishment allowed life imprisonment as a replacement penalty. Setting such a penalty would avoid provoking strong objections on the part of States that were still in favour of capital punishment and might even encourage them gradually to abolish it in their national legislation. It should also be stressed that the application of the penalty would be left to the appreciation of the court and that, with regard to the enforcement of the sentence, no matter how harsh, the conduct of the convicted person should be taken into account so that he might benefit from a reduced sentence if he mended his ways.

30. Concerning the proposed confiscation measure, he noted that the Special Rapporteur had proceeded cautiously: not only had he placed the provision in square brackets, but he would also leave it to the judge to decide so that the provision would be applied only as appropriate. Confiscation was thus a complementary, and not an accessory, penalty. In some countries, such as his own, Algeria, a distinction was made between the two, the idea being that a complementary penalty was provided for by the law and the judge might or might not impose it, whereas an accessory penalty was automatically added to the main penalty; the judge did not have to impose it and he could not even rule it out. In his own view, the penalty of confiscation could involve both those aspects. Cases were conceivable in which the penalty would be imposed automatically: for example, confiscation of objects used to commit the crime, the means of producing and transporting narcotic drugs, the products of a criminal activity and the property and profits illegally acquired through that criminal activity; in other cases, confiscation would be optional and would take the form of a financial penalty intended to compensate the victims. The fate of the confiscated property would also depend on its nature: stolen property should be returned to its rightful owners or their heirs or, in their absence, should be entrusted to humanitarian organizations. In any event, whether accessory or complementary, the penalty of confiscation would have to be provided for in the Code; otherwise, any decision taken by the judge would be criticized as being inconsistent with the principle of *nulla poena sine lege*.

31. With regard to the international criminal jurisdiction, the Commission had to improve on the work it had begun at its preceding session and establish the rules and principles governing action by the international criminal court and its relations with national courts—or in other words, specifically determine the scope of the principle of universal jurisdiction.

32. The simplest solution would, of course, be for the international criminal court to have exclusive jurisdiction. That would then eliminate, or at least solve, the many complex problems that would lead to conflicts of jurisdiction between the court, on the one hand, and national courts, on the other, or even as between national courts. It remained to be seen whether the solution was acceptable to States at the current stage. The General Assembly had not wanted to take a decision in that connection and States seemed to be fairly divided on the matter. None the less, the solution should not be ruled out; it would even be a good idea to stress its advantages with a view to encouraging the General Assembly to take a position in the matter.

33. A second solution, mentioned by Mr. Graefrath (2208th meeting), would in effect be for the jurisdiction of national courts and that of the court to exist side by side, by conferring jurisdiction on the court to hear appeals from national courts. It was doubtful, however, whether States would accept that solution, particularly if it meant that appeals could be lodged against decisions handed down by higher courts such as a supreme court. Moreover, there were countries where the law provided, in criminal cases, for appeal not on a point of fact, but on a point of law. It was therefore important to determine whether the international criminal court would be seized by way of appeal on a point of fact, in other words, whether it could reconsider the facts and try the case again on the merits, or by way of appeal on a point of law, in other words, whether it could take a decision not on the facts, but on compliance with the rules of law and with the procedural rules. That question called for further reflection.

34. A third solution would be for national courts and the international criminal court to have concurrent jurisdiction. It was a compromise solution and would probably be more acceptable in the eyes of States, as it would allow them to exercise their sovereignty in judicial matters, but it was more complex and delicate. That was because it would involve a careful examination of ways of combining the jurisdiction of national courts and of the international court and, in particular, of avoiding the conflicts of jurisdiction that might, depending on the course of events, lead to paralysis and injustice.

35. The Special Rapporteur, for his part, proposed a solution that was based on the principle of the territoriality of criminal law, combined with other rules such as that of the nationality of the perpetrator or of the victim, to complement or supplement territorial jurisdiction. Paragraph 2 of the proposed provision was, however, either over-ambitious or inadequate, and the accompanying commentaries were not very clear. The argument put forward by the Special Rapporteur in his report to demonstrate, on the basis of the precedents set by the Nürnberg and Tokyo Tribunals, that there was a trend towards having crimes tried in the place where they were committed was ambiguous: was it the place where the court had its seat or its nationality that determined territoriality? Without wishing to reopen the debate on the legal nature and character of the Nürnberg and Tokyo Tribunals, he considered that, had the principle of territoriality been strictly applied, the German or Japanese courts should have tried the war criminals in that case. They

had indeed been tried in Germany and Japan, but by courts of another nationality. It could, of course, be argued, as certain writers had submitted, that the courts in question had been set up by the victors to exercise the jurisdiction of the courts of the vanquished. But the precedent cited by the Special Rapporteur in that connection was neither satisfactory nor convincing, particularly since it was not certain that the jurisdiction of the Nürnberg and Tokyo Tribunals had been limited to crimes committed in Germany and Japan: they might have had to try crimes committed outside the borders of those countries. The Special Rapporteur had demonstrated very clearly the drawback to his proposed solution, which was based on the difficult, if not impossible, reconciliation of the principle of territoriality, the system of active and passive personality and the system of real protection—so much so that one might even wonder whether he really believed in it. At any rate, his analysis justified the conclusion that the solution was impracticable and that, even if it were adopted, other problems would arise that would in turn have to be solved. Paragraph 2 of the draft provision submitted to the Commission was no more than a starting point or outline. In other words, the Special Rapporteur and the Commission still had much to do, unless they managed to win the support of States for the principle of the exclusive jurisdiction of the international criminal court.

36. Fourthly and lastly, with regard to criminal proceedings and in particular to the respective roles of the Security Council and the international criminal court in the case of the crime of aggression, he recalled that the problem had already arisen in connection with draft article 12 and had yet to be solved. The clause in that article relating to relations between the Security Council and national courts—namely to the question whether it was for the Security Council or for national tribunals to determine that a crime of aggression existed—had thus far remained in square brackets. In his view, the international criminal court and the Security Council were two organs that operated on different levels. The Security Council was an organ vested under the Charter of the United Nations with special political powers and prerogatives which could not be usurped by any other organ. The court, for its part, would be a judicial organ on which the Code conferred judicial powers. The proceedings of the international court should on no account depend on other organs, particularly where some of their members had a right of veto under their statute. In that connection, he endorsed what Mr. Pellet had said when he had recalled that the problem had arisen at ICJ in the case between Nicaragua and the United States of America.⁸ It was that independence of the law which would ensure that criminals received due punishment.

The meeting rose at 11.10 a.m.

⁸ See footnote 6 above.

2210th MEETING

Friday, 17 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, 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. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³
(continued)

1. Mr. JACOVIDES said that the topic under consideration had acquired added importance in the light of recent developments on the world scene. He was firmly convinced that a code of crimes against the peace and security of mankind had a rightful place in the corpus of international law. As a complete legal instrument encompassing the three essential elements of crimes, penalties and jurisdiction, it could and should serve the important purpose of deterrence and punishment. It was gratifying that recent events had moved some of those who had viewed the draft Code with scepticism to join in the support for the proposed establishment of an international criminal jurisdiction. The overall impact of the Gulf crisis and its aftermath, by highlighting the need to observe the relevant rules of international law and to implement United Nations resolutions, was conducive to promoting the international legal order that his country had advocated long before the crisis had begun.

2. As to part one of the Special Rapporteur's report, concerning the issue of penalties, it was clear that the principle of *nulla poena sine lege* called for a relevant provision in the Code. Since only the most serious

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 . . . 1991*, vol. II (Part One).

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

crimes should be included in the Code, it followed that the penalties should be of equivalent severity. Again, there existed in international law a diversity of concepts and philosophies, and hence a uniform system of punishment presented difficulties, particularly in the matter of the death penalty, on which there was no generally acceptable rule; even where the death penalty did exist, very often it was not carried out in practice. The penalties should be included in the Code itself, so as to ensure uniformity of sentencing, in preference to the alternative of incorporating the provisions of the Code directly into domestic law. On the other hand, the text proposed by the Special Rapporteur in draft article Z, prescribing life imprisonment and, in extenuating circumstances, imprisonment for a term of 10 to 20 years, required further reflection and was an issue on which the views of the General Assembly and of States should be taken into account before the Commission reached any final conclusion. The same could be said of the third paragraph, on partial or total confiscation of stolen or misappropriated property even though, personally, he agreed with the principle of confiscation. In addition to the possibilities mentioned by the Special Rapporteur for making use of confiscated property, namely, assigning it to ICRC, UNICEF or an international organization fighting illicit drug traffic, other possibilities might be envisaged, including a fund to finance United Nations peace-keeping operations or even a fund of the Secretary-General to finance recourse to ICJ by States which lacked the necessary financial means.

3. As to the establishment of an international criminal jurisdiction, it was frustrating that the General Assembly had refrained from choosing between resort to a system of universal jurisdiction, the establishment of an international criminal court or the establishment of some other trial mechanism. It was likewise unfortunate, although not unusual, that the Assembly had not taken a clear position on the possible options and main trends that had emerged from the Commission's deliberations, as set out in its latest report (A/45/10),⁴ with regard to specific and significant areas related to the creation of an international criminal court. Often, clear guidance was not forthcoming from the General Assembly on key issues of concern to the Commission. There was no alternative but to seek such guidance again and for all members of the Commission who participated in the work of the General Assembly as representatives of Member States to endeavour to assist the Commission by focusing on such issues. The position taken by his own country, Cyprus, during the debate in the Sixth Committee,⁵ had been one of wholehearted support for the Commission's broad agreement, in principle, on the desirability of establishing an international criminal court connected with the United Nations system, because Cyprus was convinced that such a court would be a progressive step in further developing international law and, if widely supported by the international community, would strengthen the rule of law internationally. It was to be hoped that at the Assembly's next session, delegations as a whole

would address the issue more positively so as to achieve more concrete and constructive results.

4. He agreed with the Special Rapporteur on the issue of jurisdiction: in international law there was no general rule limiting criminal jurisdiction to the law of the place where the crime was committed. But the principle of the territoriality of criminal law was the principle generally applied, something that was confirmed by the Nürnberg⁶ and Tokyo Charters.⁷ At the same time, as confirmed by PCIJ in the *Lotus* case,⁸ there was no rule of international law preventing a State from exercising jurisdiction over foreigners in respect of offences committed against that State. As the Court had put it, territoriality was not an absolute principle of international law and by no means coincided with territorial sovereignty. Thus, the Special Rapporteur was correct in combining, in paragraphs 1 and 2 of his proposed text, the territoriality system with the active and passive personality system and the so-called real-protection system. The benefit of that approach outweighed the possible drawbacks of, in some cases, the trial being conducted by the assigning State that might have ordered the criminal act to be perpetrated or, in other cases, of jeopardizing impartiality and objectivity by conferring jurisdiction upon the victim State.

5. Paragraph 3 was also based on sound logic and followed the general practice in authorizing the court to decide whether it had jurisdiction in a given case. Since it was the highest international criminal court, there was no possibility of appealing such a decision. The same could be said for paragraph 4 in a dispute between two or more States concerning the jurisdiction of one of the States concerned, and it would also serve the standardization of judicial practice in the event of a conflict of laws and jurisdiction and ensure observance of the *non bis in idem* principle in the event of proceedings in respect of the same crime in the courts of two or more States.

6. Paragraph 5 was particularly welcome in that it afforded the international criminal court the possibility of interpreting authoritatively the provisions of international criminal law, thus enabling it to play an important role in unifying the law and in clarifying the content under international law of a number of concepts and principles, including conspiracy, complicity and attempt, *nulum crimen sine lege, nulla poena sine lege* and *non bis in idem*.

7. The Special Rapporteur had rightly proposed a text whereby criminal proceedings in respect of crimes against the peace and security of mankind were to be instituted by States, but further examination was needed of the proviso in paragraph 2 thereof that:

... in the case of the crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes.

⁶ See 2207th meeting, footnote 5.

⁷ Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946. *Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 *et seq.*

⁸ *P.C.I.J., Series A, No. 10*, judgment No. 9, 7 September 1927, pp. 18-19.

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

⁵ *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee*, 36th meeting, para. 85.

A number of delegations in the Sixth Committee had proposed that the Code should include, in addition to draft article 12 (Aggression)⁹ and article 13 (Threat of aggression),¹⁰ another provision to cover the case of deliberate non-compliance with binding decisions of the Security Council aimed at ending the aggression and punishing those responsible for non-compliance. Such a proposal for a third phase after the threat and the act of aggression was indeed a logical step in filling a gap, as had been illustrated more than once in the recent past.

8. The question arose as to the role of the Security Council in instituting proceedings before the international criminal court. As stated in the commentary on the possible draft provision, it was hard to envisage sole jurisdiction for the Security Council in instituting criminal proceedings, for the Council's functions were primarily political, not judicial. On the other hand, under Article 39 of the Charter of the United Nations, the Security Council had the power to determine the existence of any threat to the peace, breach of the peace or act of aggression, and had done so, most recently in the Gulf crisis. It could only be a matter of speculation whether, in the future, developments would warrant a repetition of the rare unanimity displayed by the Security Council in that instance or whether that was an isolated example dictated by the particular circumstances. A number of other instances could be cited in the recent and not-so-recent past where the Security Council had proved unable to make a determination of a threat or act of aggression and where it could be validly argued that such a threat or act had occurred and had continued because the right of veto had been exercised on political grounds, regardless of the legal merits of the case. The question, therefore, was whether it would be appropriate to make the instituting of proceedings before the international criminal court subject to such extra-legal considerations. In theory, the answer should clearly be no. In practical terms, in the light of political realities and depending on the future course of events and the relationships between the permanent members of the Security Council, the answer was not so clear. If the price to be paid for setting up an international criminal court that effectively administered a code of crimes against the peace and security of mankind was to make the instituting of proceedings before the court subject to a veto by any of the permanent members of the Security Council in a case of aggression, that was something that had to be weighed very carefully, and the views of the General Assembly should be taken into account before the Commission took a decision.

9. Mr. BEESLEY said that he had consistently supported the Commission's work on the Code and the creation of an international criminal court, but had also put forward a number of suggestions as to the possible development of an ad hoc tribunal system pending the establishment of such a court. He supported the idea of a code and of a tribunal system that would ensure effective application and implementation in order to provide a measure of deterrence as well as a means of punishment and rehabilitation, as in most systems of domestic law. A

system of criminal procedures and jurisdiction at the international level was needed for the same reasons as it was needed at national level, namely, reasons of public or legal policy. The main difference between the two systems was that only the most serious crimes fell within the ambit of the proposed Code.

10. He agreed that it was necessary to include penalties in the Code and not in the statute of the court. He did, however, have a number of reservations on certain points, the first being the possible consequences of the elimination of the death penalty. The trend in many, but not all, States, and in the field of international human rights, was towards abolition, but the question arose as to how to reflect the position of those States which still retained the death penalty, if the widest possible acceptance of the Code was to be encouraged. He did not doubt that the vast majority of the Commission favoured its abolition, yet the Commission could take no decision on such an important subject without the Sixth Committee's clear-cut guidance, which was not forthcoming. The question of life imprisonment presented a similar dilemma. States which punished murder, treason or terrorism more severely than the Commission proposed for the most heinous crimes could well challenge such leniency. Once again, the Sixth Committee must be asked to provide the Commission with guidance.

11. In the matter of lesser penalties, he would not object to including a range of penalties, perhaps in square brackets, and a commentary making it clear that it was not that the Commission had not been able to take a decision but rather that it did not consider it its function to reach such conclusions at that stage, given the diversity of opinions, legal systems, moral and legal attitudes, and the paucity of guidance reflected in the topical summary of the debate of the Sixth Committee (A/CN.4/L.456, sect. B). The Commission was dealing seriously and expeditiously with the topic because it had been told that it was one of priority. It was not appropriate for the Sixth Committee to avoid the issues, since its guidance was needed in the decision-making process.

12. He had no objection to lesser penalties, including even community service, which he supported, although the latter must be approached with the greatest caution to avoid creating misunderstanding about the seriousness with which the Commission approached crimes against humanity.

13. It was problematic to see why the question of confiscation of property was so difficult. Surely, the simple solution was to return the property to its rightful owner. Where that was not possible, a system of a hierarchy of prior claims might be worked out; when no one was alive to inherit what had been taken, the beneficiary might be the State of the victim or an international humanitarian agency.

14. On the question of whether it was better to stipulate a penalty for each offence, the easy answer would be to have one single range of penalties. However, the various crimes were sufficiently diverse to warrant establishing separate penalties, if there was enough time available. That issue, too, should be raised with the General Assembly, perhaps in the commentary. He was not persuaded that the best solution was to have one range of

⁹ See 2208th meeting, footnote 5.

¹⁰ For text and commentary, see *Yearbook... 1989*, vol. II (Part Two), pp. 68 and 69.

penalties applicable to all crimes. Aggression, genocide and terrorism were all quite different from one another.

15. With regard to the jurisdiction of the court, he favoured the establishment of a permanent international criminal court as the best course, but he recognized that it was also the most difficult to achieve. The second-best solution would be to continue to develop and maintain, but also improve, the existing system of "universal jurisdiction", which was actually national jurisdiction applying and implementing internationally agreed rules. He had certain reservations about that system, because it was unwieldy, inconsistent in application, and there was real difficulty in harmonizing the variety of national judicial systems. Yet such a system did exist and, before it was eliminated, very careful thought should be given to whether it would be replaced by something better. It might prove necessary to have two systems in parallel, if that was the only way to evolve gradually towards the establishment of an international criminal court, which, in his view, was an idea whose time had come. There must be guarantees of impartiality and uniform application of the Code, and that was not at all easy to achieve in view of the diversity of legal systems, the variety of legal procedures, and the problems inherent even in national legal systems in ensuring uniformity and fairness in applying the law.

16. A third possibility, and one which he had informally raised from time to time as being the most practicable short-term solution, was some form of ad hoc tribunal. The principle of territoriality should not be deemed sacrosanct in all circumstances. A flexible approach which provided fairness and a degree of certainty, and was perceived to do so, was preferable to an all-or-nothing approach. Use might even be made of existing national tribunals strengthened by panels of judges from other jurisdictions, e.g. from the victim State, the State of nationality of the accused or the State in which the crime had allegedly been committed (if that was not the State of prosecution) and, possibly, one or more judges from States with quite different legal systems not directly involved. A solution of that kind might help to reassure all concerned that the proceedings would be impartial.

17. With regard to paragraph 2 of the possible draft provision on criminal proceedings, he had never been convinced of the need to obtain the Security Council's permission in order to institute proceedings against someone accused of the heinous crimes of aggression or threat of aggression. As many members had already pointed out, a finding or the absence thereof by the Security Council would have great weight, but it might not be determinative in all cases on all issues. Even where the Security Council had declined to find that aggression had been committed or threatened, it should not necessarily be impossible to initiate proceedings in an international tribunal. Whereas the Security Council was a political organ with certain important legal functions, the court would be a judicial body, with purely legal functions and powers. Moreover, it was important to avoid any double standard inherent in the Security Council's system of operation.

18. On the question of whether the court should have original, concurrent, appellate or advisory jurisdiction, his own view was that it should be a court of original jurisdiction but should also be empowered to hear appeals from national courts and even to give advisory opinions to States, international organizations, and possibly even national courts. For the same reasons as those advanced by other members, he was opposed to the concept of simple concurrent or overlapping jurisdiction, which might give rise to competing claims and other undesirable consequences. Lastly, he re-emphasized the need to obtain clear-cut directives from the Sixth Committee in connection with the Commission's continuing work on the present topic.

19. Mr. OGISO said that, in making his first statement before the Commission at its thirty-fifth session, in 1983, he had expressed the view that an international criminal court was essential.¹¹ The reaction of other members at the time had been less than positive, and it therefore gave him special pleasure to find a chapter in the Special Rapporteur's ninth report on the question of the establishment of an international criminal jurisdiction.

20. According to part two of the report, the judicial competence of the international criminal court would be the same with regard to all crimes listed in the Code. Personally, he wondered whether that approach was necessarily the right one. From the standpoint of the court's competence, crimes under the Code should be divided into two broad categories, one covering crimes against peace and crimes against humanity such as those dealt with at the Nürnberg and Tokyo military trials, and the other category covering war crimes and crimes relating to illicit traffic in narcotic drugs, which, in the majority of cases, had been dealt with in the past by national criminal courts. The international criminal court should have exclusive jurisdiction over crimes in the first category, but only review competence in the case of those in the second, over which the courts of the State in which the crime was committed should be given primary jurisdiction. However, if the State in which the crime was committed failed to initiate proceedings, States whose nationals were the victims of the crime should be permitted to institute proceedings before the international criminal court. That would take account of the principles of the territoriality of criminal law, which were also reflected in some provisions of relevant international conventions, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.

21. Crimes in the first category, however, were new crimes in the sense that the individuals responsible for them were to be punished under international, rather than national, law. Such crimes were not dealt with in national penal laws: they often involved persons who occupied leading positions in their country, and the effects inevitably extended to State-to-State relations. Those crimes were therefore of an inherently international character.

¹¹ *Yearbook ... 1983*, vol. I, 1760th meeting, paras. 38-54.

22. On the assumption that the competence of the international criminal court should differ depending on the category of crimes concerned, certain minimum requirements would have to be met in order to make the court an effective judicial organ. First, the court's jurisdiction should extend to individuals of all States which accepted the jurisdiction of the court, and all States parties to the Code should, *ipso facto*, be parties to the statute of the court. The concept was similar to the relationship between membership of the United Nations and of ICJ, except that in the present case it would be taken for granted that becoming a party to the Code signified acceptance of the jurisdiction of the court. As to the question whether States not parties to the Code should be able to bring a case before the international criminal court, a procedure similar to the one set out in article 35, paragraph 2, of the Statute of the International Court of Justice might be adopted.

23. The second requirement for enhancing the court's effectiveness was that to enable the prosecution of individuals for crimes against peace or crimes against humanity the States to which they belonged should have accepted the jurisdiction of the court by becoming parties to the Code. In other words, the State's consent to the jurisdiction of the court should also imply that the State to which the individual belonged agreed to its nationals being tried solely in the international criminal court. However, in cases where specific provisions of the relevant international conventions, such as article VI of the Convention on the Prevention and Punishment of the Crime of Genocide or article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, allowed a State to opt either for the jurisdiction of its national criminal tribunal or for that of an international penal tribunal, States parties to those conventions would act in accordance with those provisions. Hence they were not necessarily obliged to surrender to the jurisdiction of the international criminal court.

24. The court's review competence in respect of judgments by national criminal tribunals relating to crimes in the second of the two categories he had defined should, in his opinion, be of a recommendatory nature and should not have the effect of overriding the national criminal tribunal's final judgement.

25. He endorsed the Special Rapporteur's decision to include a clause on penalties in the draft Code. Quite apart from the principle of *nulla poena sine lege*, on which everyone was agreed, an international criminal court which, in keeping with the views he had just outlined, should have exclusive jurisdiction over crimes against peace and humanity, would need to apply penalties. He also agreed with the proposal to make life imprisonment the maximum penalty, in view of the current trend towards abolition of the death penalty. He would none the less prefer a formulation whereby the international criminal court could choose, on a case-by-case basis, and in the light of all relevant circumstances, a penalty within a particular range. Furthermore, principal perpetrators or persons who played a leading role in committing the crime should, for the purposes of penalties, be distinguished from subordinates acting on orders, especially in the case of crimes against peace and crimes against humanity. Lastly, a provision on penalties in the

draft Code would be useful even where the international criminal court performed only a review function. Decisions or sentences rendered by national courts with primary jurisdiction over crimes in the second category, namely, war crimes or crimes relating to illicit traffic in narcotic drugs, and the like, should be subject to review by the international criminal court in accordance with a procedure to be set out in the draft Code. However, due attention should be paid to ensuring that the court's penalty did not take precedence over the final decision of the national tribunal in such a way as to impede the primary jurisdiction of the State in question. The effect to be given to decisions of the international criminal court in the exercise of review competence should therefore be studied very carefully.

26. With regard to the proposed draft provision on the jurisdiction of an international criminal court, he would like to know whether the terms "conferred jurisdiction" and "conferment of jurisdiction", which appeared in paragraphs 1 and 2 respectively, had the same meaning as "conferment of jurisdiction" in article 26, paragraph 3, of the 1953 revised draft statute for an international criminal court. The 1953 provision read:

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.¹²

It had been included because the intention was to make it clear that:

... by conferring jurisdiction upon the court, a State was not bound to bring specific cases before the court. Such a State ... might well choose to bring cases before its own national courts according to the laws determining national criminal jurisdiction ... or before special international tribunals ... the only duty following from the conferment of jurisdiction would be passively to allow persons to be tried.¹³

Accordingly, "conferment of jurisdiction", as opposed to "accept jurisdiction", the form of words used in, for example, article VI of the Genocide Convention, could never mean specific acceptance of the jurisdiction of the international criminal court or acceptance of the exclusive jurisdiction of that court over a specific kind of crime. Rather, it meant that the State concerned retained the right to bring, or not to bring, a particular case before the court even after jurisdiction had been conferred. If the Special Rapporteur was using the terms in question in the sense in which they were employed in the 1953 draft, therefore, paragraphs 1 and 2 of his proposed text might compromise the idea behind the jurisdiction of the international criminal court.

27. For his own part, he was unable to accept the need for the concept of "conferment of jurisdiction" by the State or States in which the crime had allegedly been committed or of which the perpetrator or victim was a national. Crimes such as waging of wars of aggression or crimes against humanity should be brought under the exclusive jurisdiction of the international criminal court, and such jurisdiction should be accepted unconditionally by States that became parties to the Code. Moreover, those States should, by virtue of their acceptance of the Code, become parties to the statute of the international

¹² Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645), annex.

¹³ Ibid., Supplement No. 12 (A/2645), para. 95.

criminal court and be deemed to accept its jurisdiction. Any persons accused of crimes against humanity should then be tried solely by the court, save where a national court acquired jurisdiction over such persons under the terms of a special convention.

28. One or more States might bring crimes such as war crimes or drug trafficking before the international criminal court. In that event, two different situations could arise. On the one hand, a case might occur in which the State that acquired, or had an obligation to exercise, national jurisdiction over persons accused of such crimes did not exercise that jurisdiction; in his opinion, the victim State could then bring the case before the international criminal court. On the other hand, applications for the review of judgements handed down by national courts might be filed by other States. In both instances, the parties to the Code should accept jurisdiction in the same way as when the international criminal court had exclusive jurisdiction.

29. As to paragraph 5 of the draft provision, the court could indeed play a very important role in the unification of international criminal law. In particular, the possibility of vesting the international criminal court with the power to give an advisory opinion on legal questions relating to the interpretation of the Code merited consideration. The issue of who could request such an opinion should also be examined.

30. Paragraph 1 of the draft provision on criminal proceedings did not specify which States were entitled to institute proceedings before the international criminal court in respect of crimes against the peace and security of mankind. In his view, where crimes against peace and humanity were concerned, all parties to the Code should be entitled to do so.

31. It had rightly been said that a distinction had to be drawn between a determination by a political body of an act or threat of aggression and such a determination by an international criminal court. When the Security Council took no decision, the international criminal court could determine the existence of aggression of its own motion. However, in the case of threat of aggression, in other words, where aggression had not actually occurred, it would be inappropriate for the court to express a legal opinion on a matter that was of a highly political nature.

32. Mr. ARANGIO-RUIZ said he would be grateful for some elucidation as to the distinction between the two possibilities advanced in the report for ways in which the Code should be incorporated into domestic law. The problems raised by the two main questions discussed in the report—penalties and the implementation of the Code—were so many and varied that his remarks would necessarily be of an entirely provisional nature.

33. As to penalties, he agreed that recognized principles such as *nullum crimen sine lege* and *nulla poena sine lege* called for a decision on the part of the Commission. As far back as 1764, before ideas about the death penalty and human rights had developed, Cesare Beccaria, an aristocrat from Milan, had published a work entitled *Dei delitti e delle pene*, one of the basic propositions of which had been that the death penalty was pointless and unnecessary, and that no man had the right

to take another's life. The death penalty was plainly out of the question.

34. He fully endorsed the views of members on imprisonment, but was somewhat less hesitant on two points. Mr. Tomuschat took the view (2208th meeting) that it should be left to States at the diplomatic conference to adopt the Code to specify the penalties applicable. For his own part, however, he could not see in what way any guidance the Commission offered to the General Assembly—which would, in any event, then make recommendations to States—would curtail the freedom of States to make the final choice in the matter. Again, he did not see how the making of such choices could enhance the commitment of States to the Code. A decision on the establishment of an international criminal court seemed to him to be just as significant as a decision on the adoption of the Code.

35. Further, he agreed on the need to provide for confiscation of property, either for the purpose of compensating the victims of crimes or as an additional penalty. Looting had always been, and remained, an element in aggression and annexation. At the very least, those who perpetrated the crime of aggression, or indeed of drug trafficking, should not be allowed to profit from their deeds.

36. The other point on which he would be less hesitant than some other members concerned life imprisonment. Admittedly, the establishment of an international penal institution presented considerable difficulty, but he would find it difficult to contemplate the release, even after 20, 25 or 30 years, of a dictator of the type common around 1930 who had been guilty of aggression, genocide and other crimes of similar magnitude, or even the release of a major drug trafficker. Such people could not just be returned to society, as the English had soon realized in the 100 days following Napoleon Bonaparte's exile on the island of Elba. It was a question of fitting the punishment not only to the crime but also to the gravity of the danger, and of preventing a recurrence at all costs. Dictators who survived defeat tended to revert to type, if not at their own initiative, then with the encouragement of former allies or supporters. The Commission would therefore be better advised to provide for differentiated penalties for the various crimes, something which would in no way undermine the sovereign liberty of States.

37. The Special Rapporteur was to be commended for his prudent approach to the question of establishing an international criminal court and to the various options involved. It was also perfectly understandable why the Special Rapporteur had decided, in the absence of a mandate from the Commission, not to submit a draft statute for the court. Two things were quite clear. In the first place, a code of the type contemplated would have no chance of being accepted by a sufficient number of States, or indeed of ever being implemented impartially, if there was no international criminal court. The difficulties of creating such an institution were no greater than those of obtaining the consent of States on the primary provisions of the Code or on the more complex rules on national universal jurisdiction. Once those difficulties had been surmounted, States would have less difficulty in accepting the Code and it would be easier to draw up

rules for implementing it. The problems that would have to be resolved in order to establish such a court would to a large extent be compensated by the elimination of a mass of problems that would have to be resolved in the context of a system characterized by a multitude of national—and rival—universal jurisdictions.

38. Secondly, in his view it could not be asserted that the Commission had received insufficient guidance from the General Assembly to enable it to interpret its mandate as one to devise a code which included, quite naturally, such institutional and procedural rules as the Commission deemed necessary in order to guarantee effectiveness. By effectiveness, he meant that the Code should be applied in the case of all of the numerous and varied crimes it covered and which encompassed, for instance, drug trafficking, genocide, environmental offences, and aggression. If the uncertainties about extending the Commission's mandate to institutional and procedural matters might to some extent have been justified until 1988—though he doubted it—there was no longer any reason for such uncertainties, particularly in view of the terms of General Assembly resolution 45/41, paragraph 3 of which made it clear that it was now for the Commission to decide at what time to begin detailed discussion of the question of an international criminal court and to take a position, within the limits of its advisory function, on "the possibility of establishing an international criminal court or other international criminal trial mechanism". In his opinion the time had come.

39. That consideration determined his position on the issues raised in part two of the report. Paragraph 1 of the possible draft provision on the jurisdiction of the court, should be simplified by vesting the court with competence for all of the crimes covered by the Code, regardless of any territorial considerations. All States parties should accept the international criminal court system, including all the necessary subsidiary machinery, and of course they should accept the competence of the court. The only crimes lying outside the court's competence would be crimes in respect of which States parties were not entitled under general international law to exercise their criminal jurisdiction, i.e. crimes over which States not parties to the system had jurisdiction.

40. Mr. Mahiou had asked (2209th meeting) in what sense "territoriality" would have applied in the case of the Tokyo and Nürnberg Tribunals and had argued that the options of seizing the courts of the State of the accused or an international tribunal set up by the victors were not available in the case of an international criminal court. There were two main problems: first, the problem of States not parties to the system, and secondly, that of war crimes in the strict sense which were not serious enough to fall within the Code and the competence of the international criminal court. Presumably, the rules of general international law would continue to apply to such crimes. Once an international criminal jurisdiction was accepted, the criteria of the active or passive personality of the accused or of the victim no longer applied. In the possible draft provision on jurisdiction, paragraph 3, on the competence of an international criminal court to rule on competence, and paragraph 5, on competence to interpret, remained generally acceptable.

41. With regard to the possible provision on criminal proceedings, Mr. Calero Rodrigues (2208th meeting) and other members had rightly said that the instituting of criminal proceedings should remain in the hands of States, which would also have the task of drawing attention to crimes and their alleged perpetrators. But the conduct of the proceedings would be the responsibility of a separate international institution.

42. On the respective roles of the Security Council and the international criminal court he endorsed the position taken by Mr. Pellet at the previous meeting. The present situation, as set out in draft article 12 of the Code, would be radically altered by acceptance of an international criminal court. If the Security Council made a prior determination of a crime of aggression, proceedings could be instituted against the alleged perpetrator in accordance with the procedures of the international criminal court. Even if the Security Council did not make such a determination, there was nothing to prevent criminal proceedings from being instituted. The distinction between the political functions of the Security Council and the legal functions of the court must be maintained: even if the Security Council designated State A as the aggressor, it might still be concluded that there were no legal grounds for proceeding against State A. Such problems could not be ignored: they demonstrated the impracticability of any solution which did not place the necessary judicial institutions at the core of the Code. Otherwise, the Code would remain a dead letter or would work in favour of the perpetrators of the crimes by creating even more sources of conflict between States.

43. The Commission should therefore explore the option of an international criminal court in detail, leaving aside for the moment the option, preferred up to now, of multiple national universal jurisdictions. It must, however, be remembered that the draft Code was more Utopian than realistic. It would prove practicable only if the Commission could offer States a serious prospect of impartial implementation and operation by going beyond the mere formulation of the rules to the establishment of an institutional system of which the international criminal court would form the core.

44. Since August 1990 there had been much talk of a new international order, but no one had ever explained the origins of the idea or in what sense the order was "new". It was certainly hard to say whether the promise of a new international order had been realized in the Middle East region. It was to be hoped that the new order would manifest itself in all parts of that region in the same way and with the same degree of justice and balance. The Commission's work on the draft Code might prove both a normative and an institutional contribution to the new order, but that would depend largely on whether the Code offered a minimum guarantee of the objectivity and impartiality without which there could be no valid or lasting order. The only way to provide such a guarantee was to establish an international criminal court.

45. Mr. NJENGA said that the debate in the Commission had revealed a general agreement that penalties must be included in the draft Code. A draft article 5 for the 1954 Code, quoted by the Special Rapporteur in his

report, had been criticized by several States as leading to diversity of sentencing. The Commission must therefore specify the penalties for the crimes covered by the Code on the basis of the second of the two approaches mentioned by the Special Rapporteur, namely, to include the penalties in the Code itself and to adopt it by means of an international convention. However, that approach did not inevitably lead to a single penalty for all of the crimes, as suggested by the Special Rapporteur, despite the fact that they were all extremely grave. Such crimes as genocide, aggression, apartheid and colonialism could not be viewed in the same way as drug trafficking or mercenarism. The crimes included in the Code therefore warranted severe, but differentiated, sentences.

46. The Special Rapporteur had rightly excluded the death penalty from draft article Z, because of the clear trend among States to abolish that penalty. In that connection, the revised version of part I, section A of the ninth report was welcome, for it clarified the position regarding the death penalty in Africa, where it had been abolished by many States. Despite the fact that States which imposed severer penalties for the crimes in question would be unlikely to surrender accused persons to an international criminal court which would impose lighter sentences, the Commission could not specify the sentence for every crime in the Code. Yet to settle for a single penalty would be defeatist, and the solution was to leave it to the international court to determine the sentence in the light of the circumstances of the case and within minimum and maximum limits established in the Code itself.

47. Life imprisonment was unacceptable as the maximum sentence, for the objective was justice, not blind retribution. A life sentence imposed on an elderly person, without any possibility of remission, did little credit to the conscience of mankind, and in domestic systems the prerogative of mercy or parole was frequently exercised. Again, many countries had abandoned the life sentence on the ground that it infringed human rights. He could not concur with Mr. Calero Rodrigues (2208th meeting) that the minimum sentence should be 12-15 years and the maximum 30-35 years, but he did agree that the sentences must be firm. The best solution might be to establish an international clemency and parole board which could not consider release until the prisoner had served at least two thirds of his sentence.

48. He could not accept the provision concerning confiscation of stolen or misappropriated property, for such property did not belong to the thief or to his family or heirs, nor could it be given to any humanitarian organization. The only course was to return it to its rightful owners where possible, and to the State concerned as *bona vacantia*, for it to be allocated to deserving charitable organizations. He was, however, in favour of monetary penalties, including confiscation of property of the convicted person for the purposes of reparation, in addition to the imposition of a term of imprisonment.

49. As to the establishment of an international criminal jurisdiction, it was disappointing that the General Assembly had not given an opinion on the options and main trends which had emerged in the Commission at the previous session, for without such an opinion it

would be difficult for the Commission to make further progress. The possible draft provision on the jurisdiction of the court left much to be desired in its present form. Paragraph 1, on territoriality, was acceptable, but paragraph 2, which would apparently also require consent to jurisdiction to be given by the State of nationality of the perpetrator, the victim State or the State whose nationals had been the victims of the crime, would contradict the whole purpose of the establishment of criminal jurisdiction, opening a Pandora's box by allowing many States to deny such jurisdiction. The paragraph would be acceptable if it was worded as an enabling clause to confer jurisdiction, but in its present form it could not be included in the Code. Paragraphs 3 and 4 were consequential on paragraph 2 and required no comment. Paragraph 5 was welcome in that it would promote the harmonization of international criminal law.

50. Nor was the possible draft provision on criminal proceedings acceptable in its present form. There was general agreement that competence to bring criminal proceedings before an international court was vested exclusively in States, but paragraph 2 would require the Security Council to make a prior determination of the existence of aggression or threat of aggression. Such a provision was entirely out of place in the Code. The functions of the Security Council were political, while those of the international court were legal, and the two should be kept separate. The Court would, of course, be bound to take cognizance of such a determination by the Security Council, but it must be remembered that the draft Code related to individuals, whereas the Security Council's competence related to States.

The meeting rose at 12.55 p.m.

2211th MEETING

Tuesday, 21 May 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, 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. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPporteur (continued)

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³ (continued)

1. Mr. JACOVIDES said that many members of the Commission, together with other experts, had spent part of the previous weekend at Talloires, France, discussing the Commission's objectives under the present agenda item, at the invitation of the Foundation for the Establishment of an International Criminal Court and International Criminal Law Commission, a non-governmental organization on the roster.

2. The late Zenon Rossides, a former Permanent Representative of Cyprus to the United Nations and former member of the Commission, had posthumously retained the title of honorary president of the Foundation. A passionate believer in the international legal order and, more particularly, in the establishment of an international criminal jurisdiction, he had been instrumental in reviving that issue before the General Assembly, following the adoption of the Definition of Aggression.⁴

3. As one who was as firmly convinced as Mr. Rossides had been of the importance of the item under consideration, he expressed the hope that, during the United Nations Decade of International Law, which the General Assembly had proclaimed in resolution 44/23 of 17 November 1989, and in the present propitious international climate, major progress could be made towards the establishment of an international legal order. The completion of that undertaking would be a fitting tribute to the memory of Zenon Rossides.

4. Mr. TOMUSCHAT, referring to part two of the ninth report on the question of the establishment of an international criminal jurisdiction, said that, despite the General Assembly's reticence on that issue, which was difficult to understand, the international situation was favourable to the establishment of an international court. If the Commission failed to take advantage of present circumstances in order to make progress, it was to be feared that the task would be handed over to an ad hoc committee. There were many models on which it could base its work. The seminar just held at Talloires seemed to have

been extremely fruitful and the scholarly work done by the American author Cherif Bassiouni also offered a useful guide to legal thinking on the subject.

5. The problem of the conferment of jurisdiction on the international criminal court was extremely complex. The internal law of States was not relevant; the problem had to be solved according to the general principles of international law. States which accepted the court's statute would, by that token, recognize the competence of the court to try their nationals. To reproduce the dissociation between being party to the statute, on the one hand, and accepting jurisdiction, on the other, which characterized the regime of ICJ would be a mistake.

6. Regrettable as that might be, it did not seem feasible to establish uniform rules for all crimes to be covered by the Code. The legal position was relatively simple when the Commission confined itself to codifying rules already in force in the form of customary or treaty law. In the case of war crimes, for example, where it was established under humanitarian law that the victim State was entitled to institute criminal proceedings before its own courts, the consent of that State would suffice for proceedings to be instituted before the future international court. Similarly, in the case of crimes against the peace and security of mankind, nothing could prevent the international community, acting through the court, from trying the perpetrator of an offence which was already in that category under the law in force. Neither the consent of the State of which the perpetrator was a national nor that of the State in which the crime had been committed would be required in such cases.

7. It was not easy, however, to provide for all possible cases. In his view, there was only one crime—genocide—which left no room for doubt. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide clearly stated that persons charged with genocide could be tried by an international penal tribunal or by a competent tribunal of the State in the territory of which the act had been committed. Referral to the international court would therefore not be subject to any preliminary condition.

8. If the Commission wanted to innovate, it had to refer to the rules of the Vienna Convention on the Law of Treaties concerning the relative effect of international treaties. The case of apartheid was a good example in that regard. There could be no doubt that, as ICJ had found in its advisory opinion concerning the legal consequences for States of the continued presence of South Africa in Namibia,⁵ apartheid constituted a denial of fundamental human rights and was therefore contrary to generally accepted rules of international law. However, the Commission was concerned with individual responsibility and the question at issue was therefore whether apartheid was a crime whose perpetrators were liable to incur an international criminal penalty. It had to be admitted that the International Convention on the Suppression and Punishment of the Crime of Apartheid had thus

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 . . . 1991*, vol. II (Part One).

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

⁴ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

far had only very limited success and that none of the States of one specific region had acceded to it. It was therefore not possible to speak of universally recognized customary law and, that being so, the *pacta tertiis nec nocent nec prosunt* rule was fully applicable.

9. What then of aggression and intervention? According to Mr. Graefrath (2208th meeting), the victim State would be competent to institute proceedings under any circumstances, but he himself did not think that the matter was so simple. To the extent that not all States recognized them as crimes against the peace and security of mankind, the conventional rule of the immunity of persons acting on behalf of the State came into play and nothing short of international consensus could set such immunity aside in the interest of justice. There again, the rule of the relative applicability of international conventions had to be taken into account and the consent of the State of which the suspect was a national would appear to be indispensable—a situation which led to deadlock.

10. The hypothesis of the international court acting as a court of appeal or of review should not be dismissed *a priori*, especially where the law in force gave national courts jurisdiction to try war crimes, for example. In the case of aggression, intervention or colonialism, it would be almost shocking to leave the decision in the hands of a national court and, in the case of crimes against international peace, he shared Mr. Ogiso's view (2210th meeting) that only an international court could have jurisdiction. There again, however, some distinctions would have to be made and the Commission would have to mobilize all its intellectual resources in order to find satisfactory solutions.

11. With regard to the possible draft provision on criminal proceedings, he endorsed the views expressed by the preceding speakers. The right to bring charges should be entrusted to a Government prosecutor's office attached to the court, the role of States being limited to drawing the attention of that office to the facts warranting the opening of an investigation. The preparation of the charge should be accompanied by guarantees of impartiality and objectivity and it would be dangerous to entrust that task to States, which might be tempted to misuse their power for political ends.

12. He opposed the idea of giving the Security Council a right of veto in cases of aggression. The Commission had already established a certain link with the Security Council in terms of substantive law in the text it had provisionally adopted at its fortieth session for article 12, paragraph 5, which read:

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]⁶

but to grant the Council the possibility of blocking criminal proceedings would create a basic inequality between persons accused of the crime of aggression, that would be contrary to the principle of all being equal before criminal law. In that connection, he noted that there was some inconsistency in the texts already adopted by the Commission. Whereas the provisions of article 12, paragraph 5, made the decisions of the Security Council

applicable also with regard to aggression, nothing of that kind was to be found in article 14 (Intervention),⁷ despite the similar nature of the situations involved. The Security Council would thus be able to block criminal proceedings in one case, but not in the other.

13. In conclusion, he said he shared Mr. Graefrath's view (2208th meeting) that the statute of the court should be supplemented by a system of cooperation and mutual judicial assistance similar to that provided for in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

14. Mr. AL-KHASAWNEH said that a provision on penalties was motivated by the principle of *nulla poena sine lege* and the need for the uniformity of applicable law. The Commission should pursue that task in a functional rather than a dogmatic way. The word *lex* could be, and had been, interpreted to mean more than written law, but, in view of the paucity of precedents, the lack of explicit provisions was more immediately felt. Similarly, with regard to uniformity, the Special Rapporteur himself had said in one of his earlier reports that criminal law was steeped in subjectivity,⁸ thus the reprobation elicited in the public conscience as a reaction to a particular act could never be uniform. Criminal law was all the more subjective in an international setting and that raised a question about the wisdom of seeking to design a system of uniform sentences for a heterogeneous world. The Commission should have a clear idea about its objective and pursue it pragmatically; that objective should be, first and foremost, to prevent abuse through nominal or excessively severe penalties.

15. The Special Rapporteur advocated a provision with minimum and maximum penalties. However, the exclusion of the death penalty was likely to be a contentious matter and would not enhance the prospects of acceptability of the draft Code for those States under whose law capital punishment was prescribed for certain particularly heinous crimes. It was misleading to speak of a general trend towards abolishing the death penalty. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the General Assembly in resolution 44/128 of 15 December 1989, was controversial and was also optional, as its title indicated. The Code, which covered only particularly grave crimes, must not become an instrument for settling the issue of capital punishment.

16. The best solution would be to let the States concerned deal with the question of penalties in accordance with their internal law. The need to guard against abuse should be met by a general provision stipulating that crimes should be punished by sentences that took into account their extreme gravity. All conventions against terrorism incorporated such a provision and it had worked reasonably well.

⁷ For text and commentary, see *Yearbook... 1989*, vol. II (Part Two), p. 69.

⁸ *Yearbook... 1985*, vol. II (Part One), p. 69, document A/CN.4/387, para. 47.

⁶ See 2208th meeting, footnote 5.

17. Neither General Assembly resolution 45/41 nor the debate in the Sixth Committee gave the Commission the necessary guidance; hence the need for a bold approach. It was therefore surprising to read in the ninth report that the Special Rapporteur had opted for a "makeshift solution, a necessary concession to State sovereignty". Yet a permanent solution under which the jurisdiction of the court would be free from the constraints of internal law was possible. Another solution, along the lines of the one suggested by Mr. Graefrath, would give the court a review competence and, in certain cases, a role as the court of first instance.

18. In the possible draft provision on jurisdiction, the Special Rapporteur was correct in assigning priority to the territoriality principle and grouping other criteria for the conferment of jurisdiction under paragraph 2. However, those criteria probably did not all have the same standing. For example, the passive personality principle was particularly controversial, not only because some States did not claim it for themselves, but also because it was based on an assumption of bad faith, namely, that the States that had jurisdiction under the territoriality or active personality principle would not fulfil their obligation. The Special Rapporteur might wish to look into the possibility of establishing a hierarchical order for those various principles.

19. With regard to paragraph 5 of the possible draft provision, he supported the view expressed by earlier speakers that international organizations should also be able to seek an interpretation of a provision of international criminal law.

20. During the consideration of article 12, paragraph 5, at the fortieth session, he had argued in favour of making a distinction between the court's judicial function and the political function of the Security Council, which, as the guardian of international peace and security, should be directly involved in dealing with acts of aggression in a way that cut across divisions between political and legal problems; in that connection, Mr. Beesley (2210th meeting) was right in saying that the determination of an act of aggression by the Security Council would have great weight, but at the same time, there was some incongruity in making criminal responsibility dependent upon a determination of aggression because, then, political criteria rather than legal standards were the decisive factors.

21. The problem was all the more pressing in view of the fact that the international system lacked a set of checks and balances or a mechanism to determine whether a political body was acting *ultra vires*. International law divorced from international justice could not be the expression of an ideal. An independent judicial function would enhance the effectiveness of the system which derived from the Charter of the United Nations and complement it in such a way that it would not be seen as embodying a dichotomy between law and justice.

22. Mr. ROUCOUNAS said that the very fact of referring, as the Special Rapporteur had done in part one of his report, on the difficult question of applicable penalties, to differences in national legislation might suggest that consideration was being given to the possibility of establishing a mechanism to guarantee the uniform ap-

plication of the Code or even a completely separate regime of penalties within the framework of the Code. But that result could not be achieved by setting minimum and maximum penalties in the abstract or by picking up the debate where it had left off in 1954.

23. Criminology had made considerable progress since the Second World War and research in that area could be very helpful to the Commission.

24. It was essential to include provisions on penalties in the Code itself, but such provisions must not just state a few simple ideas. For example, indicating that a certain scale of penalties was suitable for all the crimes envisaged would assume that agreement had already been reached that all the crimes listed in the Code were of the same nature, that the penalties were those that criminologists considered to be the most suitable and that the scale of penalties would guarantee the uniform application of the Code.

25. The Special Rapporteur had not attempted to solve all the problems that arose in respect of penalties, rightly choosing instead to proceed cautiously. It was not enough to draft a substantive provision; such a provision must be complete in order to avoid having to rely on national legislations, with all the distinctions they made between the various categories of wilful killing, supplementary and accessory penalties, extenuating and aggravating circumstances, and so forth.

26. The basic question being raised was which jurisdiction would be responsible for applying the Code. In the case of the crime of genocide, for example, what was the current scale of penalties in each of the 100 States or so that had acceded to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide? If the same court must apply both the Convention and the Code, to which of the two would it give priority?

27. A number of other as yet unresolved preliminary questions must also be raised in connection with penalties. That was the case in particular of an order given by a hierarchical superior, whose effect for individual responsibility was the subject of a considerable body of legal decisions and an abundant bibliography. Yet the judge, whether at national or international level, would need to be able to find provisions on that question in the Code.

28. With regard to the death penalty and the undeniable progress made throughout the world towards its abolition, although Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty⁹ provided for the abolition of the death penalty in times of peace (article 1), it also contained a proviso for the case of war and even for the case of imminent threat of war (article 2), which, in accordance with the interpretation that some had given to that provision, the authorities of the State concerned would be free to determine.

29. In other words, the Commission would sooner or later be faced with a dilemma: either to establish a single

⁹ Council of Europe, *European Treaty Series*, No. 114 (Strasbourg).

scale of penalties (excluding capital punishment) or to institute a special scale of penalties for certain categories of crimes, including war crimes.

30. It would be preferable for the Code to contain a separate regime of penalties rather than setting forth a few general provisions that would be mere guidelines. He also doubted whether creating a single scale of penalties for all the crimes in the Code was an effective method. It would be better to take as a basis the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to provide, as in that instrument, that States parties must pledge to impose upon the authors of crimes enumerated in the Code penalties proportional to the gravity of their acts.

31. In its last report to the General Assembly (A/45/10),¹⁰ the Commission had dealt with the question of the jurisdiction of a possible international criminal court only very superficially, confining itself to repeating the brief comments on the subject formulated by the Working Group, and it was therefore not surprising that the General Assembly had not given it specific guidance for the follow-up to work on that aspect of the subject. It was up to the members of the Commission to pay closer attention to all of the questions raised, some of which, such as those concerning the possible independence of the court and its relations with national courts, were both difficult and crucial, and to submit the results of their reflections to the General Assembly.

32. More precisely, it would be useful to examine whether to confer on the international criminal court both exclusive jurisdiction and jurisdiction concurrent with that of national courts. Under such a system, the court would have exclusive jurisdiction for all crimes of an extreme gravity, such as the crimes of aggression or threat of aggression, whereas, for the other crimes in the Code, both the international court and the national courts would have jurisdiction.

33. With regard to aggression or threat of aggression, he agreed with other members of the Commission that the Special Rapporteur's idea of making criminal proceedings subject to a prior determination by the Security Council was open to criticism. It might happen that action by the Security Council and by the international criminal court was complementary, but the opposite could also occur, for example in the event of a deadlock in the Security Council. In the case between Nicaragua and the United States of America,¹¹ ICJ had demonstrated that certain basic norms of general international law were independent of the Charter of the United Nations. Subordinating the intervention of the international judge to the determination of an act by the Security Council would be tantamount to calling into question the principle of the universality of international crimes.

34. Mr. RAZAFINDRALAMBO said that he would first make some general comments on the jurisdiction of the international criminal court and then consider in more detail the approach adopted by the Special Rapporteur, who, in part two of his report, tended to favour a

system of parallel jurisdiction in which the international criminal court would operate concurrently with national courts.

35. Nothing in General Assembly resolution 45/41, however, seemed to allow for such a clear-cut choice. As the Special Rapporteur himself stated, the General Assembly had refrained, at least at that stage, from choosing between the different options proposed by the Commission. Admittedly, the General Assembly's attitude might appear to be open to criticism; there were also those who would like the Assembly to be urged to provide the Commission with more specific guidance, but if the Commission wanted to maintain harmonious relations with the General Assembly, it would have to get down to its task as a technical body and consider all possible jurisdictional formulas, including, if need be, the establishment of an interim body which would fill the gap and function until a permanent international criminal court had been set up, with all the attributes, privileges, guarantees and characteristics attaching to it.

36. It was therefore regrettable that, at the current stage, the Commission was not in a position to indicate the advantages and disadvantages of an international court with exclusive jurisdiction and an international court with concurrent jurisdiction.

37. Undue stress should not be placed on the principle of State sovereignty in order to rule out exclusive jurisdiction. It could not be validly argued that States would refuse to abandon their judicial sovereignty, preferring to retain the right to try all crimes, including and especially the gravest, while being willing to confer such jurisdiction on an international court on a case-by-case basis as and when they wished. That reasoning, if carried through, would inevitably lead to the conclusion that the establishment of an international criminal court worthy of the name smacked of Utopia, for such a system was bound to give rise to conflicts the solution of which would itself be hampered by the very same principle of State sovereignty.

38. Furthermore, the principle of sovereignty had changed, evidence of that was the current integration of Europe or the idea of a new world order which had been revived by the Gulf crisis. It therefore did not seem consistent with current trends to invoke the concept of sovereignty in order to rule out exclusive jurisdiction.

39. That being so, the Commission would sooner or later have to take a serious look at the advantages and disadvantages of exclusive jurisdiction and the Special Rapporteur would have to propose an alternative that would enable the Commission, and the General Assembly in particular, to take a decision concerning the possible options with regard to jurisdiction in full knowledge of all the facts.

40. Turning to the question of applicable penalties and to the draft article proposed by the Special Rapporteur in that connection, he said that, by virtue of the principle *nulla poena sine lege*, a criminal code necessarily had to provide for penalties. Like many other members, he did not agree that the judge should be empowered to determine the penalty to be imposed, particularly since, in the case of crimes against the peace and security of man-

¹⁰ *Yearbook . . . 1990*, vol. II (Part Two).

¹¹ See 2209th meeting, footnote 6.

kind, the gravity of the offence called for a severe penalty. The imposition of unduly light penalties would expose the international criminal court to ridicule, if not paralysis. Given the nature of the crimes in question, the penalties should be both afflictive and infamous, in other words, they should affect the actual life of the guilty person and his moral reputation, legal and political status and family and social situation. It would be difficult as a matter of *lex ferenda* to treat the perpetrator of such crimes more leniently than the perpetrator of an ordinary crime or of the traditional kind of political crime. Moreover, as several members had already pointed out, that kind of criminal could certainly not receive more favourable treatment before the international criminal court than that laid down with respect to him under national criminal codes: that would only make the international court itself less acceptable.

41. As to the death penalty, before it could simply be expunged from the vocabulary of criminal law, as some recommended on humanitarian—and, moreover, highly commendable—grounds, a replacement penalty of a sufficiently exemplary and dissuasive nature had to be found. In his view, the only possible substitute in the case of crimes against the peace and security of mankind was a penalty that deprived the guilty person of his liberty either for a specific period or for life. However, caution should be exercised in selecting the term to designate deprivation of liberty. The word “imprisonment” was too vague. There were many forms of imprisonment under criminal law, such as rigorous imprisonment, detention, deportation and even forced labour, although the last-mentioned penalty would seem to be excluded in the present instance, as it was contrary to human rights and, in particular, to the conventions on forced labour. Until such time as the international community was in a position to define an adequate penitentiary regime, therefore, it would be better to stick to the term “deprivation of liberty”.

42. With regard to the duration of imprisonment, while it might be necessary to lay down a minimum on the basis of the terms of imprisonment provided for under national codes, it was difficult to see how agreement could be reached on a maximum penalty. He did not, however, share the misgivings of some regarding life imprisonment; it was well known that, unless there was some express provision on the subject, the convicted person could normally benefit from a reduction of sentence, release on parole for good behaviour or early release on grounds of health. The judge could also adjust the sentence if he considered that there were extenuating circumstances. If extenuating circumstances were allowed, however, then aggravating circumstances should also be allowed.

43. He agreed that confiscation of property should be a supplementary penalty and that a distinction should be drawn between stolen property and property of the perpetrator. In the first case, the measure would actually be in the nature of recovery rather than of confiscation; but the fact of the matter was that it was difficult to distinguish between money stolen from the people and money belonging to the guilty person which might, for instance, form part of the joint estate of the spouses. Confiscation was thus very much a patrimonial penalty which could,

unfortunately, affect the criminal’s family. He therefore suggested that a fine should be added to the list of penalties, which would be payable to the victim State or, where appropriate, to the United Nations, if the General Assembly so wished, and which would be imposed on the guilty person in the same way as afflictive penalties.

44. Turning to part two of the report, he underlined the fundamental importance of the proposals submitted by the Special Rapporteur for the Commission’s consideration. The discussion of the principle of concurrent jurisdiction showed how difficult it was to establish an international criminal court that functioned concurrently with national courts. The drawback of the proposed system was that it would bring into play simultaneously jurisdiction *ratione materiae* and jurisdiction *ratione personae*, when clarity dictated that they should be dealt with separately. So far as jurisdiction *ratione materiae* was concerned, the Special Rapporteur considered that it should apply to the crimes covered by the Code or, alternatively, to the crimes to be defined in the annex to the statute of the court. However, in view of the difficulty of drawing up the list of crimes to be covered by the Code, it did not seem advisable to endeavour to draw up a second separate list. It would be better to adopt a minimalist approach, in other words, to provide that the international criminal court would try only certain crimes, including those that were already the subject of the international conventions in force, such as the crimes of genocide and apartheid.

45. With regard to the application of jurisdiction *lato sensu*, the Special Rapporteur suggested that the proposed international criminal court should function only where jurisdiction was conferred on it by one of the four States concerned, which should be defined according to the principle of territoriality, the system of active and passive personality and the system of real protection. It should be noted that the revised draft statute drawn up by the 1953 Committee on International Criminal Jurisdiction¹² had adopted only the criteria of territoriality and nationality. Since the Committee had, however, opted in favour of jurisdiction *ratione materiae* relating to all international crimes, some of which had already been subject to national jurisdiction, its draft had understandably been based on concurrent jurisdiction, without any need to provide for special machinery for the settlement of disputes. In adding two new criteria, the Special Rapporteur seemed to be complicating the situation unduly and it was doubtful whether the procedure he envisaged for the settlement of positive conflicts of jurisdiction had any practical value. There were two possibilities: either States would have conferred jurisdiction on the international criminal court *post factum* and thus precluded bringing the case before their own courts, or they would prefer to go immediately to their courts, in which case they would not refer the judgements handed down by those courts to the international criminal court for reconsideration. In other words, what States refused to do *post factum* they would be even less likely to do after a judgement, for any reconsideration that might take place would be an even more serious infringement of their judicial sovereignty. There remained the possibility

¹² See 2207th meeting, footnote 7.

of negative conflicts of jurisdiction, when there would be no conferment of jurisdiction and the case would not be referred to any court, whether national or international. That, however, would be more in the nature of a denial of justice than of a negative conflict of jurisdiction, which was highly unlikely to arise.

46. It was also doubtful whether the review procedure proposed by the Special Rapporteur could be implemented. In that connection, it was important first to define clearly the concept of review. In its traditional meaning, whether in French law or the common law, it was a procedure whereby a convicted person could appear again before the court that had sentenced him with a view to the trial being reopened following the discovery of a new fact. That did not, however, seem to be the case envisaged in paragraph 4 of the Special Rapporteur's possible draft provision, which provided for the sentences handed down in respect of the same crime by the courts of the different States to be reviewed. The issue, therefore, would rather be one of conflicting judgements, which prompted the following comments. The problem in the instant case was one of a dispute that arose out of a conflict between two judgements. In order to deal with the dispute, all the States concerned would have to confer jurisdiction on the international criminal court and the judgement submitted for review would have to be final, in other words, all the domestic remedies must have been exhausted. In the light of all those factors, the question arose whether a State which had not felt able to decline jurisdiction in a case at first instance in favour of the international criminal court would agree to submit for review by that court a decision of, say, its supreme court. It was understandable in the circumstances that those who had formulated the 1953 draft statute had not deemed it advisable to grant such a power of review to the criminal jurisdiction they had proposed.

47. He agreed that the international criminal court should be vested with advisory jurisdiction. The power to seek an advisory opinion should, however, be extended to the General Assembly and the Security Council, as well as to governmental organizations.

48. With regard to criminal proceedings, valid points had been made against the intervention of the Security Council and he would therefore simply point out that there were two aspects to criminal proceedings: a public right of action and an action for damages. The latter was absolutely essential to secure the sentencing of the guilty person to payment of damages or to the restoration of stolen property, by virtue of the legal principle inherited from Roman law whereby a court could not render judgement *extra petita* or *non petita* except where its decision took the form of a patrimonial penalty, in which case the beneficiary could not, in principle, be a private person. A special provision relating to an action for damages therefore seemed to be indicated.

49. Mr. McCaffrey congratulated the Special Rapporteur on a report which should enable the Commission to make progress in its work, in particular by providing the General Assembly with food for thought on the possible establishment of an international criminal jurisdiction. For its part, the Commission had to be modest and practical, all the more so in that recent events—not only

the Gulf war, but also the initiatives taken, for example, by the United States Congress and the United Kingdom Parliament—opened a “window of opportunity” for the possible acceptance of the idea of setting up an international criminal court to try individuals accused of having committed a very narrow class of extremely serious crimes under international law.

50. With regard to the first part of the report, in which the Special Rapporteur dealt with the penalties to be applied, he believed that the Code should certainly make some provision for the applicable penalties by virtue of the *nulla poena sine lege* principle, but he agreed with Mr. Tomuschat that the issue was also a political one. More precisely, he believed that the penalty to be applied for each crime could be determined only by States, either the States which would be represented at a future conference convened to consider the draft Code and the establishment of an international criminal court or perhaps the States that would become parties to the statute of such a court. As Mr. Roucouas had pointed out, the best the Commission could do was to establish a hierarchy of penalties, determining, for example, that genocide was the most serious of all crimes under the Code and should be punished most severely, while some forms of intervention should receive less severe penalties. The Commission should therefore propose a range of penalties—even though that would be difficult and the death penalty, for example, was controversial—instead of laying down a specific penalty for each crime or, as the Special Rapporteur had suggested, one penalty for all crimes. While it was true that the crimes in question were taken to be the most serious ones, they did differ in their gravity. The Commission would achieve nothing by trying to impose a penalty of deprivation of freedom for a specific period or by recommending the penalty of life imprisonment, with or without the possibility of conditional release. At all events, there could be no doubt that the Commission should recommend against the death penalty on the basis of the practice of States which the Special Rapporteur had so usefully analysed.

51. Like other members of the Commission, he believed that, in determining the applicable penalty, the judge should take account of all circumstances: not only extenuating circumstances, but also aggravating circumstances, such as disregard of Security Council resolutions, particularly outrageous conduct and premeditation, planning and methodical execution, for example, of a programme of genocide. The court must be given discretion to set the penalty that fit the crime, perhaps within certain prescribed parameters and in the light of all the relevant circumstances.

52. Referring to the question of the establishment of an international criminal court and, in particular, its competence *ratione materiae*, he was inclined, in order to make the court more acceptable, to support the second alternative proposed by the Special Rapporteur, namely, to limit that competence to the crimes defined and widely accepted in the conventions in force. As to the States which would be able to institute proceedings in the court, it would probably be useful to take advantage of the results of the Talloires seminar referred to by Mr. Jacovides. In other words, since the crimes in question were crimes against the international community as

2212th MEETING

Wednesday, 22 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

**Expression of condolences on the death of
Mr. Rajiv Gandhi, former Prime Minister of India**

1. The CHAIRMAN said that he had learned with horror of the circumstances of the death of Mr. Rajiv Gandhi, former Prime Minister of India. All members of the Commission would no doubt wish to join him in mourning the loss of a great statesman. On behalf of the Commission he extended heartfelt sympathy to Mr. Sreenivasa Rao, to Mr. Gandhi's family and to the people of India in their irreparable loss.

2. Mr. Sreenivasa RAO thanked the Chairman and all members of the Commission for their expression of sympathy on the tragic loss suffered by the Indian people. The assassination of a promising and much-loved political leader provided fresh evidence, if such were needed, of the timeliness of the task on which the Commission was currently engaged.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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

ARTICLE Z and

**JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³
(continued)**

3. Mr. SOLARI TUDELA said that, in part one of his report, the Special Rapporteur advocated a single penalty

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... 1991*, vol. II (Part One).

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

a whole, any State should have the right to institute proceedings before the court by submitting a complaint in writing to the authority which was competent under the court's statute and which had to be an independent and impartial body entrusted with the task of investigating the charges and determining whether there was a *prima facie* case. In any event, the court could have jurisdiction only with the consent of the injured State, the State of nationality of the accused, the State of nationality of the victim or the State in whose territory the accused had been arrested. In practice, the consent of the latter State would be crucial because, in order to prevent abuse for purely political reasons, trial *in absentia* must not be permitted. The consent of that State would, moreover, make it unnecessary to have the rather complicated system envisaged by the Special Rapporteur in paragraph 2 of his possible draft provision, whereby a number of States would have to confer jurisdiction on the court in cases in which their own domestic courts also had jurisdiction to try the accused. Such a system might well jeopardize the jurisdiction of the court in the gravest cases, such as those involving war crimes or the crime of genocide.

53. He believed that States would be even less inclined to accept the review function of the court referred to in paragraph 4 of the possible draft provision than the conferral of jurisdiction on the court in first instance.

54. With regard to the relationship between the international criminal court and the Security Council, he continued to believe that the crimes of aggression and threat of aggression were *sui generis*, in that, by definition, they existed only if the Security Council characterized certain acts as such. In those circumstances, it was very difficult to see how an international criminal court could find an individual guilty of having committed the crime of aggression or threat of aggression if the Security Council had not acted or if it had found that aggression or threat of aggression had not been committed. On that point, he did not fully agree with Mr. Pellet's comments (2209th meeting) concerning the judgment of ICJ in the case between Nicaragua and the United States of America, in so far as the Court, rightly or wrongly, depending on one's view on the admissibility of the claim, had dealt with self-defence, which was very different from aggression. It would not only be strange to have two different determinations by the Security Council and the court, but it would also be detrimental to the international legal order for an international criminal court to find, for example, that a senior official was guilty of the crime of aggression when the Security Council had held that there had been no aggression on the part of the State to which that official belonged. That did not mean that the international criminal court would not be able to deal with cases involving an armed conflict: it would have to do so if it was called upon to try war crimes.

55. In conclusion, he expressed the hope that the Commission would rapidly be able to agree on a specific proposal concerning the establishment of an international criminal court in particular.

The meeting rose at 11.35 a.m.

for all crimes against the peace and security of mankind, with extenuating circumstances reducing the penalty to 10 to 20 years' imprisonment. In his own view, however, it would be preferable, in the absence of such extenuating circumstances, to lay down a minimum and a maximum penalty and leave it to the court to exercise its discretion in applying the appropriate penalty according to the circumstances.

4. The worldwide trend in favour of the abolition of the death penalty was also to be seen in the Latin American region, as reflected not only in the municipal law of the various Latin American countries but also in the American Convention on Human Rights. The Convention did not prohibit the death penalty itself, but did prohibit its reintroduction once it had been abolished. Life imprisonment did not seem to be compatible with the Latin American legal system. The criterion adopted in the American Convention on Human Rights, for instance, was that penalties should not only be correctional in nature but should also rehabilitate the convicted person so that he could resume his place in society. A more realistic penalty would be imprisonment for a minimum of 10 years and a maximum of 25 years, which was the longest term of imprisonment in many Latin American countries. One advantage was that the prisoner could not be released on parole.

5. He shared the reluctance of other members about extending the penalty of confiscation of property to the heirs and relatives of the accused. None the less, such a penalty would be appropriate in some cases, for instance, unlawful trafficking in narcotic drugs. Money and means of transport could be confiscated where it was clear that they had not been restored to those from whom the property had been taken unlawfully. It would, however, be advisable to specify to whom any confiscated property should be assigned.

6. The establishment of an international criminal jurisdiction, which was the subject of part two of the report, had aroused great interest throughout the world and the recent press campaign reflected public opinion in the matter. In the circumstances, the Commission had a political responsibility to expedite its work with a view to establishing an international criminal court. It might therefore wish to appoint a working group to study the matter or to adopt some other appropriate procedure. The first reading of the Code could then be accompanied by an initial draft of a statute of the international criminal court.

7. The Special Rapporteur proposed a possible provision on the jurisdiction of the international criminal court, suggesting two possible alternatives, namely, that jurisdiction should be confined to the crimes defined in the Code, or that it should extend to the crimes listed in an annex to the statute of the court. His own view was that the court's jurisdiction should not be confined to crimes against the peace and security of mankind but that the court should be able to try international crimes in general. If that was what was meant by a list of crimes annexed to the statute of the court, he could agree to the Special Rapporteur's second alternative. It should, however, be specified that, in the case of crimes against the peace and security of mankind, the court's jurisdiction

would be compulsory, which did not mean that it would be exclusive. It could have exclusive jurisdiction at first and at second instance, or at second instance only where the crime had been tried by a competent national court as provided for under subsequent paragraphs of the proposed draft provision. In that event, there would be concurrent jurisdiction.

8. The provision on criminal proceedings suggested by the Special Rapporteur embodied two ideas: first, that only States could institute criminal proceedings and, second, that, in the case of crimes of aggression, there must be a prior determination by the Security Council that such a crime existed. So far as the second idea was concerned, he agreed with Mr. Pellet (2209th meeting) that such a provision would be inadvisable, since it would be tantamount to extending the power of veto vested in the permanent members of the Security Council under the Charter of the United Nations to a power to find the alleged perpetrator of an aggression innocent. That was not in keeping with the intention of the authors of the Charter and it would be unacceptable.

9. It also seemed that access to the court would be reserved for States alone, but it was important to recognize the possibility of access by non-governmental organizations, by international organizations, and indeed, by individuals. In the case of an environmental crime, for instance, it would be far simpler for a non-governmental organization such as Greenpeace or a similar body to institute criminal proceedings, since States had to tread carefully in their international relations. The same was true of war crimes and serious human rights violations, when the Red Cross or Amnesty International, for example, could act more easily. At the same time, to ensure that a non-governmental organization did not institute criminal proceedings directly, a provision could be included in the statute of the court to the effect that a case should be referred to the relevant prosecution authorities, which could then, if they endorsed the case, initiate proceedings on behalf of the non-governmental organization.

10. Mr. AL-BAHARNA said that he welcomed the addendum to the Special Rapporteur's ninth report, which unravelled some of the inherent doctrinal complexities, and also presented two possible draft provisions as a basis for discussion.

11. Paragraph 1 of the possible draft provision on jurisdiction set forth two alternatives regarding the extent of the court's jurisdiction. The first limited jurisdiction to the crimes defined in the Code, while the second extended it to crimes defined in an annex to the statute. It was apparent from the statement in the report, concerning the court's jurisdiction *ratione materiae*, that the Special Rapporteur had not foreclosed the possibility of extending the court's jurisdiction, and the alternative in square brackets was therefore not entirely without utility. On the other hand, since the idea of an international criminal court was linked to the draft Code, it would be inadvisable at that point to extend the jurisdiction of the court beyond the category of crimes defined in the Code. Should States consider it appropriate to extend the court's jurisdiction later on, they would no doubt be able to do so by amending the statute accordingly.

12. As far as the court's jurisdiction *ratione personae* was concerned, the Special Rapporteur had taken account of members' concern that the criminal jurisdiction of States should be respected and, accordingly, paragraph 1 made the court's jurisdiction subject to the consent of the States concerned. The principle of conferment of jurisdiction was essential to the proposed statute, but it would be helpful if the reasons behind the differentiation between territoriality and other principles, including those relating to nationality and to the victim State, were more fully explained. The Special Rapporteur acknowledged that, although there was no general rule limiting criminal jurisdiction to the law of the place where the crime was committed, the territorial principle was none the less the one generally applied.

13. Paragraphs 1 and 2 of the draft provision invited comparison. Whereas paragraph 1 dealt with the exercise of criminal jurisdiction on the basis of the place where the crime was committed, in other words, on the basis of territoriality, paragraph 2 dealt with jurisdiction on the basis of the nationality of the accused or the victim State, in other words, on the basis of the principle of personality. Under paragraph 1, therefore, the court could only try the accused if the State in which the crime had been committed conferred jurisdiction upon it, whereas, under paragraph 2, conferment of jurisdiction by the State or States concerned was only necessary where such States also had jurisdiction over the individuals in question under their domestic legislation. The effect of paragraph 2 was to reduce, in theory, the number of States required to confer jurisdiction on the court. Hence it was necessary to consider whether the nationality principle was of less legal significance than the territoriality principle as far as conferment of jurisdiction was concerned. A State might, for instance, consider it necessary to exercise jurisdiction on the basis of the personality rather than the territoriality principle, for as PCIJ had opined in the *Lotus* case,⁴ nearly all systems of law extended their action to offences committed outside the territory of the State. Furthermore, the territoriality principle was itself capable of creating what the Special Rapporteur called a "veritable obstacle course" in terms of the number of States seeking and withholding conferment. In the light of those facts, it would be extremely useful if those principles, and in particular the territoriality principle, could be reviewed in detail.

14. Paragraph 3 was to be welcomed, for the power to challenge a court's jurisdiction was a generally recognized right that was inherent in every court. In addition, all international courts recognized the principle of competence. Paragraph 4 was likewise essential in that it confirmed rights that were an integral part of any judicial institution. For example, if two or more States were to claim the exclusive right to confer jurisdiction on the basis of the criteria laid down in paragraphs 1 and 2, the court should obviously have jurisdiction to adjudicate upon those claims.

15. Paragraph 5 was acceptable, since clarification of principles of law was a necessary function of courts of

law, but the question arose of the scope of the paragraph, and in particular of the expression "international criminal law". In his view, the terms of paragraph 5, like those of paragraph 1, should be confined to the draft Code or to the annex to the statute. To that end, paragraph 5 could be reworded to read: "The court may be seized by one or by several States with the interpretation of the provisions of the Code of Crimes against the Peace and Security of Mankind". Furthermore, a number of different words had been used to express the same idea and it would be preferable to replace such words as "competence", "seize" and "cognizance" by "jurisdiction".

16. The draft provision on criminal proceedings stipulated that the proceedings should be instituted by States. However, both logic and principle dictated that the court should be accessible to other bodies and to individuals as well, failing which its action might be stultified. For instance, States might not wish to take proceedings for policy considerations, and the Secretary-General of the United Nations for example, or bodies such as ICRC or intergovernmental organizations might be more interested in doing so, particularly since the crimes under the draft Code concerned crimes against the peace and security of mankind. It might also be necessary to consider whether the court should be accessible to individuals, since individuals could be subjected to unduly severe penalties by national courts for crimes under the Code. Such individuals should surely have the right to seek review by the international criminal court of the sentences handed down against them.

17. Paragraph 2 contained a questionable proposition and one that he found hard to accept. The Security Council was a political body governed by the veto system; to make criminal proceedings subject to its consent would be tantamount to subjecting international judicial machinery to the power of veto vested in the five permanent members of the Security Council and that might impede the development of an international criminal jurisdiction. The power vested in the Security Council under Article 39 of the Charter of the United Nations to determine the existence of any threat to the peace, or act of aggression did not preclude the instituting of criminal proceedings by States and other entities empowered to do so under the statute. The nature of the competence under Article 39 was political and, as such, could not be regarded as an impediment to the exercise of jurisdiction by the court with regard to crimes of aggression and threat of aggression.

18. Mr. PAWLAK said that, like almost all members, he was in favour of including provisions on penalties: without penalties and instruments for implementation the draft Code would be a paper tiger. The Code had direct meaning both as an instrument of punishment and as an important deterrent. Admittedly, the principle of *nulla poena sine lege* called for penalties, but it did not indicate what the penalties should be or how they should be applied. He agreed with the Special Rapporteur that the penalties should be included in the Code itself and not incorporated with the Code in domestic legislation. In view of the variety of possible crimes, degrees of guilt and circumstances, there should be a separate penalty for each crime. The adoption of a single penalty was the eas-

⁴ See 2210th meeting, footnote 8.

ier approach, but it was not justified. He could not, therefore, support the proposals made in draft article Z.

19. The severity of the penalties should depend on the nature of the crime and the circumstances in which it was committed. The matter should not be left to the judge, but should be dealt with in the Code itself. The trend in criminal policy in many States was away from the death penalty, but the Commission must be realistic and must not exclude any form of punishment, especially as far as grave war crimes were concerned. For the same reason, life imprisonment should be viewed as an important penalty and should not be ruled out. Both extenuating and aggravating circumstances should also be taken into account. Provision should, of course, be made for supplementary penalties, but the aim must be punishment, not simply restoration of stolen or misappropriated property. Such property should be returned to the rightful owners, but property confiscated by the court must be property actually owned by the perpetrator of the crime.

20. At the previous session he had commented on the question of an international criminal jurisdiction, and the report on that session⁵ had set out a number of options. The Commission must now take a position on the establishment of an international criminal court based on paragraph 3 of resolution 45/41 without waiting for further guidance from the General Assembly. It was time for the Commission to decide whether it was in favour of establishing a permanent international criminal court with exclusive jurisdiction for such crimes as aggression, apartheid, genocide and large-scale drug trafficking. At the same session a working group had done some work on the subject, and the Commission now needed to address a resolution to the General Assembly giving an outline of the draft Code and its basic principles. A working group might be set up with a view to producing a draft document by the end of the current session.

21. The role of the Security Council with respect to the international criminal court was a complex problem. The special responsibilities of the Security Council under the Charter of the United Nations could not be limited, or ignored by the Commission, but that consideration did not imply any limitation on the prerogatives of an international court. It was a political fact that the era of East-West confrontation was over, and the Commission must reorient its thinking accordingly in its approach to the role of the Security Council. The Council had recently shown unanimity in confronting difficult problems, and there were grounds for optimism that its role in the future would help rather than hinder the activities of the court. If the Council did not make a prior determination of the existence of the crimes of aggression or the threat of aggression, the court should be free to decide, in accordance with the Code, on its own procedures in the matter.

22. Mr. FRANCIS said that he had been surprised by the negative approach taken by the General Assembly to the question of the establishment of an international criminal jurisdiction. Happily, the matter had been referred back to the Commission, which must now press ahead. He endorsed the suggestion that a working group

should be set up with a view to concluding the topic as quickly as possible.

23. He had no difficulty with the essence of paragraph 1 of the possible draft provision on the jurisdiction of the court but, read in conjunction with paragraph 2, the provision did not go far enough. To take an example from recent events in the Gulf, it was conceivable that an offender might be found in another State and protected there by a regime which supported the offender's position. Such a State would be unlikely to consent to the jurisdiction of the international court. The Commission must be realistic and send to the General Assembly draft proposals including a "drag-net" which would be effective in bringing all offenders against the Code to trial. Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide there was an option for an offender to be tried by an international tribunal (article VI). The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, which, admittedly, was not universally accepted, also contained principles on which the Commission could draw. For example, in article IV (b) it required all States Parties to enact legislation to try offenders, including stateless persons, regardless of where the offence had taken place. Again, in accordance with article V, persons charged under the Convention might be tried by a competent tribunal of any State Party having jurisdiction over the offence in question. He commended that approach to the Special Rapporteur, for the Code deserved no less.

24. He agreed with members who had questioned the advisability of the Special Rapporteur's proposal concerning the court's review competence, as set out in paragraph 4 of the possible provision. Adoption of the proposal would not improve the court's efficiency and would create problems for many States which had appeal regimes.

25. Under the terms of paragraph 1 of the possible draft provision on criminal proceedings, the right to institute proceedings was limited to States. However, in paragraph 137 of its 1990 report⁶ the Commission had discussed two options: the most limited access, and the most liberal access, which granted that right not only to any State, but also to any organization or individual. Since the aim of the Code was to try individual offenders rather than States, the most liberal access was clearly preferable.

26. He did not concur with some members of the Commission regarding paragraph 2 of the provision, on the role of the Security Council. His starting point was the Definition of Aggression, adopted by the General Assembly in 1974.⁷ At that time, the Assembly had drawn the Security Council's attention to the Definition and recommended that it should be taken into account by the Council in determining the existence of an act of aggression. Now, so many years later, the Council could not argue that it was unaware of the Definition. However, the Assembly had also stated that the list of acts of aggres-

⁵ *Yearbook . . . 1990*, vol. II (Part Two).

⁶ *Ibid.*

⁷ See 2211th meeting, footnote 4.

sion was not exhaustive and that the Council might determine that other acts constituted aggression under the Charter of the United Nations. Once the Assembly accepted the acts of aggression defined by the Commission, the Council would have to take them into account as well. There ought to be no difficulty on that point, because the acts of aggression included in the Code were taken from the Definition adopted by the General Assembly. Only in unusual cases would the Security Council need to make a determination.

27. The Special Rapporteur's recommendations on penalties did not go far enough. Several members of the Commission rightly preferred a range of penalties suited to the gravity of the offences, and in that connection he endorsed the suggestions made by Mr. McCaffrey at the previous meeting.

28. States should be allowed to reach the goal of abolition of the death penalty gradually. If a specific reference to life imprisonment was included in the Code, certain States would not adhere to it. It was preferable to show flexibility and allow less rigorous penalties to be imposed. There was much to be gained by that approach, and much to be lost by insisting upon a rigid posture.

29. As to the question of confiscation, he agreed with the Special Rapporteur that confiscated property could be assigned to charities, but would go even further. For example, such property could be distributed among the relatives of the victims, or, in the case of property confiscated in connection with drug trafficking, it could be used to support clinics for rehabilitating drug addicts.

30. Mr. HAYES said that the Commission had reported on the question of an international criminal court to the General Assembly at its forty-fifth session, in response to a specific request made at the forty-fourth session.⁸ Although the report had been well received by the Sixth Committee, guidance had not been forthcoming on which of the three models for a court described in the report was most acceptable and on which options were favoured for the competence, jurisdiction and structure of such a court.

31. Paragraph 1 of the draft on jurisdiction dealt with two aspects, the first being jurisdiction *ratione materiae*. Over the years, proposals had been made in various quarters to establish an international criminal court for specific criminal acts, mainly genocide, apartheid and, more recently, international drug trafficking and violations of humanitarian law. The Commission had itself raised the question and reported to the General Assembly several years previously, again without receiving a direct response. The draft Code as it was taking shape included those specific offences as well as others, and, in his view, they were the crimes to which the jurisdiction of the court should extend. He therefore favoured the Special Rapporteur's formulation at the beginning of paragraph 1 rather than the one contained in square brackets. Jurisdiction should not be confined to only some of the crimes in the Code, even temporarily. There was no justifiable criterion for such selectivity, which would inevitably be invidious. There were acts other

than those in the Code that amounted to international crimes, yet he did not favour a provision to cover them. Apart from the fact that they were hardly of sufficient gravity to merit international jurisdiction, there was no agreement as to what they actually were, and specific identification of their elements was lacking. The task of the court would thus be impossible.

32. The second aspect raised in paragraph 1 of the possible draft provision on jurisdiction also touched upon paragraph 2 of the draft, namely, the derivation of jurisdiction *ratione personae*. It was his impression that the Special Rapporteur foresaw ratification or acceptance of the statute of the court by a State as conveying that State's will to join in establishing the court, with potential jurisdiction as set out in the provisions in question. In other words, it would not include advance consent by that State to the exercise of jurisdiction. On the contrary, specific consent would be required for each individual case. If that was the Special Rapporteur's understanding, he agreed that the State in whose territory the crime had been committed was the most important State for conferment of jurisdiction upon the international court. That was the most widely used basis for national jurisdiction. He would go further than the Special Rapporteur and say that only the consent of that State should be required for the purpose of conferring jurisdiction on the court. Thus, he would delete paragraph 2, for a requirement for numerous consents would tend to paralyse the court. That might be less likely if ratification of the statute implied the advance consent of the ratifying State in any case in which its consent was required for conferment of jurisdiction. However, if the State where the accused was found was not required to give consent to jurisdiction, another problem arose. Should that State be unwilling to send the accused before the court, there would be the question of an *in absentia* trial, a proceeding which he considered undesirable. If the Commission's proposals raised that question, it would have to be discussed.

33. Paragraph 3 was logical, but he had doubts about the desirability of paragraph 4. What rules or criteria could the court invoke in adjudicating disputes between States on judicial competence or indeed reviewing sentences of rival national courts? The trend in the *Lotus* case decision⁹ went against the existence of international law rules prohibiting grounds on which national jurisdiction was claimed, and in his opinion, it was not desirable for the international court to make law on that subject. Review of rival sentences with the consent of the States concerned might be less problematic in that respect, but it would carry implications that ran counter to the *non bis in idem* principle, to which he attached great importance. Nor was he persuaded by an argument that the effect of such review would be to mitigate the consequences of ignoring that principle.

34. Paragraph 5, on advisory opinions on international criminal law, provided for a potentially very useful function of the court and should be retained, even if it was unlikely to be made use of at an early stage. The paragraph was silent as to whether those opinions would be binding. If they were, the usefulness of that jurisdiction

⁸ General Assembly resolution 44/32 of 4 December 1989.

⁹ See 2210th meeting, footnote 8.

in harmonizing the interpretation of international criminal law would be greatly enhanced.

35. As to the draft on instituting proceedings, he suspected that the problem was partly a semantic one, inasmuch as institution of proceedings often meant setting in motion the court proceedings for a prosecution, which was, of course, the function of the prosecuting authority. The Commission's 1990 report¹⁰ on that issue had referred to States or others submitting cases, wording that might be more appropriate than "institution of proceedings". The international criminal court was unlikely to have the benefit of the equivalent of a police force, which most often took the national initiative that led to the prosecuting authority instituting proceedings. That national initiative might also come from individual complainants, and States would be the equivalent of such persons in the context of an international court. The arguments against an initiating role for the Security Council were convincing, and he felt the case against a General Assembly role, although not mentioned, was even more persuasive.

36. Paragraph 2 concerned the complex and difficult question of the relationship between the court and the Security Council when the alleged crime was aggression or threat of aggression. Two solutions to the problem were feasible, but neither was fully satisfactory. The first was that the Security Council alone was empowered under the Charter of the United Nations to determine the existence of any act of aggression, and that the court, as part of the United Nations system, could not make a finding in the absence of such a determination. Since a finding would be an essential element in successfully prosecuting an individual for the crime of aggression, convicting the individual would be impossible unless the Security Council had already determined that an act of aggression had occurred. It had been pointed out in the debate that that was a non-judicial approach, relying as it did on a positive determination on a question, vital to the proceedings, by a non-legal body in which, moreover, five States had a veto, something that enabled them to shield their nationals or others from the court's adjudication.

37. Modified versions of that approach would permit the court to decide the question, either where the Security Council had not addressed it or, having done so, had failed to reach a decision. It would appear that that modification only partly escaped criticism. From the point of view of those supporting precedence for the Security Council determination, it involved the risk of a delayed clash of conclusions if the Security Council subsequently took a different decision on the situation. For opponents of that view, such an approach would still maintain the vital role to be played by a non-legal body in a judicial proceeding.

38. Those who opposed precedence for the Security Council determination based their argument for the second solution on the conviction that the political function of the Security Council and the judicial function of a court were entirely separate and that, in trying an individual for the crime of aggression, the court might, and

indeed must, make its own assessment as to whether an act of aggression had taken place before it moved on to the matter of individual responsibility. They rejected the contention that it would be unacceptable to have differing conclusions by the Security Council and the court. The different functions of the two bodies, they maintained, included the fact that one dealt with relationships between States in a political context, whereas the other would consider individuals in a judicial context. They referred to the autonomous nature of the fundamental principles of international law and the Judgment of ICJ in the *Nicaragua* case.¹¹ Furthermore, the court could also rely on the Definition of Aggression, as adopted by the General Assembly.¹²

39. Those arguments had echoes of attitudes to such related concepts as separation of powers and a system of checks and balances. Indeed, neither of those elements was particularly prominent in the United Nations system, and he was not sure whether that was an argument for or against findings by the court that differed from a determination by the Security Council.

40. It was not surprising that the Commission had failed to resolve such a complex question when it had addressed it in substance in article 12.¹³ He tended to favour the separation approach as being judicially more sound and practically more just, but he was not blind to its disadvantages. Further reflection was needed, and he would suggest that the report should identify that point as one on which the Commission would welcome comments in the Sixth Committee's debate.

41. In its 1990 report the Commission had said that its examination reflected a broad agreement in principle on the desirability of establishing a permanent international criminal court,¹⁴ a view that he had consistently shared. There had not been any clear guidance from the General Assembly or from Governments on the fundamental question of establishing a court or on what kind of jurisdiction, if any, they would find acceptable. It was to be hoped that the Commission would pursue the limited mandate it had been given in 1990 to go further into the issues raised in its own report. It might be useful to establish a working group to make greater headway, the Commission's tight schedule notwithstanding. Moreover, the new term of the Commission should be marked by renewed efforts for an early completion of a draft statute for an international court. By presenting solutions to difficult legal and practical problems, the Commission would disprove the recently repeated allegation that such problems had not received serious consideration. In addition, the presentation of a draft would make it clear that what was required for the establishment of the court was the political will to accept the solutions suggested by the Commission or to seek other more feasible but more acceptable ones. That was the only way to bring the question to a conclusion. In the meantime, the Commission, the most suitable body for accomplishing the preparatory work on such a court, must progress at a rate

¹⁰ *Yearbook . . . 1990*, vol. II (Part Two).

¹¹ See 2209th meeting, footnote 6.

¹² See 2211th meeting, footnote 4.

¹³ See 2208th meeting, footnote 5.

¹⁴ *Yearbook . . . 1990*, vol. II (Part Two).

that deflected the danger of being outflanked by other less well-equipped bodies.

42. Mr. BARSEGOV, referring first to the question of the jurisdiction of an international criminal court, said that the limitation introduced in paragraph 1 of the draft provision suggested by the Special Rapporteur meant that the State or States in which the crime was alleged to have been committed could, by failing to bring the offender before a national court or to refer the case to the international court, prevent justice from being done. In his commendable desire to be realistic, the Special Rapporteur had overlooked an important aspect of reality, namely, that virtually all crimes against the peace and security of mankind, such as apartheid, genocide, aggression or State terrorism, were generally committed by States in their own territory but were directed against other States or mankind at large. The question of jurisdiction in respect of that category of crimes, which were crimes under international law, was therefore of concern not only to individual States but to the international community as a whole. The fact that, in order to meet the objections of a few members of the Commission, the Special Rapporteur had decided to drop the concept of a crime under international law was to be regretted, especially as the Special Rapporteur himself had previously appeared to be in favour of the concept. Its rejection represented a disavowal of existing conventions on the crimes in question. If those crimes were not crimes under international law, the question of the establishment of an international criminal court lost its importance; the responsibility for trying offenders would then lie with national criminal courts of which the international court, if it ever came into being, would merely be an adjunct. The solution proposed by the Special Rapporteur would thus signify a return to a state of affairs which had existed before the adoption of such instruments as the Genocide Convention.

43. As repeatedly stated on previous occasions, he was prepared, in the interests of strengthening international legality, to accept the universal jurisdiction of a permanent international criminal court in respect of crimes under international law. Such a solution would undoubtedly be the most conducive to the court's political independence and impartiality, as well as to the uniformity of international criminal justice. At the same time, he was prepared to consider other generally acceptable and realistic solutions whereby an international criminal court would be combined with the existing system of prosecuting persons who committed international crimes, or in other words, with the principle of universal criminal jurisdiction exercised by States individually. One such solution would consist in national criminal courts acting as courts of first instance, with a permanent international court as a supreme court dealing with crimes under international law. That solution, however, presupposed a more advanced degree of political culture and worldwide legal integration than existed at the present time. Another, in his view more realistic, scenario would be based on a clear-cut delimitation of the respective jurisdictions of national criminal courts and the permanent international criminal court according to the type of crime. The most serious crimes, such as genocide, aggression and possibly certain others, which directly affected the interests of all mankind, would fall within the

jurisdiction of the international criminal court, and all other international crimes would continue to be tried by national criminal courts.

44. The question of the international criminal court having review competence in its capacity as a higher court was particularly delicate. On the one hand, such competence could ensure that sentences by national courts complied with international standards and were handed down on appropriate grounds; on the other hand, it was likely to encounter objections from individual States. He hoped that agreement could be reached in the Commission on that issue.

45. The coexistence of national and international criminal jurisdictions would help to ensure that, in accordance with the "try or extradite" principle, no crime under international law would remain unpunished. In cases where the national criminal court refused to institute proceedings, the international criminal court had to have the power, given sufficient grounds, to institute proceedings as a court of first instance, its jurisdiction in such cases being founded, not on the State's discretionary powers of referral of individual cases, but on a general rule of international law. In other words, a national criminal court's refusal to institute proceedings in a case of a crime against the peace and security of mankind would automatically give rise to the jurisdiction of the international criminal court.

46. A historical precedent for that approach was provided by the Nürnberg and Tokyo Tribunals, which had not been established on the basis of acceptance by the States where the crimes had been committed. Without wishing to comment upon the current fashion for deprecating the Nürnberg Principles as being based on the right of the victor, he would point out that the General Assembly resolution mandating the Commission to prepare a draft Code of offences against the peace and security of mankind¹⁵ had also directed it to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. The existence of those principles and their continuing validity as rules of international law had been recognized by the Commission and could not be ignored.

47. As to the question of whether criminal proceedings in the case of the crimes of aggression or threat of aggression should be subject to prior determination by the Security Council, he disagreed with the argument advanced by some Commission members to the effect that the international criminal court, or even national courts, should not be guided by a prior determination of aggression or threat of aggression by the Security Council because the latter was a political organ, whereas courts of law were legal organs. The Charter of the United Nations required the Security Council to determine the existence of aggression, not the commission of the crime of aggression by individuals. Indeed, an individual could not commit the crime of aggression; aggression being committed by a State had to be determined by the Security Council. Whether an individual had participated in the act of aggression, the extent of his involvement and

¹⁵ General Assembly resolution 177 (II) of 21 November 1947.

the punishment to be applied were questions to be determined by the court.

48. A finding of aggression was not simply a political act, but was founded on international law. Denial of the legal character of a determination of aggression by the Security Council on the grounds that the Council was a political organ would also lead to denial of the legal nature of many General Assembly resolutions setting forth principles and rules of international law. Furthermore, it should not be forgotten that acts such as genocide, apartheid or aggression were not only crimes but also political acts. He shared the fear expressed by some members that conferment of the function of determining an act of aggression upon a criminal court, albeit an international court, might ultimately lead to the destruction of the existing system of international law and order. For States Members of the United Nations, the Charter represented the supreme source of contemporary international law, and any decision in the matter by a criminal court would be without force if it ran counter to a decision by the Security Council. At the same time, he understood the concern of those members of the Commission who did not want acts of aggression to remain unpunished in cases where the Security Council, for political reasons, failed to reach a decision. The problem was, of course, a difficult one, but in seeking a solution it was more advisable to adjust to new realities in international relations than to ignore or destroy the existing legal order.

49. He agreed with the view expressed in the commentary to the draft provision on criminal proceedings, but expressed doubts as to paragraph 1 of the provision, according to which criminal proceedings in respect of crimes against the peace and security of mankind should be instituted only by States. Since crimes of that nature could not be committed by individuals except as part of actions by States, and since States could not be prosecuted under the draft Code, it would seem appropriate to allow criminal proceedings for crimes against the peace and security of mankind to be instituted not only by States but also by the General Assembly, the Security Council—without the power of veto—and by national liberation movements recognized by the United Nations.

50. With reference to the question of penalties, for all its importance, it was subordinate to the decision reached on the establishment of a permanent international criminal court. The question of penalties was difficult not only because of the multiplicity of crimes but also, as the Special Rapporteur himself recognized in the report, because of the diversity of concepts and philosophies involved. He could not agree with the Special Rapporteur's choice of a single penalty applicable to all the crimes as against a separate penalty for each crime in the Code. Uniformity in sentencing was, of course, desirable, but it could be achieved only by linking specific penalties to specific crimes. The task would undoubtedly be difficult, yet an attempt based on a close study of existing national and international practice and of the experience of specialized organizations would be worth making.

51. On the question of the maximum penalty, referred to in the first paragraph of the text proposed by the Special Rapporteur, he pointed out that the existing diversity

of penalties was due not so much to different philosophical or conceptual approaches as to different situations as regards crime in different countries. In assessing the seriousness of a specific crime, international justice also had to take into account universal criteria for determining the seriousness of the various types of crimes. So long as the international community remained divided on the subject of the death penalty, the argument that certain countries would not extradite an offender if he risked capital punishment could be countered by the argument that other countries might not want to extradite an individual guilty of, say, the crime of genocide, to a court which would perhaps sentence him to only 10 years' imprisonment. Attempting to settle the difficult question of capital punishment by accepting one of the solutions to be found in national penal systems might be detrimental to acceptance of the Code and to the idea of an international criminal court. For those reasons, he would recommend a more flexible approach, with a maximum and a minimum penalty indicated on the basis of existing practice in different countries. Such an approach would be conducive to greater harmony between national and international justice and would thus enhance the effectiveness of the struggle against international crimes.

The meeting rose at 1.05 p.m.

2213th MEETING

Thursday, 23 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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 ... 1991*, vol. II (Part One).

NINTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³
(continued)

1. Mr. Sreenivasa RAO said that the imposition of penalties for crimes committed, a necessary part of criminal justice, was a difficult problem and to tackle it before a consensus had been reached on the crimes to be covered by the Code was perhaps premature. True, only the most heinous crimes, namely, aggression, genocide and serious war crimes, were to be included in the Code and they deserved nothing less than the most exemplary punishment, usually either the death penalty or, in countries where capital punishment had been abolished, life imprisonment. However, the judge should always be given the necessary discretion to take account of any exceptional or attenuating circumstances. If the Code was to be implemented through national courts, the national system of punishment would logically be applicable. The problem of differences between penalties which might be imposed in different countries for the same crime and upon the same offender would be mitigated, in his opinion, by the avoidance of double jeopardy, reluctance to conduct trials *in absentia* and bilateral or multilateral agreements enabling a State to yield its jurisdiction to another or several other States. If, on the other hand, all or some of the crimes in the Code were to be dealt with exclusively by the proposed international criminal court, it would appear more acceptable to prescribe only one penalty, that of life imprisonment, with or without the possibility of parole after a certain number of years. From that point of view, draft article Z proposed by the Special Rapporteur seemed reasonable, although it remained linked to the question of the jurisdiction to be assigned to the court and could be treated only as tentative.

2. The text in square brackets required revision because properties in the possession of a convicted offender could be of different types. Property belonging to persons having valid title to it had to be returned to those persons or to the State of their nationality. In the absence of a rightful owner in a position to claim it, the property could be entrusted to a trust, given to the State trying the offender or to the State asked to implement the sentence of the court or simply held in the custody of the international criminal court itself. If the property belonged to the convict, it should be returned to his heirs or the State of his nationality after any valid claims of third parties had been suitably disposed of.

3. With regard to the jurisdiction of the international criminal court, there were several possible solutions: jurisdiction in the first instance on issues of law and conflicting claims only; review in the second instance of sentences rendered by national courts; exclusive jurisdiction for certain crimes and a review competence for others; concurrent jurisdiction of the court and national courts; residual jurisdiction where none of the States concerned elected to exercise its jurisdiction, and so

forth. Whatever the solution adopted, it appeared reasonable to proceed from the principle that the jurisdiction of the court should be based upon the consent of the States parties to its statute directly concerned by the crime being tried. Although the crimes in the Code were, by definition, committed against the peace and security of mankind, not all States appeared to be equally qualified to institute proceedings on their own behalf or on behalf of the international community. As recent events had shown, situations of armed conflict and acts of aggression and genocide called for careful, deliberate and mature reactions in the interests of due process of law, the rights of the accused and human rights and fundamental freedoms. It was observed that the State of which the perpetrator of the crime of aggression or genocide or certain other crimes was a national or the State whose nationals had been the victims of the crime might not always act with the necessary impartiality and objectivity. It therefore seemed preferable to have those crimes tried by the international criminal court rather than by national courts. In addition to such exclusive jurisdiction for certain crimes, the court could be given jurisdiction for other crimes which States might decide to refer to it, as well as jurisdiction to review decisions of national courts and to issue advisory opinions at the request of States, the highest national courts or international or intergovernmental organizations.

4. With regard to the conferment of jurisdiction, it seemed essential to give a central place to the consent of the State having custody of the accused. The concept of custody could no doubt be extended to include extradition, so that the custody of the accused could be transferred to the State in whose territory the offence had been committed. However, bearing in mind the length and complexity of the extradition process, he had no firm opinion as to the need to establish a link between those two concepts. In any event, the States referred to in paragraph 2 of the draft article were entitled to seek the extradition of the accused. The Special Rapporteur had certainly captured the most modern aspects of the concept of jurisdiction by invoking the passive personality or real-protection systems. In that connection, the point needed to be made that the right to bring cases before the court was confined to States and did not extend to non-governmental organizations or to ICRC, which could do more useful work through the service they rendered and as watchdogs than as complainants; and helping to gather and assess evidence.

5. Paragraph 3 of the proposed text, which was based upon a well-known principle, was acceptable, as was paragraph 5. He could also accept paragraph 4, provided that the consensual basis for jurisdiction was assured. The fact remained, however, that the only way to enhance the future international criminal court was to establish simultaneously an international prosecutor's office equipped with all necessary means of gathering evidence and deciding whether the case should be tried by the court.

6. With regard to criminal proceedings and the question whether, in the case of the crimes of aggression or the threat of aggression, such proceedings should be subject to prior determination by the Security Council, he said that a problem would arise if the Security Council were deadlocked so that the existence of the crime could

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

not be determined. In the interest of not upsetting the fragile balance of international peace and security, it seemed advisable not to provide for any possibility of the complaint being brought before the court by indirect means. If a complaint were lodged, the public prosecutor's office attached to the court could and should serve as a safeguard, but, once the case had been brought before the court, nothing should prevent it from coming to its own conclusions about the matters involved. The court could be given the option of requesting the Security Council's advice, which would be recommendatory in nature. Conversely, the Council could seek advisory opinions from the court, just as the Charter of the United Nations authorized it to do from ICJ. Thus, the respective roles of the Security Council and the court should be seen as mutually complementary rather than competing or conflicting. The role of the Security Council in determining aggression or the threat of aggression was well recognized, but the authority of its decisions would be further strengthened if the rules it laid down were applied uniformly and without discrimination. As to the international criminal court, while there now seemed to be greater support for the idea among the members of the Commission and while the international climate seemed generally more favourable to it, great circumspection was still called for in advancing towards a universal consensus.

7. Mr. ILLUECA said that the draft provision on jurisdiction would obviously involve a system of concurrent jurisdictions and, in that case, the text would be acceptable subject to a few reservations, particularly as the court was also to have cognizance of disputes concerning judicial competence, applications for review of sentences passed in violation of the *non bis in idem* principle and requests for interpretation of provisions of international criminal law. In that connection, it might be possible to go so far as to empower the court to issue advisory opinions on any legal question within its competence.

8. In his view, the ideal solution would be an international criminal court with exclusive jurisdiction for certain crimes or, in other words, as Mr. Ogiso had said (2210th meeting), a court exercising jurisdiction over the nationals of all States parties to its statute, unlike ICJ, whose jurisdiction was still subject to the consent of States. Unfortunately, that ideal solution did not seem feasible at the present stage and the Special Rapporteur had probably been guided by the need to take account of the "realism of States" in supplementing the principle of territoriality by the active and passive personality system and the real-protection system to the extent that the domestic legislation of the States concerned required their application in a specific case. No objection could be made to those principles, which seemed to be firmly established on the international scene, as the International Convention against the Recruitment, Use, Financing and Training of Mercenaries showed.

9. The Special Rapporteur's conclusion that the principle of conferment of jurisdiction was "a make-shift solution, a necessary concession to State sovereignty", thus implied that the solution lay in establishing an international criminal court having concurrent jurisdiction with national courts—a system whereby States could opt to institute proceedings before either a national court or before the international criminal court. The fact was that

universal criminal jurisdiction and the establishment of an international criminal court were not mutually exclusive, as had been convincingly argued by Mr. Graefrath, whose recent article in the *European Journal of International Law* shed useful light on the question.

10. The possible draft provision on criminal proceedings restricted the institution of criminal proceedings to States without requiring them to meet any conditions. With regard to the question of the Security Council, the Special Rapporteur, while indicating in his report that the Council could not institute criminal proceedings itself, assigned to it in the draft a dominant function which would hamper the international criminal court in the event of the crime of aggression or threat of aggression. Like other members of the Commission, he personally did not share the view that criminal proceedings had to be subject to the prior consent of the Security Council. Such a restrictive procedure had no foundation in the Charter of the United Nations. Recalling in that connection how the great Powers at the San Francisco Conference had opposed the idea of ICJ having compulsory jurisdiction, he said that the time had come for those countries to abandon a policy that had been overtaken by events, in the interest of democratization of international relations and of the United Nations system and, ultimately, in the interest of international peace and security. He noted that Article 36, paragraph 3, of the Charter embodied the compromise formula agreed on at the time in order to establish a balance between the political bodies and ICJ, while Article 95 confirmed the view that the legal order was not subject to the Security Council's decisions.

11. Without underestimating the difficulties arising from the diversity of legal systems and from methodological problems, he was in favour of the inclusion in the Code of a provision on applicable penalties, taking into account the *nullum crimen sine poena* principle. To that end, there should be a single penalty which would have an upper and a lower limit and would be determined by the court in the light of extenuating or aggravating circumstances.

12. In that connection, he said that he shared the sense of revulsion which the death penalty provoked among most members of the Commission. Latin America had recently revealed its sentiments on the matter when the General Assembly of the Organization of American States had approved a protocol to the American Convention on Human Rights on the abolition of the death penalty. He could not, however, object as vigorously to the penalty of life imprisonment. The international community should take pains to emphasize the exemplary nature of the penalty applicable to persons who committed barbarous crimes in order to prevent such acts from being committed again and to protect human rights and fundamental freedoms. Such criteria formed the basis for the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Declaration on Territorial Asylum,⁴ article 1, paragraph 2 of which provided that:

The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering

⁴ General Assembly resolution 2312 (XXII) of 14 December 1967.

that he has committed a crime against peace, a war crime or a crime against humanity . . .

and General Assembly resolution 3074 (XXVIII) of 3 December 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. With the help of the suggestions submitted by the Special Rapporteur, the Commission should be able to reach agreement on the applicable penalty.

13. Several States parties to the 1948 Convention on the Prevention and Punishment of Genocide imposed penalties for genocide. For example, in Spain, persons who committed that crime were liable under the Criminal Code to a prison term of 12 to 30 years; in the United States of America, the 1987 Proxmire Act provided for a maximum fine of \$US 1 million, together, where appropriate, with a term of imprisonment that could extend to life; in Panama, the Criminal Code provided for a penalty of 15 to 20 years' imprisonment, in other words, for the maximum authorized under Panamanian law; and, in the United Kingdom of Great Britain and Northern Ireland, the 1969 Genocide Act provided for the same penalty as that imposed on persons who committed grave offences under the 1949 Geneva Conventions, namely, imprisonment from 14 years' to life.

14. With regard to the actual wording of draft article Z, crimes against the peace and security of mankind called above all for the adoption of exemplary penalties which reflected the feeling of condemnation that such acts aroused in the international community and which also had a deterrent effect. Justice should therefore not be merely the expression of feelings of compassion and solidarity towards the victims; it should also aim at remedying the causes of the suffering endured by the victims, at righting the wrongs done and at preventing the number of torturers from increasing. Society would not forget crimes against peace and security; that was why measures had already been taken to ensure that such crimes were not subject to any statutory limitation, to provide for the extradition of persons who committed them and, in particular, to refuse them the right of asylum. Any potential criminal should realize that, while he might not actually have to suffer the death penalty, he would none the less be outlawed from society.

15. He agreed with the first paragraph of draft article Z, but considered that a provision could perhaps be included to provide, in addition to life imprisonment, for the accessory penalties of total legal incapacity and deprivation of civil rights.

16. The second paragraph of the Spanish text should be brought into line with the English and French texts and worded to read: *Si hubiere circunstancias atenuantes*. Moreover, however different the crimes covered by the Code might be, they all bore the distinguishing feature of extreme gravity, which justified a heavier penalty than a prison term of 10 to 20 years. The paragraph would therefore be more acceptable if it read: "If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 14 to 30 years."

17. The third paragraph gave rise to some problems. Confiscation or seizure of stolen property was not a supplementary or optional penalty: it was an inescapable ac-

cessory penalty, as was apparent from the work of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Havana, in 1990, which served as the basis for General Assembly resolutions 45/116 and 45/117, to which were annexed respectively, a Model Treaty on Extradition and a Model Treaty on Mutual Assistance in Criminal Matters with an Optional Protocol concerning the proceeds of crime. In that connection, he noted that the Protocol in its paragraph 1 defined the proceeds of crime as:

... any property suspected, or found by a court, to be property directly or indirectly derived or realized as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence.

He further noted that paragraph 5 of the Protocol laid down the procedure for the enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting State. The Model Treaty on Extradition also included an article on surrender of property (article 13), paragraph 1 of which read:

To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all property found in the requested State that has been acquired as a result of the offence or that may be required as evidence shall, if the requesting State so requests, be surrendered if extradition is granted.

18. Accordingly, the third paragraph of article Z could be worded to read:

"The penalty of life imprisonment and the penalty of imprisonment for a fixed term shall be accompanied by deprivation of civil rights and total legal incapacity of the accused for the duration of the penalty to which he has been sentenced as well as by confiscation of property and of other proceeds of the crime. The value of the confiscated property shall be used in the first instance to compensate the victims of the crime, as provided for under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly in resolution 40/34 of 29 November 1985, and the balance shall be entrusted to the World Food Programme."

19. Mr. EIRIKSSON said that he had already expressed his reservations with regard to the articles being drafted by the Commission. Only when it came to their adoption could the Commission really know the nature of the provisions they contained and decide what should be done with them. Unfortunately, it probably would not have time to complete the first reading of the articles at the current session and, although a full set of articles was now before the Commission, it was not yet clear what the final product would look like.

20. The Commission had proceeded with its work without having decided on the final form of the draft articles or how they would be adopted. Yet the subject in general, and the question of the international criminal court in particular, were of such a nature that the Commission could not expect clear-cut guidance from the Sixth Committee. He for his part proceeded from the assumption that the articles to be adopted would eventually take the form of a draft international convention, part of which would be the draft statute of an international criminal court. States would then have an opportunity of

choosing the provisions that were acceptable to them and even of deciding whether they wished to proceed at all.

21. At the current stage, the Commission should deal without further delay with outstanding problems concerning the international criminal court. To that end, a working group should, in his view, be convened to develop further some of the points raised at the preceding session and to choose from among the options presented. Such a group could work informally so as not to take up time allocated to other agenda items.

22. With regard to penalties, he considered, first, that the Code should include a provision in that connection and that the question should not be left to the court. Secondly, as the Commission had to deal only with a dozen or so crimes, it should not be an insurmountable task to set out penalties for each. Of course, since all the crimes in question were extremely serious, there should in principle be no great difference between them—and he said “in principle” because some articles adopted provisionally concerned crimes that would perhaps not warrant final inclusion in the Code.

23. Thirdly, for reasons of principle, the Commission should exclude the death penalty. Life imprisonment should perhaps also be excluded, though he had no strong views on the matter. The solution might be to provide for a term of imprisonment, laying down a minimum and maximum for each crime. A system for reviewing the sentence after a given period could also be introduced.

24. Fourthly, the determination of the penalty should be left to the Conference of States convened to adopt the Code. Finally, he had been convinced by a number of comments made during the discussion that consideration of the question of the return of stolen property or property unlawfully appropriated by the accused should be postponed until later, since it might delay the Commission's work. The same applied to the question whether community service should be included among the penalties.

25. In summary, the Commission should provide only for a framework of penalties to be built into the Code when it was adopted.

26. Turning to the question of jurisdiction, he said that, in the first place, a jurisdiction *ratione materiae* based on the Code should be envisaged. The Commission could reassess that aspect of the matter in the light of the progress of its work.

27. Secondly, only States parties to the statute of the court should be able to institute proceedings. If paragraph 2 of the draft provision on the jurisdiction of the court was interpreted as requiring the consent of other States, it would suffice for the court to have jurisdiction, if one of the four categories of States referred to in paragraph 135 (c) of the Commission's report on the work of its forty-second session (A/45/10),⁵ gave consent. In practice, the State in whose territory the accused was

found would also have to give its consent because, in his view, there could be no trial *in absentia*.

28. Thirdly, he could not for the time being accept paragraph 4 of the draft provision on the jurisdiction of the court, but would welcome further development of paragraph 5 on the interpretation of the provisions of international criminal law.

29. Lastly, he continued to have reservations concerning the structure of article 12 (Aggression),⁶ which had been provisionally adopted by the Commission at its fortieth session, particularly with regard to the role of the Security Council in the determination of the crime. Paragraph 2 of the draft provision on criminal proceedings which did not really concern proceedings, should be considered in the context of article 12, but an explanation should be included in the commentary to make it clear that a separate decision by the Security Council would be required on the institution of proceedings. However, in the light of his reservations on the article concerning aggression, he would not take a position on that possibility at the current stage.

30. Mr. THIAM (Special Rapporteur), summing up the debate on agenda item 4, noted that the consideration of his report had given rise to a lively and highly informative debate. Before analysing the remarks made on specific points raised in the report, he would comment on the observations made with regard to certain general matters.

31. Opinions were divided as to how the Commission should react to General Assembly resolution 45/41. Some took the view that the Commission should deliver an ultimatum to the General Assembly and let it be known that, in the absence of a clearer mandate, it would be impossible for it to make headway. Others felt that the Commission should set about drawing up a draft statute for the international criminal court forthwith and should not wait for more specific guidance from the General Assembly. Yet others recommended an intermediate solution, which had his support, namely, to request the General Assembly to express its wishes more clearly, but not to suspend the Commission's work on the matter.

32. The inclusion in the Code of provisions on penalties also did not meet with general agreement. In the opinion of some members, the determination of the applicable penalties was a matter for the political bodies and should not be dealt with by the Commission. He did not, of course, share that view. In his opinion, the Commission could certainly make proposals on the application of penalties and even suggest specific penalties without encroaching on the prerogatives of the political bodies and, more specifically, of States with which the decision would, in the final analysis, rest. If the Commission disregarded that aspect of the matter, it would also run the risk of attracting the same criticism as the authors of the 1954 Code, who had been reproached for drafting provisions on crimes without providing for penalties, in total disregard of the *nulla poena sine lege* rule.

⁵ Yearbook . . . 1990, vol. II (Part Two).

⁶ See 2208th meeting, footnote 5.

33. As to the reactions to the first part of his report and to the draft article on applicable penalties in particular, once again the positions were fairly clear-cut. Some members of the Commission considered that, given the trends in international law, the death penalty was obsolete and could not be included. They had argued that, even in countries where it had not yet been abolished, it was very rarely carried out in practice. Some would even go so far as to exclude life imprisonment. In his view, however, that would be going too far. It should not be forgotten that the crimes covered by the Code were of exceptional gravity and required an exceptional regime. That had, moreover, been recognized by the Commission when it had decided, contrary to all the principles of criminal law, that no statutory limitation should apply to those crimes and to exclude all defences, such as, for instance, duress. If the death penalty were not to be included in square brackets in the draft article, then life imprisonment should at least be retained.

34. As to aggravating circumstances, which, as one member of the Commission had pointed out, were provided for in the criminal law of all countries, he had decided, after due consideration, not to include that concept, for the simple reason that, in view of the gravity of the crimes in question, it was difficult to see how there could be any such circumstances.

35. He had proposed a provision of a general nature on penalties that was applicable to all the crimes covered by the Code because, as he saw it, all those crimes were extremely serious and could therefore be placed on the same footing. That provision was, however, not as rigid as it might seem because, since account was being taken of extenuating circumstances, it would always be possible for the judge to adjust the penalty. In view of the comments made during the discussion, he had nevertheless prepared two new versions of draft article Z which were more flexible and which read:

ALTERNATIVE A

Any person convicted of any of the crimes covered by this Code shall be sentenced to [life imprisonment] imprisonment for a term of 15 to 35 years which cannot be commuted, without prejudice to the following other sentences, if deemed necessary by the court:

1. Community work;
2. Total or partial confiscation of property;
3. Deprivation of some or all civil and political rights.

ALTERNATIVE B

1. The court may impose one of the following penalties:
 - (a) Life imprisonment;
 - (b) Imprisonment for a term of 10 to 35 years which cannot be commuted.
2. In addition, the court may order:
 - (a) Community work;
 - (b) Total or partial confiscation of property;
 - (c) Deprivation of some or all civil and political rights.

36. With regard to the confiscation of property, he admitted that the wording proposed in the text of draft article Z was not altogether satisfactory. It might be better to provide for the total confiscation of property and not to regard confiscation as a form of compensation, in which case it would be for the injured party, where appropriate, to institute civil proceedings to obtain compensation.

37. The question of the establishment of an international criminal court had given rise to a particularly lively debate. The proposed provisions on that subject had proved to be very controversial, but they had enabled the Commission to consider the question thoroughly, as the General Assembly had requested it to do.

38. He had attended the meetings of the General Assembly and had seen that the adoption of resolution 45/41 had been preceded by tough negotiations and that the text submitted by a number of third world countries had had to be considerably reworded before it could be accepted. Those who believed that the General Assembly could already entrust the Commission with the task of preparing a draft statute of an international criminal court were mistaken because several countries were strongly opposed to the establishment of such a court.

39. In order to take account of that situation, he had proposed provisions which were intended merely to give the Commission food for thought and he had taken care not to focus on his personal opinion or to try to impose his views. In the draft provision relating to criminal proceedings, he had even played the role of devil's advocate. His position on the competence of the Security Council in that regard was, of course, known to all.

40. The debate on the jurisdiction of the international criminal court had revealed two major trends. Some members considered that the international court should have concurrent jurisdiction with national courts. Others advocated a more delicately toned solution, a kind of power sharing: the international court would have exclusive jurisdiction for extremely grave crimes and concurrent jurisdiction with national courts for the other crimes covered by the Code. His own feeling was that the second solution was the best one. He believed that States could agree to recognize the exclusive jurisdiction of the court for genocide, which was the extremely serious crime under international law *par excellence*, as well as for other crimes such as apartheid and perhaps also the illicit drug traffic. No one had been in favour of conferring exclusive jurisdiction on the international criminal court for all the crimes covered by the Code, a solution which would, in any case, be quite unrealistic because States were clearly not ready to accept such a transfer of jurisdiction.

41. One member of the Commission had strongly objected to the idea of the conferment of jurisdiction, stating that, since the crimes in question were crimes defined under international law, the right of the international criminal court to try those crimes could not be disputed and, more importantly, no State whatever could be regarded as having the power to confer jurisdiction on the international criminal court for those crimes: the conferment of jurisdiction on the international criminal court should be automatic for all crimes which were defined under international law. That reasoning appeared to be based on a misunderstanding. The definition of a crime was one thing and jurisdiction was another. The fact that a crime was defined in international law did not mean that States were automatically divested of the right to deal with it. There was nothing to prevent a State from recognizing a crime defined in international law, incorporating it into its internal law and prosecuting the per-

petrators of such an act in conformity with its rules of procedure.

42. When a crime against the peace and security of mankind was committed, there were always States that were directly concerned, whether it be the State in whose territory the crime had been committed, the State against which the crime had been directed or whose nationals had been the victims, or the State of which the perpetrator of the crime was a national. It would certainly be going too far to assert that those States had no right to deal with the crime in question because it was a crime under international law.

43. In paragraph 1 of his possible draft provision on the jurisdiction of the court, he had laid down the principle of the jurisdiction of the State in whose territory the crime had been committed. His proposal had not been well received and Mr. Pellet (2209th meeting), in particular, had opposed it on the grounds that the rule in international criminal law was not the principle of territoriality, but the principle of universal jurisdiction. He himself had serious doubts about the accuracy of that assertion. However attractive it might seem, the principle of universal jurisdiction, which was preferred by most writers on law, but which, since Grotius, had not really prevailed in practice, gave rise to all kinds of material and practical problems, for the gathering of evidence, for example, which meant that, in the present instance, it could not be taken as the rule or as a fundamental principle.

44. The fact was that most of the relevant international conventions dealing, for example, with the suppression of illicit acts directed against the safety of civil aviation, of the illicit seizure of aircraft and of terrorism, placed the State in whose territory the crime had been committed first on the list of States which had jurisdiction to try the crime in question. Cherif Bassiouni, the author of a draft international criminal code, had gone further than the Commission itself had wanted to do by trying to establish an order of priority for the jurisdiction of the States concerned and his article entitled "Jurisdiction" read:

Section 1. *Jurisdictional bases*

1.1 Jurisdiction for the prosecution and punishment of any international crime as defined in this Code [Special Part] shall vest in the following order:

- (a) the Contracting Party in whose territory the crime occurred in whole or in part;
- (b) any Contracting Party of which the accused is a national;
- (c) any Contracting Party of which the victim is a national;
- (d) any other Contracting Party within whose territory the accused may be found.

In his commentary, the author stated:

The approach followed is that of ranking the priority of jurisdictional theories based on recognition of international law and practice. The primary jurisdictional theory in Paragraph 1 (a) is that of territorial jurisdiction. Sound policy reasons as well as international practice favor this theory, and that state's judicial forum will probably be the most convenient. . . . Ranking thereafter in order of their international acceptance are the theories of nationality, passive personality and universality.⁷

⁷ C. Bassiouni, *International Criminal Law—A Draft International Criminal Code* (Alphen aan den Rijn/Germantown, Sijthoff & Noordhoff, 1980), p. 112.

45. He himself had not included the State in whose territory an individual alleged to have committed the crime was present among the States on which jurisdiction should be conferred because, according to article 4 (Obligation to try or extradite) provisionally adopted by the Commission,⁸ that State had the obligation to try or to extradite.

46. He nevertheless believed it would be useful to establish some order of priority for the other States concerned. That would, moreover, help to advance international criminal law as a branch of learning. The fact remained, however, that, for the international court to be able to try a case, it was absolutely necessary for jurisdiction to be conferred on it by the territorial State, which was recognized as the competent State by international practice.

47. Turning to the question of criminal proceedings, he repeated that the draft provision he had proposed was only a working hypothesis. He construed the term "criminal proceedings", which could be taken to mean both the right to lodge a complaint and the right to try for the competent authorities of a State, only as the right to take action as a party before the international criminal court or to file a complaint before it. He therefore drew a distinction between it and *actio popularis*. Like other members of the Commission, he believed that the right to institute proceedings in the international criminal court should belong not only to States (to the exclusion of individuals), but also to international organizations. That idea was, moreover, not a new one.

48. He fully understood the strong reactions to which the key question of the role of the Security Council had given rise, in particular on the part of Mr. Illueca, whose point of view he shared to some extent. The fact remained that there was nothing absurd in suggesting the intervention of a political organ; that suggestion was to be found in a number of drafts submitted in the past. Before the Second World War, for example, Vespasien V. Pella had put forward a draft statute for the establishment of a criminal chamber within PCIJ. The draft statute had been accepted by the International Association of Penal Law and specified that international criminal proceedings would be instituted by the "Council of the League of Nations", a term later altered to "Security Council". It was true that past actions by the Security Council justified some doubts about it, but, as Mr. Pawlak had pointed out (2212th meeting), the Security Council had changed and the stalemate that had affected it for so long had been the result not of an inherent defect, but of the Cold War that had been going on at the time.

49. The question of the role of the Security Council had already been considered by the Commission a few years earlier and a number of possible situations had been discussed.⁹ First, there was that in which the Council unequivocally found, for example, that a crime of aggression had been committed, in which case it would be

⁸ For text and commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 67.

⁹ See *Yearbook . . . 1988*, vol. I, 2053rd to 2061st and 2085th meetings.

difficult for an international criminal court to say the contrary, not because it was apparently subordinated to the Security Council, but simply in order to avoid conflicts between the complainant State and the State against which the complaint was directed. There was also the possibility of the exercise of the right of veto, but he pointed out that such a veto would not make it impossible for a State to take action before an international criminal court. A veto was not a decision: it was, as it were, a refusal to deal with a problem. It would therefore not prevent the filing of a complaint before the international criminal court and would not be an obstacle to its jurisdiction. Lastly, there was the possibility of the Security Council taking no action because it was ultimately a negotiating body. The Council's silence would, similarly, not prevent the international criminal court from dealing with the case.

50. It followed that the role of the Security Council in the context of criminal proceedings could give rise to problems only in the first of those hypothetical cases. He was convinced, however, that the Commission would be able to find wise and carefully reasoned solutions to those problems which would take account of the new political climate.

51. Mr. BARSEGOV said that some clarifications were called for with regard to the Special Rapporteur's comments on what he took to be his remarks. In his view, crimes under international law fell into a particular category and should not all automatically come within the jurisdiction of the international criminal court.

52. He was prepared to accept the exclusive jurisdiction of the international criminal court for some of those crimes, for example, those covered by international conventions that provided for the perpetrators to be judged by an international court, such as the crime of genocide. For other crimes, it would be desirable to confer jurisdiction on the international criminal court only in those cases where national courts had stated that they lacked jurisdiction.

53. In other words, he had objected to the Special Rapporteur's draft because it appeared to assume that a national court which stated that it lacked jurisdiction could not refer the case to the international criminal court.

54. Mr. NJENGA said he did not believe that the new text of the Special Rapporteur's proposed draft article Z, which contained original ideas, could be referred to the Drafting Committee without having been discussed in plenary.

55. Mr. AL-KHASAWNEH said that it would be premature for the Commission, which was called upon to legislate for a world that did not agree on the question of the death penalty, to adopt a clear-cut opinion on the question instead of giving the States concerned discretionary power. After all, the death penalty was provided for in the case of certain crimes: for example, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty¹⁰ stipulated in article 2 that

“A State might make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war”. Leaving such discretion to States would in no way be contrary to the principle of *nulla poena sine lege*: it would be sufficient to indicate the gravity of the crimes in question in the Code and to include a general provision stating that those crimes would be punished by a penalty that was in keeping with their degree of gravity.

56. Mr. PAWLAK said he continued to believe that the Commission should abandon the idea of including a general provision on penalties in the Code and, instead, set a penalty for each crime.

57. Mr. DÍAZ GONZÁLEZ said that he had two questions to ask following the Special Rapporteur's somewhat contradictory summary and explanation of the role of the Security Council. First, assuming that the Security Council had determined that a crime of aggression had taken place but that the international criminal court ruled that there had not been a crime of aggression, what purpose would have been served by consulting the Security Council, if its determination was not going to be followed? Secondly, what would happen in the opposite case, where the Security Council determined that there had not been a crime of aggression but the international criminal court found that there had been? How would the international criminal court and the international community react? In that connection, he referred to Mr. Pellet's remarks (2209th meeting) with regard to the judgment of ICJ in the *Nicaragua v. United States of America* case.

58. In his view, it would be for an international criminal court to decide whether an act was a crime and to rule on the merits of the case, regardless of the opinion of any other United Nations body. The administration of justice must in no way be subordinated to another body that had nothing to do with the judicial power. The independence and freedom of the courts guaranteed justice and their impartiality.

59. Mr. THIAM (Special Rapporteur), apologizing for not being able to refer to all the statements that had been made, noted that Mr. Al-Khasawneh had taken exception to the absence of the death penalty in the draft article on penalties. The Commission's report to the General Assembly would state that two or three of its members had expressed reservations in that regard.

60. With regard to the role of the Security Council, a difficult problem that the Commission would have to solve, he again pointed out that he did not have an opinion *a priori* and rather than proposing any solution, had simply sought to initiate a debate.

61. Concerning the objection raised by Mr. Njenga about referring the new text of draft article Z to the Drafting Committee before its consideration in plenary, he was prepared to agree to such consideration if the Commission so decided.

62. Mr. FRANCIS said that, in view of the list of crimes against the peace and security of mankind that had been drawn up so far, if a case involving one of those crimes was before a court, it did not need to ask

¹⁰ See 2211th meeting, footnote 9.

the Security Council for a prior determination, even in the event of an act of aggression. Otherwise, the list would not serve any purpose.

63. Mr. AL-BAHARNA, acknowledging that the Special Rapporteur had had little time to prepare the summary of the debate, said that he, too, had expressed reservations about the question of the death penalty, although he had no definite opinion on the subject. With regard to the referral of cases to the court, he had suggested that that possibility should be open not only to States, but also to intergovernmental organizations and individuals. As to the Security Council, he was firmly opposed to giving it any role whatsoever in the administration of justice. The international criminal court, as a judicial body, must be independent and have control over its own decisions, no matter what position the Security Council might adopt, for example, on the question of aggression or the threat of aggression. Lastly, although several members of the Commission had supported set penalties for each crime, the majority had spoken in favour of a general provision setting a maximum and a minimum penalty.

The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

The law of the non-navigational uses of international watercourses (A/CN.4/436,¹¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)

64. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report (A/CN.4/436) on the law of the non-navigational uses of international watercourses.

65. Mr. McCAFFREY (Special Rapporteur) said that his report dealt primarily with the use of terms and, in particular, with the question of the definition of the term "international watercourse" and the "system" concept. In order to enable the Commission to make the best use of its time, he proposed not to take up the question of the settlement of disputes, which had been pending since the preceding session, but to focus the debate on the "system" concept. He was convinced that the only possible basis for the draft articles was that of hydrologic reality, namely, that a watercourse was a system of interrelated hydrographic components and that an international watercourse was a watercourse, parts of which were situated in two or more States.

66. His report contained a proposal for the structure of Part I of the draft articles as well as two alternative texts for the article on use of terms, which would be numbered

either "1" or "2" depending on the Commission's decision on the matter of structure addressed in his report. The texts he was proposing read:

Article [1] [2]. Use of terms

ALTERNATIVE A

For the purposes of the present articles:

(a) A watercourse system is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(b) An international watercourse system is a watercourse system, parts of which are situated in different States.

(c) A [watercourse] [system] State is a State in whose territory part of an international watercourse system is situated.

ALTERNATIVE B

For the purposes of the present articles:

(a) A watercourse is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(b) An international watercourse is a watercourse, parts of which are situated in different States.

(c) A [watercourse] [system] State is a State in whose territory part of an international watercourse is situated.

67. Mr. CALERO RODRIGUES said that, like its predecessors, the seventh report was supported by sound documentation, even if the information it contained, while very instructive from the strict point of view of hydrology, was not always directly related to the topic under consideration.

68. With regard to the definition of the term "international watercourse", the Special Rapporteur recommended using the definition that the Commission had adopted as a working hypothesis,¹² except for the last paragraph, which read:

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.

He had no objection to abandoning the concept of the "relative international character" of watercourses, which was, in fact, rather curious. Nevertheless, the articles drafted on the basis of that working hypothesis would apply to international watercourses only in certain cases: when waters in one State were affected by or affected uses of waters in another State.

69. Concerning the concept of the watercourse system, the Special Rapporteur made a distinction of doubtful legal interest between the permanent components of the system—rivers, their tributaries and groundwater—and possible components—lakes, reservoirs, canals and glaciers. With regard to groundwater, to which a large part of the report was devoted, the Special Rapporteur also differentiated between free groundwater, which was nor-

¹¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

¹² Adopted by the Commission at its thirty-second session in 1980. See *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 90.

mally associated with surface water, and confined groundwater, which was not related to surface water, and gave examples of instruments that dealt with the two categories. After commenting on the rules governing international groundwater adopted by ILA at its Seoul Conference in 1986, he concluded that the views of ILA would support the inclusion of groundwater in the Commission's draft articles, whether or not it was related to surface water. He himself did not see how the scope of the draft articles could be extended to include confined groundwater (aquifers). First, it was difficult to understand how the term "watercourse" could encompass the category of groundwater. Secondly, and above all, the provisions of the draft articles, as they now stood, did not take into consideration problems specific to confined groundwater and would therefore not be applicable to such water. Consequently, the Commission must restrict the scope of the draft articles to free groundwater that was associated with surface water and merely draw the attention of the international community to the need for an instrument on confined groundwater.

70. He agreed with the Special Rapporteur that it was necessary, in order to avoid all problems of application, to define not only the term "international watercourse", but also the term "watercourse".

71. The "system" concept defended by the Special Rapporteur was acceptable, provided that it was clearly defined. However, instead of speaking of "watercourse system", as was the case in alternative A of the draft article, it would be preferable to say, as in alternative B that "a watercourse is a system". Such wording would allow the system concept to be included in the draft articles without changing the general title.

72. On the other hand, he was opposed to the reference in both alternatives of the draft article to "hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole". In a sense, that was inconsistent with the principle of the unity of the system, which was essential and must be stressed. Moreover, the existence of a physical relationship between the hydrographic components, to use the Special Rapporteur's wording, was not sufficient to form a unitary whole. The flow of some of the waters of the Danube into the drainage basin of the Rhine, which was at the origin of the famous *Donauversinkung* case,¹³ was an example of a physical relationship between two rivers, but that did not mean that the Rhine and the Danube were a single watercourse. That was an important point to which it would be necessary to return.

The meeting rose at 1.20 p.m.

¹³ *Streitsache des Landes Württemberg und des Landes Preussen gegen das Land Baden, betreffend die Donauversinkung*, German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix, pp. 18 *et seq.*

2214th MEETING

Friday, 24 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³
(concluded)

1. Mr. THIAM (Special Rapporteur) said that, before the Commission proceeded to take a decision on draft article Z, he wished to round off the statement he had made at the previous meeting with a few additional remarks. In particular, he wished to reassure those members who had expressed reservations about the abolition of the death penalty, as well as those who favoured specific penalties for each crime, or a more flexible system of punishment that established a maximum and a minimum penalty, that their comments had been duly noted.

2. As to the court's competence to hear appeals, he was firmly opposed to any form of hierarchical scale on which the court would occupy a higher position than national jurisdictions. The only hypothetical cases in which the international court might act as a court of appeal would be those where a crime under the Code had been defined as an ordinary crime instead of as a crime against the peace and security of mankind and, possibly, where the victim State or the State of which the victim was a national had obvious reason to think that the penalty was disproportionate to the heinous nature of the offence. Provision for such hypothetical cases might rea-

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... 1991*, vol. II (Part One).

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

sonably be made where a State tried its own nationals for crimes committed abroad, but cases of that kind were rare and might be avoided altogether if, as Mr. Graefrath had suggested (2208th meeting), a system of cooperation was established between the States affected by the offence.

3. In the matter of the court's review competence, a close reading of his report would show that the case envisaged therein—that of the court's being empowered to review or rescind certain decisions of national courts—was only a hypothetical one. He was fully aware that review of a decision fell, in principle, within the competence of the court which had handed down that decision, and only if new facts emerged. That being so, it was difficult to understand Mr. Razafindralambo's vehement attitude (2211th meeting) towards something he (the Special Rapporteur) was not proposing. Lastly, with regard to the question of the relationship between the international court and the Security Council, he referred members to the statement he had made on that subject at the 2061st meeting.⁴

4. As a general comment, he noted the international community's growing interest in the subject of the Code and of a possible international criminal jurisdiction, and in that connection expressed his appreciation to the Foundation for the Establishment of an International Criminal Court for organizing a most interesting seminar on the subject at Talloires, France, from 18 to 20 May 1991.

5. He proposed that draft article Z should be referred to the Drafting Committee in the light, more particularly, of the specific proposals made by members of the Commission, including himself, in the course of the discussion.

6. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

7. The CHAIRMAN said that the Commission had thus concluded its consideration of the ninth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/436,⁵ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf. Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)⁶ (continued)

8. Mr. McCAFFREY (Special Rapporteur), continuing the presentation of his seventh report begun at the previ-

ous meeting, drew attention to the alternative versions, A and B, of the article on the use of terms he had proposed. He said that the Commission would note that, while the definitions employed were the same in both versions, the terms defined were slightly different, alternative A including the expression "system" and alternative B confining itself to the expression "watercourse". As already stated, his own preference was for alternative A.

9. As to the structure of Part I of the draft articles, he had recommended that the Commission should consider reversing the order of articles 1 and 2. Such a structure would reflect an approach followed in a number of conventions, based on Commission drafts, that he had listed in the report. There was ample precedent for beginning the draft with an article on scope, and the Commission could make such a relatively simple change at the present session, without waiting for the second reading. He also drew attention to the recommendation in the comments to the draft article to the effect that the definition of a "watercourse State" (or "system State") should be transferred from its present position in article 3⁷ to the article on the use of terms because the definition was closely related to that of an "international watercourse" or "international watercourse system", included in the article under discussion.

10. Adoption of the concept of the international watercourse system, as the basis of the draft, was essential if the articles were to have any lasting impact. Merely to speak of a watercourse without defining that expression as being inclusive of all the terrestrial components of the hydrologic system would be not only to ignore physical realities but, what was far more serious, also to leave out of account some of the worst problems which already existed today and would increasingly plague humanity in the future.

11. One of the most important components of a watercourse system was groundwater; he hoped members would forgive him for having included in the report two diagrams which were intended to illustrate the way in which various components of a watercourse system and those of an international watercourse system related to each other. The sheer quantity of groundwater alone would seem to justify its inclusion in the scope of the draft. It would be seen that groundwater constituted an astonishing 97 per cent of fresh water on Earth, excluding polar icecaps and glaciers, a figure which contrasted dramatically with that for fresh water contained in lakes and rivers, amounting together to less than 2 per cent. Without attempting to review in detail the material set out in the report, he would none the less draw attention to the passage on the *Donauversinkung* case,⁸ which strikingly illustrated the interrelationship between surface water and groundwater. A question members might wish to address, assuming that groundwater was included in the definition of a "watercourse", was whether the draft articles should apply both to groundwater related to surface water (free groundwater) and groundwater unrelated to surface water (confined

⁴ *Yearbook*... 1988, vol. I, pp. 118 *et seq.*, 2061st meeting, paras. 54-70.

⁵ Reproduced in *Yearbook*... 1991, vol. II (Part One).

⁶ For text, see 2213th meeting, para. 66.

⁷ For the text and commentary, see *Yearbook*... 1987, vol. II (Part Two), p. 26.

⁸ See 2213th meeting, footnote 13.

groundwater), or whether they should apply to free groundwater alone. Although he believed that the rules embodied in the draft articles, and especially the fundamental rules of no appreciable harm, equitable utilization and notification of planned measures, would apply equally in the case of unrelated, or confined, groundwater, he had an open mind on that question.

12. With regard to the concept of the “relative international character” of a watercourse, a notion which originated in the provisional working hypothesis accepted by the Commission as the basis for its work,⁹ he knew of no precedent for it in scientific and technical works, State practice or legal studies, reports or recommendations. The concept, as discussed in his report, might at first glance have superficial appeal, but it was, at best, incompatible with the idea, also contained in the provisional working hypothesis, that a watercourse constituted a unitary whole, and at worst, it was a dangerous element that could negate entire sections of the draft articles. In any event, as indicated in the report, there would no longer seem to be any need for the concept—if indeed such a need had ever existed—since none of the fundamental obligations under the draft articles would apply unless there was an actual or possible effect upon another watercourse State or the regime of the watercourse. As the Special Rapporteur on the topic, he therefore urged very strongly that the notion of relative internationality should be abandoned.

13. Lastly, he clarified that the last paragraph of the section of the report in which he discussed the Bellagio Draft, had been included in error and should be deleted; a corrigendum to that effect would be issued in due course. The report also listed a number of other terms for possible inclusion in the draft article on the use of terms. It was essentially a matter of polishing the final text that could be dealt with in the Drafting Committee rather than in plenary.

14. Mr. AL-BAHARNA congratulated the Special Rapporteur on his report, which considered two basic issues, first, the definition of international watercourses and, secondly, the use of the “system” or related concepts in international agreements.

15. Regarding the first issue, he shared the general view of the Special Rapporteur that the term “international watercourse” should be defined in a way that made plain the implications of the draft articles adopted thus far. As pointed out in the report, the rules of the draft, by their very nature, would require watercourse States to consider the possible impact on other watercourse States of activities that might not be in the immediate vicinity of a border. Consequently, the term should be so defined as to bring within its ambit the rights and obligations of watercourse States under the draft articles.

16. In that connection, the Special Rapporteur presented the views of geographers, hydrologists and other experts. It was stated that surface water and groundwater should not, in the view of water resource specialists, be treated separately for legal and planning purposes. More important, a number of meetings held under the auspices

of the United Nations had recognized that water resource planning should take into account groundwater resources and their interaction with surface waters. It was also noted that States were increasingly including groundwater within the scope of their agreements concerning international watercourses, a trend that had recently received further impetus by the adoption in 1986 of the Seoul Rules by ILA.

17. The issue of the use of the “system” approach in the draft articles was one of the most difficult facing the Commission. The geographical advantages of the “system” approach over the “territorial” approach were not fully clear, and the legal implications of those different approaches had not been satisfactorily explained, despite the Special Rapporteur’s instructive treatment of the subject. The report drew upon all relevant sources in international law. Interestingly, the treaties and agreements cited covered Africa, Asia and Europe, with States that belonged to different political and economic systems. Evidently, the “system” approach had steadily gained ground in State practice. He was inclined, tentatively at any rate, to support the idea of using it in the draft. However, it might be useful if the Special Rapporteur were to clarify what the principal legal differences were between the “system” and the “territorial” approaches, in order to see in what ways, if any, the “system” approach promoted better realization of the principle of equitable and reasonable utilization and participation (art. 6) and also the obligation not to cause appreciable harm (art. 8), and finally, whether the “system” approach was more likely to create differences and disputes between watercourse States than the “territorial” approach. Clarification of those points would help the Commission choose between the two alternatives.

18. The Special Rapporteur stated that the Commission had decided to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980. Notwithstanding the third paragraph of that hypothesis, the Special Rapporteur suggested in the report that the notion of relative internationality should be dropped, because its inclusion could, he argued, eviscerate entire sections of the draft articles. That was a rather questionable assumption, and he was therefore inclined to adopt the working hypothesis in its entirety, rather than piecemeal.

19. As to the proposed article on the use of terms, except for the addition of the word “system” after “watercourse”, he saw little difference between alternatives A and B and would support either version, depending upon which one received stronger backing in the Commission. Assuming that alternative A received wider support, paragraph (a) thereof, which stated that “A watercourse system is a system of waters . . .” should be redrafted so as to remove the second reference to “system”. Perhaps it could simply be reformulated to read “A watercourse system refers to waters composed of hydrographic components . . .”. Similarly, paragraph (b) of alternative A could be recast as: “An international watercourse system refers to watercourses, parts of which are situated in different States”. Paragraph (c) would be best without the square brackets, and he had no objection to moving article 3, which defined “watercourse States”, to the article, numbered 1 or 2, that would deal with the use of terms.

⁹ Ibid., footnote 12.

20. Mr. ILLUECA said that, in an excellent report, the Special Rapporteur raised two basic issues, first, whether the draft articles should apply to all of the hydrographic components of international watercourses and all of the forms of those watercourses, including rivers, their tributaries, lakes, canals, reservoirs and groundwater, and, secondly, whether watercourses should be treated as having a "relative international character". The first question could, to some extent, be resolved if the Commission retained alternative A proposed by the Special Rapporteur for the article on the use of terms. As to the second question, the Special Rapporteur concluded that the concept of the relative international character of a watercourse should be dropped. If members agreed that the concerns that had led to the introduction of the idea of a relative international character had, as indicated by the Special Rapporteur, been addressed in articles that the Commission had already adopted provisionally, one could not but admit that his argument was well-founded.

21. Reference was made in the report to the Common Zambezi River System. He requested clarification regarding the scope of the term "common river system" and whether it differed from what the Commission was seeking to define as a "watercourse system". Of the alternatives proposed for the article on the use of terms, he was in favour of retaining alternative A, which defined a "watercourse system". He also supported the Special Rapporteur's proposal to incorporate article 3 in alternative A as paragraph (c).

22. Mr. SEPÚLVEDA GUTIÉRREZ expressed his appreciation for a scholarly and persuasive report. The present final chapter of the Special Rapporteur's work would be most useful for drafting bilateral and regional treaties between States whose territories included part of a hydrographic system, because it would enable them to appraise the importance of each of the components of the system and such treaties would make for certainty and for progress in international law.

23. He urged the Commission to conclude the first reading of the topic as soon as possible. Much time had already been spent on preparing the draft, and the opportunity arose to make considerable headway. When the Sixth Committee received the text, it would no doubt make comments and valid criticism, but once completed, the articles would help reduce points of friction between States that had come about in connection with the utilization and ecological conservation of international watercourses, an issue of growing importance throughout the world.

24. He was in total agreement with the Special Rapporteur's seventh report. With regard to the proposed article on the use of terms, he favoured alternative A, and found the suggestion to change the order of articles 1 and 2 acceptable.

25. As he had consistently stated in the Commission, it was his understanding that the document to be approved on first reading was to be considered as a draft "framework agreement", regardless of the scope of that term.

The meeting rose at 11.10 a.m.

2215th MEETING

Tuesday, 28 May 1991, at 10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)² (*continued*)

1. Mr. ROUCOUNAS thanked the Special Rapporteur for his very detailed report, which gave the Commission an overview of some of the main technical issues involved and dealt with three questions, namely, the use of the term "international watercourse system", the problem of groundwater and the concept of the relativity of the proposed regime.

2. Concerning the first question, it now seemed that the Commission had been right to adopt a unitary approach to the subject as concerned the regulations to be adopted and the regime to be applied. With regard to the "system" concept as such, the report reaffirmed the need to use that term, first of all because a watercourse was composed of interrelated elements and the modification of any one of those elements automatically affected all the others and, secondly, because only an overall approach to an international watercourse as a system in perpetual motion would allow for the full implementation of the principle of equitable and reasonable utilization, which was the basis of the Commission's draft. Thus, terms must be used that were consistent with physical reality and reflected the phenomenon of the hydrologic cycle. Moreover, in view of the ever-closer links between the science of law and the other scientific disciplines, the use of the term "system" was the least of the terminological changes that jurists owed scientists.

3. The use of the term "groundwater" in the draft articles was not only justified by physical reality but was

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For text, see 2213th meeting, para. 66.

also necessary from a legal point of view. If only for spatial reasons, it was impossible to say where the pollution of a river began and where it ended. The inclusion of references to groundwater in the draft would also improve the ability of national and international mechanisms to reduce the risk of causing appreciable harm to the system. Lastly, international law could not remain indifferent to the fact, as pointed out by the Special Rapporteur, that groundwater represented 97 per cent of the planet's fresh water and most of mankind depended upon it for its needs.

4. With regard to the "relative international character" of watercourses, he agreed with the Special Rapporteur that that concept would create doubts about the Commission's work and uncertainty about the real scope of the draft, while failing to have the restrictive effect that its authors had intended. The concept, whose origins were lost in the intricacies of the Drafting Committee, was now irrelevant because the articles adopted on first reading defined the scope of the text as a whole.

5. Lastly, he expressed his preference for alternative A of the draft article on the use of terms. He also noted that the term "surface waters" was translated in French both as *eaux de surface* and as *eaux superficielles* and he wished to know which term was preferred.

6. Mr. TOMUSCHAT said that the Special Rapporteur's report gave a very clear picture of the international situation with regard to the regulation of the use of international watercourses. He agreed with the Special Rapporteur's recommendation that the order of draft articles 1 and 2 should be reversed to bring part I of the draft articles into line with other conventions drafted by the Commission.

7. Concerning the use of terms, it would appear that the Special Rapporteur considered the difference between the expressions "watercourse" and "watercourse system" to be only semantic in nature. Although all the components of an international watercourse could be regarded as a unitary whole for the purposes of the draft articles, he himself wondered whether special rules should not be drafted for groundwater, even though it was part of the hydrologic cycle, as depicted graphically in the report. The draft articles dealt primarily with surface water and did not contain a single provision that focused on the specific characteristics of groundwater. Inasmuch as the subject-matter of the draft articles was surface watercourses, its scope was fairly limited. Adding groundwater might well have a fundamental impact on the nature of the draft, which would then become a set of rules applicable anywhere in the territory of States parties, with far-reaching consequences for the concept of sovereignty. In a word, such an instrument would be a treaty not on watercourses, but on water resources. It might, for example, be worthwhile to consider whether the scope of article 11³ included surface water only or also encompassed groundwater. Clearly, the extent of the obligations of States would vary according to whether article 11 was given a broad or a restrictive interpretation.

³ For text and commentary, see *Yearbook... 1988*, vol. II (Part-Two), pp. 45-46.

8. He drew the Special Rapporteur's attention to that point because it was important to know exactly what areas the draft articles covered. If the watercourse system was extended to cover groundwater, practically all the territory of Germany would fall within the purview of the proposed articles.

9. Mr. NJENGA congratulated the Special Rapporteur on his scholarly report, which would certainly help speed up the Commission's work on a topic which was of great importance, especially in the light of current international activities in the field of the environment. He said that the General Assembly in its resolution 44/228 of 22 December 1989 had decided to convene UNCED in Brazil in June 1992 and to establish a Preparatory Committee for the Conference, which had already held two sessions. It should be noted that one of the working groups set up by the Preparatory Committee (Working Group II) had placed on its agenda an item on the protection of freshwater resources and that a number of delegations at both sessions had referred to the work of the Commission and had expressed the hope that it would contribute to the preparatory process and the success of the Conference itself. At the session held at Geneva from 18 March to 5 April 1991, the Working Group had recommended that the Secretary-General of UNCED should report on progress achieved by the Commission. He therefore suggested that the Chairman of the Commission should contact the Secretary-General of UNCED in that regard before the third session of the Preparatory Committee, to be held in Geneva in August 1991. An international conference, scheduled to be held in Dublin as part of the preparations for the 1992 Conference, at which freshwater resources would be among the topics discussed, could also benefit from the results of the Commission's work at its forty-third session.

10. Turning to the report itself, he endorsed the Special Rapporteur's proposal to reverse the order of articles 1 and 2 and considered that the Commission could approve it forthwith. The section of the report dealing with the use of terms gave rise to more difficult problems. As the Special Rapporteur rightly stated:

Now that the Commission has adopted the bulk of the provisions of the draft... the time has come to decide upon the scope of the term "international watercourse"... The first [issue] is whether the draft articles should apply to all of the hydrographic components of international watercourses... The second is whether, for the purposes of the draft articles, watercourses should be treated as having a "relative international character".

11. Recalling in that connection that the Commission had been working since 1980 on the basis of the provisional working hypothesis⁴ reproduced in the report, he said that any attempt at the present late stage to enlarge the scope of the draft articles might wreck the whole draft. The Special Rapporteur had given a very detailed explanation of the hydrological cycle and the interdependence of the various components of watercourses, but it should not be forgotten that the scientific definition of a hydrological basin did not necessarily have to correspond to the legal definition. In that connection, the Special Rapporteur quoted extensively from international agreements relating to groundwater and, in par-

⁴ See 2213th meeting, footnote 12.

ticular, the agreements between Yugoslavia and Hungary, Albania and Bulgaria, as well as the 1964 Treaty between Poland and the Soviet Union which defined frontier waters as including groundwaters intersected by the State frontier; he further cited the 1968 African Convention on the Conservation of Nature and Natural Resources, which recognized the importance of common groundwater, as well as the Helsinki Rules, which spoke of "surface and underground waters", and the Bellagio Draft, which stressed the need to ensure "... the reasonable and equitable development and management of groundwaters in the border region for the well-being of their [the States Parties] Peoples." It was clear that in all those cases recognition was given to the unitary character of water resources for legal purposes and that groundwater, whether or not it was connected with surface water, formed part of that unitary whole. He therefore endorsed the idea of extending the draft articles to groundwater as one of the components of the watercourse system. It was equally clear, however, as stated in the working hypothesis adopted by the Commission in 1980, that the system was international only to the extent that the uses of the waters of the system had an effect on one another and that, accordingly, there was not an absolute, but a relative, international character of the watercourse. In his view, that was an essential point. He therefore hoped that the concept of relativity would be maintained and that the Special Rapporteur would not insist on dropping it.

12. Having also studied with care the section of the report dealing with the use of the "system" or related concepts in international agreements and, in particular, the Special Rapporteur's conclusions, he was prepared to endorse the "system" approach now that the Commission had defined the scope of the draft articles.

13. He said that, subject to the comments and proposals he had made, he would have no difficulty in supporting the adoption of the article on use of terms as proposed in the report. For the reasons stated by the Special Rapporteur himself, he preferred alternative A. He likewise supported the suggestion that all definitions should eventually be consolidated in a single article entitled "Use of terms".

14. It was to be hoped that the Drafting Committee would devote all the time necessary to the consideration of the draft articles so that the Commission might complete the first reading at the present session. It would also be useful if, at the next session of the General Assembly, the Special Rapporteur could attend those meetings of the Sixth Committee at which the topic was discussed in order to ensure that the draft articles and the intentions of the Commission were not misunderstood.

15. Mr. MAHIU said that he agreed with the Special Rapporteur's idea of reversing the order of draft articles 1 and 2 and consolidating all the definitions in what would become article 2, except where a definition would remain in a specific article when it was closely linked to that article or did not belong elsewhere.

16. The definition of the term "international watercourse" gave rise to three problems, namely, the "system" concept, the "relative international character" of the watercourse and the applicability of the draft articles

to groundwater. With regard to the "system" concept, the Special Rapporteur had considered that it was in conformity with both the natural characteristics of watercourses and the spirit of the draft articles as a whole. He himself recognized that it had the merit of introducing flexibility, clarity and consistency into the draft, but he still did not consider it absolutely necessary. The essential point was that of the rights and obligations established in the provisions which had been adopted. Those rights and obligations appeared to be relatively well balanced and respected the sovereignty of States, perhaps excessively in some cases.

17. The Special Rapporteur was proposing that the concept of the "relative international character" of the watercourse should be dropped and, in that connection, it might well be asked why the rights and duties of States should be codified in such detail if that meant running the risk of neutralizing many of the provisions adopted and, in particular, all of part III of the draft. The caution the Commission had displayed at the outset had been understandable: the concept of relativity had been a kind of counterweight designed to keep the "system" concept within reasonable bounds because its globalizing aspect and unforeseeable consequences could create concern among States. Now that the tenor of the draft articles was known and everyone could assess their consequences, there was no longer any reason to say that the internationality of the watercourse was relative, especially if alternative B proposed by the Special Rapporteur for article 1 (or 2) was adopted. If the "system" concept was dropped, the relativity concept, which went with it, must also be dropped.

18. He was grateful to the Special Rapporteur for providing the Commission with the elements which would enable it better to understand the problem of groundwater and for having drawn attention to the quantitative importance of those waters and their vital importance for all countries, in particular in desert regions. Those factors lent weight to the argument for an international regime for aquifers. The question was, however, whether aquifers should be covered by the draft articles. It was natural and logical to answer that question in the affirmative in the case of aquifers which were connected to surface waters, but it might seem artificial or excessive when the connection between groundwater and surface water was insignificant or non-existent. For example, did the draft under consideration really apply to the situation with regard to the confined aquifers in the Sahara, which were undeniably international, but nevertheless of a special nature that would call for a particular status? Perhaps the Special Rapporteur could deal with that question in greater detail in order to determine whether that category of groundwater should be covered by the draft articles, in which case some amendments might have to be made to the draft, or whether additional separate codification work should be done on it.

19. Mr. GRAEFRATH said that the purpose of the Commission was not to make a contribution to hydrologic research, but to draw up a framework agreement whose provisions would promote the adoption of specific regimes for individual international rivers, while also possibly having a residual character. The definition drafted must therefore take account of the wide variety

of international watercourses and of their different components. In that connection, the two versions of a draft article proposed by the Special Rapporteur were not alternatives: both were concerned with the definition of the watercourse system, even though alternative B spoke only of a watercourse. Nobody would question the fact that any watercourse was a system consisting of hydrographic components which, by virtue of their physical interrelationship, constituted a unitary whole. But was that concept, which was borrowed from the hydrologists, sufficiently precise for the limited legal purposes of a convention whose purpose was not to protect water resources?

20. It was not clear from the Special Rapporteur's proposed definition that the draft articles would cover certain components only, and only in so far as those components related to a watercourse or to the parts of that watercourse that were in two or more States. That defect was even more marked if the third paragraph of the Commission's working hypothesis was deleted, since the very purpose of that paragraph had been to counterbalance the extremely broad "system" concept. As the definition stood, it would mean that the draft articles would include all the watercourses of a country and would, for instance, have repercussions on the entire territory of a small State crossed by an international watercourse. Another problem was whether two international watercourses connected by a canal would be regarded as one system. Would the link between surface water and groundwater mean that the two could not be separated in legal instruments? Notwithstanding the examples of the Seoul Rules and the Bellagio Draft, to which the Special Rapporteur had referred, matters relating to transboundary groundwater which were not directly connected with an international watercourse should not come under the Commission's draft. That should be clear from the definition, particularly since the object was a framework agreement whose scope and limits should be specified. Unless it was combined with the necessary restrictions, the concept of the unity of hydrographic components was perhaps not the best way of achieving that end.

21. He agreed with the proposed change in the structure of part I of the draft articles and with the inclusion of existing article 3 in the draft article on use of terms.

The meeting rose at 11.10 a.m.

2216th MEETING

Thursday, 30 May 1991, at 10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa

Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)² (*continued*)

1. Mr. BARBOZA said that the seventh report, like the previous ones, was praiseworthy for its lucidity and intelligent approach. It reflected the commendable pragmatism and spirit of compromise that were features of the Special Rapporteur's work.

2. Previously, the Special Rapporteur had rightly placed special emphasis on conservation of the environment of the watercourse system and of the marine environment, in which rivers played a major role. The current report now focused attention on the all-important issue of groundwater, which constituted 97 per cent of the planet's available fresh water, excluding water in the form of ice in the polar caps and in glaciers, which was not, in any case, available to satisfy human needs.

3. He supported the idea of reversing the order of the articles on the use of terms and on scope, for the reasons given by the Special Rapporteur.

4. The first question of substance dealt with in the report was the definition of international watercourses, and the Special Rapporteur, in the light of international practice, recommended that the "system" concept should be retained. For his own part, he endorsed that conclusion, for without the "system" concept the present exercise would be futile. It was essential to take account of the 1980 provisional working hypothesis,³ which had guided the Commission's work to date. The essence of the definition of a watercourse system was the interdependence of its various components, which made the system a unitary whole.

5. That interdependence was not an invention of the Special Rapporteur. It was a reality and had to do with the actual nature of water: most of the uses of the water in one part of the system affected the uses of the water in other parts. It happened not only within one and the same component—for instance, in the upper or lower portion of a stream—but between different components: what was done to a lake could affect a river and what

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For text, see 2213th meeting, para. 66.

³ See 2213th meeting, footnote 12.

was done to a river could affect the related groundwater. Again, the essential concept of interdependence provided an answer for many questions posed in the report. One such question was the determination of what components should be included in the notion of a watercourse system and whether the system would include groundwater. Plainly, the answer was that the system must include all elements which were interdependent. The Special Rapporteur thought that the watercourse system should cover groundwater because of the close interrelationship between groundwater and the water of rivers and lakes. Moreover, groundwater was constantly in motion, a quality which tended to equate it with surface water. The seventh report also properly stressed the importance of including groundwater in water resources planning and management, for it examined State practice as reflected in international agreements and drafts, the Seoul Rules adopted by the International Law Association, and the *Donauversinkung* case.⁴

6. In the debate, some reservations had been expressed about extending a watercourse system so as to cover groundwater. Mr. Tomuschat (2215th meeting) had pointed out that practically all the territory of Germany would thus fall within the purview of the proposed articles. Actually, groundwater was a rather passive component of a watercourse system with few uses. All that could be done was to pump it out so that it could be utilized, for example, for washing, irrigation or industrial purposes. One important point was that groundwater could be affected by pollution from the surface components more easily than the other way round. To take Mr. Tomuschat's example, the fact that most of Germany's groundwater would fall within the scope of the draft articles would really be a blessing, particularly in view of the pollution that affected the Rhine and the Danube, which threatened the groundwaters of all the riparian countries, including Germany.

7. It seemed that wells for groundwater were mostly used in order to satisfy individual needs. At some point the number of individual wells started to cause appreciable harm to other parts of the system or even to underground water on the other side of the border. On the strength of the principles contained in the draft, affected system States could agree to fix quotas or to determine places where pumping would be permitted, as appeared to have been done by Mexico and the United States of America in the 1973 agreement mentioned in the report. Furthermore, if one system State planned some important measure affecting the groundwater of a watercourse system, the chapter of the draft on planned measures was applicable, and rightly so.

8. The members of the Commission knew little about confined groundwater, and the enormous quantitative importance of such water had actually come as a surprise. Perhaps more information should be obtained before a decision was reached in the matter, although, in principle, he saw no reason why such water should be excluded from the watercourse concept.

9. In the work on the present topic, the term "watercourse" itself had nowhere been defined. The Special

Rapporteur had chosen in alternative A for the article on the use of terms to define a "watercourse system", and in alternative B had defined a watercourse as a "system of waters". Since "system" constituted a cultural concept with human and social connotations, the question was to determine what a watercourse was in the natural, rather than the cultural, sense—in other words, regardless of the social elements. A "natural" watercourse was a quantity of water that followed a certain course, i.e. moving in a certain direction on a fixed, or relatively fixed, course. "Water", "flow" and "course" were the fundamental elements. The fact that water flowed, that it could be used by man, and that the uses in one part were closely interconnected with the uses in other parts made the watercourse a unity and a system. Hence, confined groundwater was a watercourse and consequently a system: it consisted of water, it flowed and the uses made of it in one part influenced the uses made of it in another part. It would therefore seem appropriate for confined groundwater to fall under the provisions of the draft articles. The water contained in the atmosphere was part of the water cycle and it influenced surface water. It was not, however, part of a watercourse because it followed no fixed course.

10. He preferred alternative B for the article on the use of terms, for it would be in conformity with the title given by the General Assembly. He disagreed with the suggestion that alternative A was better because it emphasized for the reader the fact that the waters of an international watercourse formed a system. The impression created on the reader was not a matter of great importance in a legal text. Besides, all the draft articles were based on the notion of system and all the essential concepts were to be found in alternative B.

11. He was inclined to agree with the Special Rapporteur that the clause on the "relative international character" of a watercourse, contained in the 1980 provisional working hypothesis, was unnecessary and could only complicate the matter. Besides, there was a contradiction between that clause, which suggested that there were an indefinite number of watercourse systems that were not pre-established but only came into being when there was evidence that parts of the water in one State affected or were affected by the uses of the waters in another State. Those propositions conflicted with the first part of the working hypothesis, which stated that there was only one watercourse system and that it was established by the mere fact of the physical interdependence of the water in different parts. Moreover, in the "single system" approach, certain effects were anticipated, as in the case of planned measures. In the "multiple systems" approach, only certain systems would be anticipated and the chapter on planned measures, along with other chapters, would need some reformulation. For instance, article 11⁵ would have to be reworded more or less on the following lines: "Watercourse States shall exchange information and consult each other on the systems that possible effects of planned measures would establish by modifying the conditions of the watercourse". He saw no reason why the solution in the *Flathead River* case, which the Special Rapporteur had discussed in the section of the

⁴ *Ibid.*, footnote 13.

⁵ See 2215th meeting, footnote 3.

report dealing with the “relative international character” of a watercourse, could have been any different if the “multiple systems” approach had been adopted. What one approach called “effects” the other called “system”. Admittedly, such a complex intellectual mechanism would make for a completely unnecessary complication in the functioning of the draft.

12. Mr. Sreenivasa RAO said that the seventh report was commendable for its clarity and precision. The Special Rapporteur’s recommendations, which appeared to be motivated by a number of reasons, such as the unity of the hydrological cycle, the necessity to conserve water resources in the interest of the needs of burgeoning human populations, the possible interrelationship between surface fresh water and groundwater, the protection of watercourses and water resources from pollution and other hazards, the planning, management and development of water resources, the education of government officials in their own State’s international obligations, and the need to nip in the bud potential inter-State problems, deserved careful consideration. The report contained an interesting analysis of the unity of the hydrological cycle and the interrelationship between its various components, not only within a State but also across international borders, and provided some helpful diagrams. The Special Rapporteur’s enthusiasm for the adoption of hydrological unity as the basis for a legal regime to govern water resources in general and international watercourses in particular was evident throughout.

13. The report raised some fundamental questions. What kind of factors should the Commission consider for the purpose of formulating a policy which could, in turn, form the basis for specific recommendations? Geographical and hydrological factors certainly deserved attention in connection with watercourses. But when watercourses crossed international boundaries and hence were common to two or more States, it seemed equally important to take into consideration, among other things, the concepts of State sovereignty and mutual benefit and to recognize the primary interest of the State in its natural resources, including watercourses and water resources in its territory. Protection, planning and development of water resources should be based on the needs of the population of the territory through which the river first passed, in accordance with the principles of optimal, reasonable and equitable utilization of water resources. Integrated basin-wide and regional development, protection and planning were desirable and should be encouraged, but they none the less were subject to the principle of mutual interest and were a natural consequence of cooperation based on common interest rather than a mandatory legal obligation. The only legal obligation, under the principle of sovereignty and mutual interest, or reciprocity, was to avoid substantial or appreciable harm to the other watercourse States. In other words, a proper policy formulation should address itself to all relevant factors, with geological and hydrological factors forming only a small, though necessary, part of the overall context. Specific policies should promote a proper balance of the interests of all States and avoid any attempt to shift natural priorities within those interests or to accord unacceptable rights of interference to one or more States in the sovereign domain of another State. Realistic and acceptable solutions in all areas had to take into account

the existence of sovereign and equal States and had to be based on the common interests of those States. Any other course was likely to be dismissed as utopian, unrealistic and even illegal. The management of international watercourses could not be treated in isolation from those broader conditioning factors or realities. Accordingly, the unity of the hydrological cycle—a fact that was not at issue in the Commission—could not in itself provide the basis for a legal regime.

14. The report contained the questionable statement that legal rules governing the relations of States with regard to international watercourses should take account of the interrelationship between components which functioned as a unitary whole, so that the operation of the rules—and thus the protection of fresh water as well as the rights of watercourse States—would not be frustrated. Actually, the attempt to separate the objective of protecting fresh water from that of safeguarding the rights of watercourse States was incorrect in itself. That conclusion was supported by the passage from James Brierly’s *The Law of Nations* quoted in the report, which seemed to indicate that an international watercourse could be treated as a system only in the limited sense of its uses causing appreciable harm or material injury to co-riparian States.

15. As to the recommendation that the notion of the relative internationality of a watercourse should be allowed to fall away now that the edifice of a legal regime to govern the non-navigational uses of international watercourses had been fully erected, some members had expressed concern that the suggested legal regime might assume a scope which had not been intended and would not be acceptable to many States. It should be remembered that the provisional working hypothesis had not been merely a temporary arrangement but had constituted the very basis for developing the framework agreement now under consideration. To abandon the concept at the present stage would be tantamount to removing the very foundation for the edifice of the legal regime. The reasoning given by the Special Rapporteur was not very convincing and perhaps even contradictory in places. For example, it was stated that the notion of relative internationality was incompatible with the draft articles, in particular those in Part III. But at the same time, the assurance was given that there was no need to rely on the notion of relative internationality, as it would seem to have been incorporated in the draft articles already adopted by the Commission, in particular by the most important obligations, contained in articles 6, 8, 23 and Part III.⁶

16. If the concept of relative internationality was dropped, problems among States would not be nipped in the bud. They would all too soon mature, in some cases even needlessly, because of excessive interference by States in each other’s legitimate internal affairs and because of undue internationalization of the process of enjoyment of watercourses by States. Hence it was essential to retain the entire working hypothesis as a basis for the draft. To make the purpose of the draft articles clear, the working hypothesis should be explained with refer-

⁶ For texts, see *Yearbook . . . 1990*, vol. II (Part Two), para. 312.

ence to James Brierly's opinion, to which reference had already been made.

17. The present report was also notable for the case it made for including groundwater in the legal system. To that end, it drew on the recommendations of a number of learned bodies and included a survey of State practice and a case analysis. Yet the survey of State practice and the opinion of a number of experts clearly indicated that a case could be made for including groundwater in inter-State regulation only to the extent that the water crossed international boundaries, flowed into a common terminus and its utilization could cause appreciable harm to others. The United States-Mexico treaty, for example, mentioned in the report, concerned the pumping of groundwater near the border to control the possible adverse effects of such pumping by one country in the other. The areas of concern were limited. Johan Lambers, whom the Special Rapporteur had also quoted, had only spoken of diffused surface water and groundwater which flowed into a common terminus. The Helsinki Rules defined an international drainage basin as including groundwaters flowing into a common terminus. Consequently, it was not clear on what basis ILA in its Seoul report had recommended inclusion of groundwater in the legal regime on surface waters even when it did not "form with surface waters part of a hydraulic system flowing into a common terminus". The Special Rapporteur appeared to have accepted the Seoul recommendation without any further critical analysis. If the whole argument was based on a system theory and the unity of the hydrological cycle, the argument seemed to be defeated by dealing with groundwater that did not in any way form part of the hydrologic system.

18. The Special Rapporteur's conclusions that all "groundwater will eventually reach the main stream channels" and that groundwater "is normally closely associated with rivers and lakes" also ran counter to the idea of dealing with groundwater separately. Moreover, the question of the possible pollution of river waters through the contamination of groundwater or vice versa was covered by the same concept of the obligation not to cause appreciable harm and did not require the different or more extensive legal framework that was being proposed.

19. The *Donauversinkung* case had only demonstrated, as the Special Rapporteur himself pointed out, that the two principles of equitable utilization and the obligation not to cause appreciable harm were well recognized, and as the court itself had noted, the application of those principles was governed by the circumstances of each particular case. It was not possible to draw any other particular conclusion from that case on the question of whether groundwater should be included in the various components of the watercourse system.

20. Reference had been made by the Special Rapporteur to the Indus system of waters. As he understood it, the Indus system was different from the "system" concept used for a watercourse. Indeed, the Indus Waters Treaty dealt with different rivers of the Indus system separately, and not together as a system, with rights and obligations of the parties clearly defined in respect of each river.

21. Lastly, he saw no reason to extend the proposed legal regime to cover groundwater in general, despite its importance in hydrology, and no convincing case had been made for including it in the "system" hypothesis adopted by the Commission. The Special Rapporteur's recommendation to place the article on scope before the article on the use of terms was acceptable, and he agreed with members who had pointed out that, in effect, there was no difference between alternative A and alternative B for the proposed article on the use of terms. The phrase "constituting by virtue of their physical relationship a unitary whole", in paragraph (a) of alternative A, should be replaced by the relevant wording in the Helsinki Rules, assuming that it had to be used at all. The reference to groundwater should be deleted, and he would prefer the "system" concept to be employed, together with the concept of the relative international character of a watercourse.

22. Mr. SHI, speaking in reference to the structure of Part I of the draft, said he had no objection to the Special Rapporteur's proposal that the article on the scope of the draft should precede the one on the use of terms. That was not only a matter of logical sequence but was also consistent with the Commission's normal practice.

23. The seventh report dealt with two issues, namely, whether the draft articles should apply to all the hydrographic components of international watercourses, i.e. whether the concept of an international watercourse system should be adopted, and whether watercourses should be treated as having a "relative international character". The very acceptability to States of the draft articles as a whole was to a considerable degree dependent on the Commission's decisions on those two issues, and therefore caution must be exercised.

24. From the scientific point of view, the hydrographic components of a watercourse were clearly part of the hydrologic cycle. Yet one might ask whether the legal definition of a watercourse must coincide with the natural phenomenon of a watercourse. The answer depended on the purposes and needs that the legal definition was to serve. Although the hydrographic components of a watercourse formed a whole, the geographical configuration and geological structure of the parts of an international watercourse situated in different States, as well as the climatic variations in the riparian States, might not all be the same. That was also true of the different social and economic needs of the riparian States. Those factors helped to create divergent and often conflicting interests, which the draft articles were designed to reconcile on the basis of equitable and reasonable utilization and cooperation, without impairing the territorial sovereignty of riparian States. In addition, the draft articles would take the form of a framework agreement for general application to any international watercourse, regardless of the specific characteristics of any particular one.

25. The articles provisionally adopted by the Commission to date appeared to be modest in character and did not place great demands upon riparian States, and the chances of them being accepted by States in general seemed to be good. On the other hand, if the Commission decided to adopt a definition of a watercourse embracing the "system" concept, a number of riparian

States would hesitate to accept the draft, for fear that much or most of their countries would be covered by such a definition, particularly if the "system" concept included groundwater; acceptance of the draft might then mean internationalization of much of their territories, leaving them with little sovereignty. At the previous meeting, Mr. Tomuschat had given a convincing illustration of the possible consequences of the inclusion of groundwater in the definition of a watercourse by citing the example of watercourses in his country. Exclusion of the "system" concept from the draft would not prevent States from adopting the concept in a specific agreement on a particular international watercourse.

26. As to the proposed draft article on the use of terms, he agreed with Mr. Graefrath (2215th meeting) that there was no difference in substance between alternatives A and B. Each was the same in essence, namely, the concept of a watercourse as a system of waters. Moreover, the idea of a system of waters flowing into a common terminus, as adopted by ILA in its Helsinki Rules, was perhaps more precise and limitative than the wording "system of waters...constituting by virtue of their physical relationship a unitary whole", contained in the Special Rapporteur's alternatives.

27. The concept of the "relative international character" of a watercourse, had originally been conceived as part of the provisional working hypothesis accepted by the Commission as the basis of its work on the topic. The concept could not be dissociated from the other parts of the working hypothesis. The purpose of the paragraph on the relative international character of a watercourse was to serve as a guarantee of sorts for riparian States against excessive or improper broadening of the scope of application of the draft articles, thereby dispelling fears of any encroachment upon the sovereignty of riparian States. In the Special Rapporteur's view, the concept was purely artificial, incompatible with hydrologic reality and without any basis in scientific or technical works or State practice. The Special Rapporteur also feared that it was not only likely to produce intractable disputes between watercourse States but would also eviscerate entire sections of the draft articles, and had therefore proposed to abandon it. In proposing to give up the concept, the Special Rapporteur recommended incorporating the other two parts of the working hypothesis into the draft article on the definition of a watercourse system. Actually, if the scope of the draft was confined to uses of international watercourses unrelated to the "system" concept, the notion of relative international character might no longer be needed. Should the Commission ultimately decide to preserve the first two paragraphs of the working hypothesis, the concept of a system of waters must be included in the definition of a watercourse. In that case, groundwater should not be included, because the Commission was dealing with uses of watercourses, not with water resources. Nor could the concept of relative international character be abandoned. He was not convinced that the concept would, in practice, eviscerate some sections of the draft.

28. The legal concept of an international watercourse should not only take into account the natural phenomenon of a watercourse but also be acceptable to States as a

legal norm for general application to any international watercourse, regardless of the peculiarities of particular international watercourses. On the other hand, watercourse States were free to make provisions for the "system" concept in specific agreements on a given international watercourse if they saw fit.

29. The Special Rapporteur had made an invaluable contribution to the topic and he hoped that the Commission would be able to adopt the complete set of draft articles on first reading by the close of the session.

30. Mr. BARSEGOV associated himself with other members in thanking the Special Rapporteur for a detailed report, which raised the highly important issue of the actual subject and sphere of application of the draft articles. Strictly speaking, the Commission should have begun its work with that issue, but the question was so complex and so controversial that the decision had been taken to leave it aside for the time being so as to expedite work on the topic. The Commission had thus almost completed the construction of an edifice which still lacked a foundation.

31. The question raised in the report, of whether the draft articles should apply to all hydrographic components of international watercourses including rivers, their tributaries, lakes, canals, reservoirs and groundwater, was of immense importance. The point at issue was not so much that adoption of the "watercourse system" concept would extend the scope of international regulation to cover entire territories of States, whether large or small, but that it would entail international regulation of water resources, which fell within the scope of State sovereignty. He therefore failed to see how the problem could be described simply as a matter of semantics.

32. The alternative versions of the draft article on use of terms resembled one another so closely as to remind him of the elections which used to be held in his country in the not too distant past: a choice seemed to be offered, but it was not a real choice. The argument that alternative B was preferable because it maintained the title of the topic as it had been referred to the Commission by the General Assembly was unfounded since the definitions contained in subparagraphs (b) and (c) of both variants were identical. The real choice facing the Commission was a most important and responsible one, and it had to be made in full awareness of what the decision implied.

33. The interrelationship between everything in nature went without saying. It was as true of the waters of a watercourse as of everything else. It was not by chance that the Special Rapporteur had gone to great lengths to describe the hydrologic cycle in order to explain the need to adopt the concept of a system comprising all waters, including groundwater.

34. The Special Rapporteur rejected the notion of the "relative international character" of a watercourse, not because it entailed legal contradictions, but because its purpose was to limit the scope of the draft articles by excluding those parts of the waters in one State which were not affected by or did not affect uses of waters in another State. According to the maximalist approach recom-

mended by the Special Rapporteur, the "watercourse system" concept would cover even those parts which did not affect use of other parts of the watercourse in a neighbouring State. The Special Rapporteur attached no importance to that distinction.

35. He understood and sympathized with the Special Rapporteur's desire to expand the framework of the topic, and believed that the question of water resources in general would probably come to occupy the international community's attention at some time in the future. The question at that stage, however, was whether the Commission was entitled to change the topic assigned to it and whether States would agree to the internationalization of water resources throughout their territory. Even if the answers to both questions were in the affirmative, and if it could be established that the Commission was mandated by the General Assembly to deal with underground waters in the territory of States, a great deal of additional work would have to be done before any concrete results were achieved. It was to be feared that, by arbitrarily expanding the topic under consideration, the Commission would actually jeopardize the results of many years' work.

36. The fact that an interrelationship existed between the components of the hydrologic cycle or system did not mean that all components had to be dealt with at once; neither did the law necessarily have to follow the precise physical connection. There were many examples of different approaches. For instance, the geological concept of the continental shelf did not coincide with the legal concept. He was of the view that each separate component of the hydrologic cycle would require an approach of its own, and should be dealt with as the necessity for, and the possibility of, a solution became apparent.

37. If, nevertheless, the Commission were to adopt the "watercourse system" concept, it would have to review many of the draft articles already agreed on and probably add a number of others. In his opinion, it would be wiser to adopt the watercourse as the basis for the scope of the draft. If that was done, the articles prepared by the Commission would represent a major step in the progressive development of international law and would help to expand the sphere of activities regulated by international law.

38. Mr. OGISO said that, as one who had been interested from the outset in the concept of a watercourse system, especially from the point of view of resources preservation and management, he had taken particular note of the emphasis laid by the Special Rapporteur on the need to include groundwater as a component in water resources planning and management. He had also been impressed by the integrity with which the Special Rapporteur had again submitted the "system" concept in the context of the question of use of terms. He had some slight hesitation, however, since he wondered whether that concept might not give rise to problems as far as practical application of the articles was concerned. As already pointed out, it might not always be easy to determine the physical relationship between groundwater and other hydrographic components of a watercourse system. Moreover, it was difficult for a layman like himself to

understand what criteria would be used to separate one groundwater component from another. The practical difficulties which could ensue in the application of the "system" concept might become a source of unnecessary dispute between two or more States.

39. One possible solution might be to omit the word "system" from the proposed article—in which connection he agreed that there was no substantive difference between alternatives A and B, on the understanding that groundwater should be included as a hydrographic component. That would preclude the likelihood of a dispute between watercourse States and in particular between States that shared the same groundwater resources. Although the criterion of the relative international character of the watercourse could be used to differentiate between kinds of groundwater, there were a number of drawbacks and it would be better not to use it. In short, the "system" concept, though sustainable in theory, could give rise to problems in practice.

40. The Special Rapporteur's seventh report contained a diagram depicting the hydrologic cycle. Although the diagram was most instructive he saw the hydrologic cycle in a far wider context which would encompass, for instance, a typhoon that originated in the South Pacific causing heavy rainfall in a number of countries such as China, Japan and the Philippines.

41. Mr. SOLARI TUDELA said that, like other members, he was in general agreement with the definition laid down in the proposed article on use of terms. Either of the proposed alternatives would do, since they were much the same, and what mattered in a definition was content. He none the less had a slight preference for the "system" approach.

42. It seemed that the definition referred solely to groundwater connected with surface water, and not to confined water, since it referred to "groundwater and canals, constituting by virtue of their physical relationship a unitary whole". Since confined water lacked that physical relationship and thus did not form part of the "unitary whole", it must fall outside the definition. Consequently, he would like to know how the Special Rapporteur proposed to deal with confined water—whether under a new set of draft articles or under a rule dealing with confined water in the present draft, on either first or second reading.

43. He agreed that the concept of the "relative international character" of a watercourse would give rise to uncertainty and should therefore be abandoned. He also concurred with the proposal to reverse the order of the articles on scope and on the use of terms, so as to follow the order adopted in other codification conventions.

The meeting rose at 11.50 a.m.

2217th MEETING

Friday, 31 May 1991, at 10 a.m.

Chairman: Mr. César SEPÚLVEDA GUTIÉRREZ

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf. Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)² (*continued*)

1. Mr. BEESLEY said that, like the earlier ones, the Special Rapporteur's seventh report was exemplary in that it dealt with the basic and secondary issues arising from the topic in the context of some more general problems which also had to be taken into account by the Commission. He had been right to include some technical materials in his report which would enable the members of the Commission—at the time when the Planning Group was discussing the need to consult experts—to familiarize themselves with matters in fields about which they knew very little. While recognizing that it was not applicable in all cases, he fully supported that very original approach, which opened up new horizons for the Commission.

2. The nature of the instrument on which the Commission was working called for some observations. The first was that it would probably become a framework agreement which could not be imposed on States. States might decide at a diplomatic conference to accede to it, but the rules it contained would always be residual. The text was thus in some ways comparable to an optional protocol. States could either accept or reject it or they could decide to apply it in so far as its provisions were not contrary to those of legal instruments already in force. Various methods could be used for that purpose, including that of reservations, which was criticized because of the abuses to which it gave rise, but to which no one had apparently objected during the debate. Without underesti-

ating the value of its work to writers of articles, to the legal profession in general and sometimes even to international courts, the Commission should therefore not forget that the text it was drafting would serve only as a framework agreement; that would help it solve outstanding problems and face the continuation of its work calmly and confidently.

3. With regard to the draft article, he said that, as stated in the report, all components of the same hydrographic system, even those which might appear autonomous, were actually interrelated. The existence of those natural links was not enough to dictate the regime applicable to watercourses, but it was a fact which could not be ignored. If the Commission did not wish to engage only in a codification exercise, but also meant to contribute to the progressive development of the law, it had to take account of the real world and, in particular, of the now well-known relationship between the various components of the environment.

4. In particular, the draft would be incomplete if it did not deal with groundwater. But, there again, there was no need to include all groundwater in the scope of the draft. His own preference would be to extend the scope of the draft to free groundwater and leave aside confined groundwater, even if the distinction between those two categories of waters was hardly a scientific one.

5. Glaciers, another component of the hydrographic system, should also be covered by the draft articles, but he would not pursue that point if the other members of the Commission were against it.

6. The time had come to adopt an approach which would reconcile the problem's environmental dimension with its political and legal dimensions. There would be no sense in simply rejecting the principle of State sovereignty by saying that it was outdated: States were not about to disappear and they would always tend to want to keep control of their resources and be the only ones to decide how they should be protected and utilized. If the Commission wanted its work to benefit future generations, however, it had to take account of ecological realities as well and, in particular, of all the components of hydrographic systems. Otherwise, its text would be of no use in solving the increasingly serious problems that would inevitably arise in future in the field under consideration.

7. Such an approach was not without precedent: the United Nations Convention on the Law of the Sea would not have seen the light of day if it had not reconciled opposing principles (State sovereignty, on the one hand, and freedom of the high seas, on the other), defined new concepts (economic zone) and formulated new rules (freedom of transit). The international community had shown on that occasion that it was capable of overcoming problems and finding innovative solutions. That was what the Commission should try to do in offering States guidelines which they could follow if they deemed fit. The apparent contradiction between ecological and political or legal imperatives should not be allowed to paralyse the Commission's action.

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For text, see 2213th meeting, para. 66.

8. In his view, the concept of the relative international character of international watercourses could safely be abandoned even if it was still being used at present.

9. As to the structure of the draft, he could see no objection to reversing the order of articles 1 and 2, as proposed by the Special Rapporteur.

10. On the subject of the use of terms, he noted that the working hypothesis adopted in 1980³ and used by the members of the Commission since that time in no way prejudged the definition of an international watercourse that would eventually be adopted.

11. Referring briefly to some passages of the report which had given him food for thought and on which he would have wished to be able to comment at greater length, he said that, in the section dealing with the components to be included in the definition of an international watercourse in particular, the Special Rapporteur had very successfully summed up the consequences of the unitary nature of hydrographic systems by stating that:

Unless the scope of the draft articles was limited to contiguous watercourses and boundary lakes—a suggestion that had not been made in the Commission to the knowledge of the Special Rapporteur—the rules of the draft by their very nature will require watercourse States to consider the possible impact on other watercourse States of activities that may not be in the immediate vicinity of a border . . . The same would be true of the capacity to cause appreciable harm. For example, toxic chemicals discharged into a minor watercourse flowing into a boundary lake might ultimately make their way across the lake, causing harm on the other side of the border to another watercourse State.

12. Still on the subject of the definition of the term “international watercourse”, the Special Rapporteur was right to state that a definition that focused upon the portion of a stream, lake, etc., that formed or crossed an international boundary would seem too narrow to be helpful to those responsible for applying the draft articles.

13. The passage on free water was also of great interest. By stating that water was constantly in motion, the Special Rapporteur accentuated an ecological reality which the Commission absolutely had to take into account. An equally important reality, namely, that water was an enduring yet finite resource on which the Earth’s burgeoning human population was placing ever-increasing demands, was likewise recalled.

14. He had also taken note with interest of the percentages given by the Special Rapporteur, for example, regarding the amount of fresh water “locked” in polar ice-caps and glaciers, and of the fact that a majority of the world’s population was currently dependent upon groundwater.

15. The Special Rapporteur, who considered that surface waters and groundwater were all interrelated, referred in support of his theory to a specialized work which stated that:

There are enough examples of streamflow depletion by groundwater development, and of groundwater pollution from wastes released into surface waters, to attest to the close though variable relation between surface water and groundwater.

In his own view, however, that was going too far: not all groundwater was necessarily related to surface water.

16. With regard to the article proposed, he did not yet want to choose between alternatives A and B because they might differ more than appeared at first sight. He would wait until the Special Rapporteur had given further explanations before taking a stand.

17. It was regrettable that no agreement had yet been reached in the Commission, but that was no surprise. It was even inevitable because, in the present case, the Commission had no text to rely on. Nothing had yet been done in that field and it was up to the Commission to make the first choice.

18. Mr. ARANGIO-RUIZ said that the current discussion and the Special Rapporteur’s report revealed the eternal dilemma between safeguarding State sovereignty and equality, on the one hand, and, on the other, promoting international solidarity and friendly and effective cooperation in solving the problems of a world that was increasingly proving to be an indivisible physical, economic and social entity. The Commission was thus torn between two imperatives: avoiding the adoption of a text which would reduce the number of States willing to accede to a convention on watercourse law and promoting solidarity and cooperation, which was becoming an increasingly urgent matter.

19. With regard to technical choices, he considered that the Commission should rely on the expertise the Special Rapporteur had acquired in the field, particularly since the topic was less strictly legal than other topics and any legal choices in the matter would be closely interrelated with technical matters. It must also be remembered that any choices made by the Commission, whether legal or technical, would be subject to careful scrutiny both by the Sixth Committee and by States themselves, which, at the diplomatic conference, would make the final choices from which a convention would emerge that could be signed and ratified.

20. As to the key issue of the definition of a watercourse system, he was in favour of the adoption on first reading of the Special Rapporteur’s proposal, possibly adapted by the Drafting Committee. Subject to the choices to be made by the General Assembly and Governments, he was particularly in favour of the inclusion of groundwater in the definition of a watercourse system. The reasons which justified that inclusion had been referred to by Mr. Barboza (2216th meeting) and explained at length in the Special Rapporteur’s report. In any case, the Commission could always revise its text on second reading, in the light of the reactions of the Sixth Committee and Governments and, in particular, of Member States with a major interest in the adoption of one regime rather than another.

21. If that solution, which could be described as maximalist, was unacceptable to the Drafting Committee, the question might be presented in the form of an alternative and the Commission could then draw the attention of the General Assembly to the importance of the choice to be made in that regard. As a matter of fact, drawing the groundwater issue to the General Assembly’s attention

³ See 2213th meeting, footnote 12.

would be necessary even if the Drafting Committee did agree on a single solution. It might also be useful for a reason which went beyond the present debate and which was connected with the very great importance of water resources from the viewpoint of the law of the environment and development. The environment should not be protected at the expense of development. As it happened, the Commission was committed to making a contribution to the conference which would take place on that topic in Brazil in 1992. The working document which was being prepared for that purpose under Mr. Barboza's guidance should place as much emphasis as possible on the problem of the groundwater regime.

22. Mr. THIAM thanked the Special Rapporteur for his very instructive report and, in particular, for the scientific information it contained. With regard to the proposals that had been formulated, he agreed with the idea of reversing the order of the first two articles so as to define the scope of the draft before dealing with the definition of terms. The "system" concept appeared to be self-evident and it was therefore unnecessary to define it explicitly. He accordingly preferred alternative B of the article which was proposed: the drafting was clearer and thus less likely to lead to confusion than that of alternative A.

23. The key issue dealt with in the report—whether groundwater was sufficiently autonomous to be the subject of a separate codification or whether it should be covered in the draft convention—was a question that was difficult for persons new to the subject to answer because the distinction between confined and free waters was not easy to understand. Moreover, the Special Rapporteur himself was very cautious on that point because he was proposing to include groundwater in the draft while considering the possibility of a separate codification for groundwater which was really independent, in other words, not related to surface water. The solution was an elegant one and would make it possible not to take a decision on a very technical question, to which it was difficult to give precise and definitive answers without having very broad knowledge. The fact that the Special Rapporteur had preferred to formulate general principles without going into certain questions in depth was a matter not only of caution, but also of necessity, for States would not accept a text which, although it was presented as a framework agreement, tried to bind them in too constraining a manner.

24. He once again congratulated the Special Rapporteur on the work which he had done: it would be very useful to the countries of the third world, and in particular the countries of the Sahel, which were especially poor in water resources.

25. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his report, which contained a great deal of interesting documentation, particularly from the technical point of view. He said that it was essential, when formulating legal rules, to take account of concrete realities. The Commission's work must, however, be primarily of a legal nature: in the present case, it had to define the legal meaning and content of concepts to which it wanted to give the form of legal rules, but those concepts were in the process of changing and the terms to be used to

express them had to be defined precisely. That was not, however, the only objective of the Special Rapporteur's report, which in fact summed up all the work done so far so that the Commission could decide what it was supposed to study and, consequently, what the scope of the draft articles should be.

26. The most important question in that regard was that of the definition of the "system" concept. That of groundwater, as the Special Rapporteur indicated, had already been the subject of many meetings and agreements or draft agreements, such as the Bellagio Draft. As Mr. Thiam had said, the members of the Commission did not have the necessary scientific knowledge to study the question in depth, but they did know that groundwater represented 90 per cent of the water consumed by mankind, accounted for most of the world's water resources and was even the sole source of fresh water in some countries, such as those of the Sahel. The decision whether or not to include groundwater in the draft articles should thus not be taken lightly. Such a vital question must be discussed in depth so that the Commission could adopt a well-reasoned position.

27. Needless to say, everything would depend upon the definition of the term "watercourse". The "system" concept was not new; it had been implicit in the term "hydrographic basin" or "river basin", which many United Nations bodies and international law organizations had considered more suitable. Clearly, a watercourse often consisted of a number of components situated in several States, each with its own legal system. Hence the concept of the international character of a watercourse, the case of the Danube being an excellent example. It was thus essential to regulate the use of those watercourses and that was why the Commission had been entrusted with the task of drafting a set of articles to provide an appropriate legal framework in the form of general provisions that could serve as a guide to States for concluding agreements or treaties on the use of shared watercourses. In those conditions, he was inclined to agree with the Special Rapporteur that the concept of the "relative international character" of a watercourse could be deleted. Furthermore, if the concept of "watercourse system" or "hydrographic basin" was adopted, it was clear that the use of all the components constituting that "system" or "basin" must be regulated in such a way that it would have no effect on other watercourse States or on the watercourse regime itself. The concept of relativity would be valid only if it could be demonstrated that certain wells or watercourses situated in a given State were used in that State in a manner that did not cause any harm to another State or to the watercourse itself.

28. The terms used in the draft articles therefore had to be defined carefully. In that regard, he noted that some of the articles already adopted on first reading contained terms that did not have legal content. That was the case of the concepts of equitable and reasonable utilization, optimum utilization, adequate protection and the obligation to cooperate. What was equitable, reasonable or adequate for one was not necessarily so for another; it was also difficult to make cooperation, apart from that in favour of the peace and security of mankind, a legal obligation. Those examples proved that the text was not

ready. In that context, it should be noted that, although the Commission supposedly adopted a number of articles on first reading, in reality it neither considered the texts prior to referring them to the Drafting Committee nor did it have time to do so at the end of the session, once the Drafting Committee had taken a decision. Thus, it was the latter's decision that was adopted—in what was a completely unjustified reversal of roles.

29. It was important to decide whether or not the definition of an international watercourse should include the "system" concept and whether or not it should cover groundwater. In his view, the "system" concept should be retained because it was consistent with the concept of the hydrographic basin, which the Commission had implicitly used as a basis for so many years. The examples of the Nile, the River Plate, the Amazon and the Senegal River showed that such basins were made up of a number of components, including, it should be recalled, the human element. However, as the Commission had not yet decided on the content of alternatives A and B proposed by the Special Rapporteur, he was unable to choose between the two. As he saw it, the first reading of the draft articles had not been concluded, far from it. The Commission must avoid at all costs referring to the Sixth Committee or a diplomatic conference a draft which would then be completely recast because the terms used did not have legal content. That would be regrettable in a text that was supposed to be the work of legal experts.

30. Mr. AL-KHASAWNEH, commending the Special Rapporteur on his latest report, which enabled him to understand the theory of the water cycle, said that he had no objection to reversing the order of the first two articles on the use of terms and the scope of the articles, respectively, for the reasons explained in the report.

31. With regard to the question of groundwater, any separation of that component from surface water, except if the groundwater could be classified as confined, was bound to be arbitrary. Groundwater was not taken into account in many international agreements, such as the 1959 Egypt-Sudan agreement on the division of the Nile waters,⁴ although the groundwater concerned was plentiful and of good quality. It was possible to predict, however, that, with the increasing competition for water resources due to population pressure and the greater awareness of the value of groundwater, the future would certainly see a more comprehensive approach to the question. With that in mind and in order to bring the law on the question into line with hydrographic reality, he supported the explicit reference to groundwater in the two alternatives proposed for the article on the use of terms. He was, however, duty-bound to recall that the Commission and the Sixth Committee had proceeded in a way not unlike that of the negotiators of the Egypt-Sudan agreement in that groundwater and its impact on the draft articles had not been taken sufficiently into account. Yet the number of watercourse States was likely to increase as States whose border was not crossed by an international river or other form of surface water discov-

ered that their groundwater made them watercourse States.

32. In its 1987 report to the General Assembly⁵ and in its commentaries on the articles in part I of the draft,⁶ the Commission had indicated that watercourse States could be identified by simple geographic observation in the vast majority of cases. If groundwater was included in the draft, however, it would take more than simple geographic observation to ascertain which States were watercourse States. Thus, the criterion of simple geographic observation, which had been the assumption upon which the Commission and the Sixth Committee had worked, was inadequate on that point and it was regrettable that that aspect had not been considered at an earlier stage in the work on the topic.

33. Confined groundwater should be dealt with as a separate topic in the same way in which the Commission had dealt with the law of treaties or the law of the succession of States.

34. With regard to the "relative international character" of a watercourse, he had long been persuaded that, from a scientific point of view, the system approach or drainage basin approach corresponded more to hydrologic reality than the simple watercourse approach. It should be remembered, however, that the difference between them was one of degree rather than of kind. Total abandonment of relativity could be achieved only if all the waters of the Earth which constituted a unitary whole could be made subject to a single legal regime, which would clearly be unmanageable and absurd. Relativity was therefore the price that had to be paid for manageability. The system or drainage basin approaches were also likely to be opposed in the Sixth Committee because of their territorial connotations. In the present case, however, he was concerned less with the prospects for acceptability of the draft than with the question of fairness. If either approach was adopted, practically all of the territory of small States would be subject to international regulation. That in itself was unobjectionable, though the tenacity of the exclusivist tendencies of States in the matter of sovereignty should not be underestimated. The problem was, rather, that the draft, which was characterized by elastic substantive rules on equitable utilization and prevention of appreciable harm, gave prominence to negotiations and negotiations, by definition, would reflect the relations between watercourse States. It was reasonable to expect small or weak States, in other words, the majority of States, to be reluctant to accept an approach the effect of which would be to subject much of their territory to a regime which was unsuitable for determining the rights and duties of each of them and where negotiations would inevitably work against them.

35. In short, while he was not opposed to the system or drainage basin approach, he believed that its obvious merits were offset by its inherent dangers in view of the structure of the draft itself. Had it been a convention

⁴ United Nations, *Treaty Series*, vol. 453, p. 64.

⁵ *Yearbook . . . 1987*, vol. II (Part Two), pp. 18 *et seq.*

⁶ *Ibid.*, pp. 25 *et seq.*

with detailed substantive rules, that approach would have had his total support.

36. He expressed gratitude to the Special Rapporteur not only for his latest report, but also for his earlier ones. Any progress made on the topic was due solely to the efficiency and perseverance of Mr. McCaffrey who, as Special Rapporteur, would leave a very definite and long-lasting imprint on the law of the non-navigational uses of watercourses.

37. Mr. RAZAFINDRALAMBO said that the Special Rapporteur's seventh report was of undoubted scientific merit and marked the culmination of a major endeavour. In his view, the Commission's consideration of that report would not alter appreciably the conclusions the Special Rapporteur had drawn from international agreements and from the work of various international bodies on the subject. He agreed that the order of the first two articles should be reversed and that the definitions at present to be found in a number of different articles should be brought together in the article on the use of terms.

38. In his opinion, the solution to the problem of having to choose between the terms "watercourse system" and "international watercourse" lay in the determination of the scope of the draft. The scope of the subject that was the crux of the study had broadened over the years. Initially, it had been confined to the legal problems involved in the use of "international rivers". Then the term "international watercourses" had been introduced. After the work of a previous Special Rapporteur, Mr. Schwebel, the Commission had opted for the term "international watercourse", at the same time adopting, albeit only provisionally, the term "international watercourse system". The Commission's intention had apparently been to broaden its study so as to cover a group of hydrographic components which were characterized by their physical interdependence and thus constituted a unitary whole. That was how the Commission had come to abandon the working hypothesis based on the study of international rivers alone and how that term had come to be replaced by the term "international watercourses". Although in everyday language the difference might appear to be merely one of drafting, that choice seemed to meet with general agreement. At any rate, no one appeared seriously to question the composition of the hydrographic components of watercourses or the forms they could take. To the extent that only surface waters were concerned, there was therefore virtually unanimous agreement. In his view, the word "system" best expressed the idea of hydrographic unity, the word "basin" apparently having been dropped, more for terminological than for legal reasons. Also, the words "international watercourse", used on their own, would not altogether cover certain components of the unitary whole such as lakes and glaciers.

39. It remained to be seen whether groundwater should also be considered as forming part of the system. Many members of the Commission refused to accept that idea, since they feared that it would be tantamount to making the whole, or almost the whole, of the territory of some States subject to the draft, which would then apply to all water resources and not just watercourses. In cases where none of the hydrographic components of the sys-

tem was predominant and took precedence over the others, that fear was not totally unfounded; and watercourse systems composed solely of surface waters were conceivable. What would be the position, however, if the converse were the case, namely, where a system was composed solely of groundwater? The Special Rapporteur gave a partial reply to that question in his report and quoted an OECD recommendation which was accompanied by the following explanatory note:

Underground and surface waters constitute a closely interrelated hydrologic system

That was the general position. In his view, however, even in the, doubtless rare, case in which there was apparently no such interaction (he was thinking, for instance, of confined aquifers), there should be no problem, as the States where such confined groundwater existed would probably not ratify the convention.

40. In the interest of clarity, however, it would be advisable to deal separately with groundwater and to make it clear that the application of the draft to groundwater was dependent on the existence of a close link with the other components of the system. To that end, the last part of paragraph (a) of both of the alternatives proposed for the article on the use of terms could be formulated as a condition, and not a fact, to read: ". . . provided that they are linked together physically and constitute a unitary whole". Otherwise, it might not be possible to meet the legitimate concern of those who feared that the scope of the draft would extend to virtually all countries and even to islands connected to the mainland by the continental shelf.

41. The Special Rapporteur also raised the question whether watercourses should be regarded as having a "relative international character", as justified by the fact that parts of the waters in one State might not be affected by or did not affect uses of waters in another State. The Special Rapporteur considered that the concept of "relative international character" should be abandoned because it was incompatible with the hydrologic reality recognized in the Commission's working hypothesis, namely, that the hydrographic components of a watercourse system constituted by virtue of their physical relationship a unitary whole. However, as he himself had already stated, the physical relationship should not be a mere fact: it should be a prerequisite for a unitary whole. Once that was so, the "relative character" would follow the same logic: some parts of the waters would be excluded because they did not satisfy the prerequisite for a unitary whole, there being no physical link. Perhaps the emphasis should not be placed on the uses, but on the link that existed before the use. None the less, the idea of relative character was, in his view, a valid one.

42. The Special Rapporteur, of course, expressed doubts about the practical application of that concept because he felt that it could eviscerate entire sections of the draft articles. Those concerns, if justified, fell within the context of the working hypothesis which the Special Rapporteur had called a "scaffold". As that scaffold was by definition of an external nature, it could be withdrawn without harm to the actual construction, namely, the draft. "Relative character" remained a valid explanation in so far as it referred to the physical link as a

condition *sine qua non* of the unity of the whole that constituted the system.

The meeting rose at 11.50 a.m.

2218th MEETING

Tuesday, 4 June 1991, at 10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, 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. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Add.1, ILC (XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)² (concluded)

1. Mr. McCaffrey (Special Rapporteur), summing up the discussion of the seventh report, said that members seemed to have unanimously endorsed his proposal to reverse the order of articles 1 and 2, so that the article on scope would precede the one on the use of terms. Similarly, there was no objection to moving the definition of "watercourse State" from article 3 to the article on the use of terms.

2. Three main substantive issues had been addressed in the debate, namely, whether the term "watercourse" should be defined as a "system" of waters; whether groundwater should be included in the concept of an international watercourse or international watercourse system; and whether, for the purposes of the draft articles, a watercourse should be regarded as having a "relative international character".

3. On the first point, the great majority of members who had addressed the question favoured the "system" concept, some 13 members saying that it should be employed in the draft and two being in favour of using it under certain conditions. Several other members had not explicitly endorsed the concept, but had stated that they supported his proposals in that regard. Some of those who endorsed the use of the "system" concept had also suggested that the Helsinki Rules idea that the waters must flow into a common terminus should be included in order to keep the scope of the articles within reasonable bounds.

4. Two members were opposed to defining a watercourse as a "system of waters", and two others had reservations under certain conditions. Yet even one of the two members speaking in opposition to the "system" concept had not rejected it outright, and had said that an international watercourse could be treated as a system, although only in the limited sense of its uses causing appreciable harm or material injury to co-riparian States. Another of those members had said that States generally used the term "basin" rather than "system" and that the Commission should not expand the scope of the topic beyond that of watercourses, which was already broader than "rivers". As discussed in his report, the practice of States which employed the term "basin" actually supported use of the "system" concept. Furthermore, the question was not whether "watercourse" was a broad or narrow term as such, but what the term meant as far as the draft was concerned. The overwhelming support for use of the "system" concept provided a clear mandate to the Drafting Committee and the Commission to use that term in defining the expression "watercourse".

5. On the question of including groundwater in the concept of a watercourse, members were more divided, but there too, by his count, 12 were in favour, only five were against, and one member would exclude groundwater under certain conditions. The condition most often mentioned by those in favour was that the groundwater should be related to surface water; in particular, confined groundwater should not come within the scope of the draft. Several members had even suggested that confined groundwater should be the subject of a new topic on the Commission's agenda; if it was, in fact, decided not to include that form of groundwater, he would support that idea. Another proposal by several members was that, to be included, the groundwater must flow towards the same terminus as the surface water to which it was related. That was consistent with the similar proposal made with regard to the "system" concept.

6. Several arguments had been advanced against including groundwater. One or two members had said that, in discussing the draft articles over the past 5 or 10 years, they had always had rivers, and possibly lakes, in mind, but certainly not groundwater. Thus, they had not considered how some of the provisions adopted by the Commission might apply to groundwater. In that regard, he would point out that the provisional working hypothesis, first accepted in 1980,³ expressly referred to groundwater as one of the components of an international

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For text, see 2213th meeting, para. 66.

³ See 2213th meeting, footnote 12.

watercourse system. Perhaps he should have set out the hypothesis at the beginning of each of his reports to ensure that the Commission did not lose sight of it. At the present stage, however, rather than exclude such a vital component of the system, the sounder course would be to retain it and to review the question on second reading in light of the comments of Governments.

7. A second argument had been that, given the size or number of international watercourses flowing through some countries their entire territory would be subject to the draft articles if the concept covered groundwater. That, of course, had not been demonstrated to be the case and, for the time being, was only a hypothesis. But even if it were true of certain countries, whose number, in his estimation, would be small, it did not appear to be a technical or legal argument against the inclusion of groundwater. It was certainly not a line of reasoning based on State practice, the conclusions of meetings held under United Nations auspices or the work of international bodies, nor did it appear to be based on considerations of equity, since it would not seem to be unfair that a State which presumably derived substantial benefits from its international watercourses should also be responsible for any harm to other States resulting, for example, from pollution or excess depletion of groundwater supplies, especially where such supplies were fed by the international watercourses concerned. Thus, that argument seemed to be principally political and was precisely the kind of point that was suitable for comments by Governments at the first reading stage.

8. A third argument made for excluding groundwater from the draft articles was that it was difficult to determine where the groundwater was, in which direction it flowed, and so forth. Along similar lines, one member had noted that the commentary to article 3 stated that watercourse States could be determined in the vast majority of cases by simple observation, and had apparently taken that to imply observation of the surface of the land. That statement from the commentary would remain accurate if groundwater was included, particularly if the draft covered only groundwater related to surface water. The reason was that, far more often than not, a State whose groundwater contributed to an international watercourse system would also have surface water that formed part of the system. Thus, as stated in the commentary, in the vast majority of cases, watercourse States could, in fact, be determined by simple observation of the surface waters. In the relatively rare instances where a State contributed only groundwater to an international watercourse system, knowledge of hydrology had progressed to the point that in most cases it would not be difficult to make such a determination. The diagrams and charts in the annex to the seventh report, circulated informally, showed how advanced the mapping of groundwater reserves had become.

9. In short, the debate had strengthened his conviction that groundwater should be included in the scope of the articles, at least in so far as it was related to surface water. Such an approach was also supported by the heavy reliance on groundwater for such basic needs as drinking water, which would increase dramatically in the near future, as populations continued to grow. As illustrated in the diagram showing the elements of a hypo-

thetical international river use system, pollution of surface waters could contaminate aquifers and vice versa, making those precious resources unusable for many human needs.

10. Further support for the inclusion of groundwater was provided by the opinion of specialists and United Nations conferences that groundwater should be managed together with surface water in an integrated manner. As early as 1966, the Helsinki Rules, adopted by ILA, had included groundwater, provided it was part of a system of waters consisting, *inter alia*, of surface waters. The Seoul Rules, adopted in 1986, had simply applied the principles of the Helsinki Rules to groundwater that was not related to surface water. He was confident that the Commission would adopt a position that would not only assist States in the comprehensive management of international watercourses but would also demonstrate that it was in tune with the times and had not ignored the hydrographic imperatives already recognized 25 years previously by ILA.

11. The third major point in the discussion had been whether, for the purposes of the draft, a watercourse should be regarded as having a relative international character. Once again, although opinion was not unanimous, a clear majority was in favour of defining an international watercourse or international watercourse system without reference to the idea of relative internationality. Of the members who had addressed the question, nine thought that the idea of relativity no longer served a useful purpose, while three thought that it did. Three others also seemed to be in favour of retaining the concept, while two appeared to support deleting it, although their positions were not as clear-cut. Those favouring retention of the idea generally thought it necessary to keep the scope of the articles within manageable bounds; those who believed that it was no longer needed felt that sufficient safeguards had already been incorporated into the draft articles and that consequently, the idea of relative internationality was, at best, superfluous.

12. While the origin of the concept was far from clear, in all likelihood it had been included in 1980 as a safeguard, since no articles containing substantive obligations had yet been adopted. At the time, the idea of relative internationality had provided some assurance that the articles would not be extended to cover situations where the actions of one watercourse State would have no effect upon other watercourse States. But as the Commission had adopted the bulk of the draft articles, the requirement of an actual or potential effect could be seen to have been built into the articles themselves.

13. The reasons, however, for abandoning that concept went beyond the fact that it was no longer necessary. As discussed in the report, the notion of relative internationality would seriously interfere with the functioning of the draft articles. For example, a State would not know whether it was a watercourse State unless and until it could be established that parts of the waters in its territory were affected by or affected uses of waters in another State. Thus, it would not know whether or not it had rights and obligations under the draft articles, beginning with article 4. If State A believed it would suffer harm from a measure planned in co-riparian State B, it

would have to wait until the harmful effect occurred in order to demonstrate that it was a watercourse State and entitled to the protection of the draft articles. Yet such a situation was exactly what part III of the draft articles was intended to prevent; the articles therein were designed to deal with potential conflicts among users before positions became entrenched, damage was caused, and the matter escalated into a serious dispute. That same basic problem would impair, if not wholly block, the functioning of the provisions in every part of the draft articles.

14. Specialists in the management and development of international watercourses had stressed that the idea of international relativity would make it extremely difficult for those at the working level to manage and develop the resources of an international watercourse system so as to obtain optimal benefit for all concerned. The Commission should not lose sight of that very important point: in the end, the real test of the draft articles would be whether they could be applied in practice by those whose responsibility it was to protect and manage international watercourse systems.

15. In short, there seemed to be ample support in the Commission for defining the term "watercourse" as a "system" of waters, for including at least certain kinds of groundwater in the components of a watercourse system and for not including the notion of the relative international character of a watercourse in the definition of the expression "international watercourse" or "international watercourse system". He therefore proposed that both versions of the article on the use of terms should be referred to the Drafting Committee for consideration in the light of the debate. As he had indicated in introducing the proposed article and as several members had noted during the debate, the definitions in the two alternatives were the same, but the term defined was slightly different. The discussion of the alternatives had shown a clear preference for alternative A.

16. In the Drafting Committee, consideration might be given to introducing certain changes in the proposed article in the interest of further enhancing its acceptability. The possible changes that had received the most support were, firstly, including groundwater only to the extent that it was related to, that is to say, interacted with, surface water. Hence, confined groundwater would not fall within the scope of the draft articles, nor would aquifers that were not connected with surface water, except possibly those that were intersected by a boundary. The second possible change a number of members had supported was the introduction of a requirement that the waters flow into a common terminus. The effect would be to limit the scope of the draft articles so that, for example, waters in two drainage basins that were connected by a canal would not be regarded as being part of a single international watercourse system. In addition to those possible changes, the commentary to the article on use of terms could carefully explain that the concept of internationality was no longer needed, because it had been incorporated into the articles themselves.

17. He appealed to the Commission not to adopt a definition of the scope of the draft articles that would make them outmoded before they were presented to the

international community. He was not advocating the adoption of a solution that was ahead of its time, but rather one that was consistent with the present understanding of water problems and the imperatives of managing an increasingly scarce resource. The work on the topic of the law of the non-navigational uses of international watercourses would influence not only the behaviour of States, but that of important institutions, such as the multilateral development banks, which looked to the Commission for guidance. The Commission thus bore a heavy responsibility for the manner in which States developed their water resources and, indirectly, other important sectors of their economies, such as agriculture and energy production. Undue conservatism could very well result in increased human suffering and conflicts between States. He was confident that the Commission would make an enlightened choice.

18. Mr. BARSEGOV said that he did not object to referring the draft article to the Drafting Committee, but it was his impression that more than two members had expressed reservations about adopting the term "international watercourse system". To speak of a "system" would be to exceed the mandate given to the Commission by the General Assembly, which had clearly spoken of "watercourses". Many arguments had been advanced by members of the Commission against adopting "watercourse system". In his view, the word "system" should remain in square brackets. When the draft articles were referred to the Sixth Committee, the Commission should include an explanation of the opinion of those in favour of the term "international watercourse system" and of those in favour of "international watercourse", and Governments should then be asked for guidance.

19. The CHAIRMAN suggested that both versions of the article should be referred to the Drafting Committee on the understanding that, whether or not the Committee had time to consider the question and report back to the Commission, the Commission would in due course examine Mr. Barsegov's proposal to request the views of Governments on the issue. If he heard no objection, he would take it that the Commission agreed to that course.

It was so agreed.

Jurisdictional immunities of States and their property (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING⁴

20. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of draft articles 1 to 23 as adopted by the Committee on second reading (A/CN.4/L.457).

⁴ For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook* ... 1986, vol. II (Part Two), pp. 7-12.

21. Mr. PAWLAK (Chairman of the Drafting Committee) said that articles 1 to 15 of the draft before the Commission had been adopted on second reading by the Drafting Committee at the previous session, but the Commission had decided to defer the adoption of those articles so as to have before it the complete set of articles on the topic. At the current session, the Drafting Committee had concluded the second reading of the entire draft, adopting the remaining articles, the titles of parts III, IV and V, paragraph 1 (b) (iv) of article 2, and paragraph 3 of article 10.

22. He suggested that any questions raised with respect to the articles adopted by the Drafting Committee at the forty-second session should be dealt with either by Mr. Mahiou, Chairman of the Drafting Committee at that session, or by Mr. Ogiso, Special Rapporteur for the topic. He, for his part, would confine himself to introducing the additions made by the Drafting Committee to articles 2 and 10.

ARTICLE 1 (Scope of the present articles)

23. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 1, which read:

Article 1. Scope of the present articles

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

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 1.

Article 1 was adopted.

ARTICLE 2 (Use of terms)

24. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 2, which read:

Article 2. Use of terms

1. For the purpose of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(b) "State" means:

- (i) the State and its various organs of Government;
- (ii) constituent units of a federal State;
- (iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
- (iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
- (v) representatives of the State acting in that capacity; -

(c) "commercial transaction" means:

- (i) any commercial contract or transaction for the sale of goods or supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
- (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 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.

25. Mr. PAWLAK (Chairman of the Drafting Committee) said that, on second reading, the Special Rapporteur had proposed an article, at the request of certain Governments, on State enterprises and had introduced the concept of segregated property. It had been the Special Rapporteur's intention to deal with those matters in article 11 *bis* and in the corresponding paragraph 1 (b) (iii) *bis* of article 2. The Drafting Committee, which had discussed the matter at length, had not found the concept of segregated property or the wording and position of the proposed provisions altogether satisfactory but had agreed in principle that a provision should be included in the draft concerning enterprises that were established by a State to perform commercial transactions yet had a separate legal personality from the State. It had further decided that it would be more appropriate to deal with the question in the context of article 10, and he would therefore explain the matter in more detail when the Commission came to that article.

26. Article 2, now before the Commission, was a combination of former articles 2 and 3. The definition of "State" considered by the Drafting Committee at the previous session had contained no reference to agencies and instrumentalities of the State. However, the Committee had now decided to retain the definition of agencies and instrumentalities of the State that it had adopted on first reading as paragraph 1 (c) of original article 3; that latter definition now appeared as paragraph 1 (b) (iv) of article 2. The Committee had also expanded the definition of State. In that connection, reference had been made in the Drafting Committee to a practice that had been fairly frequent after the Second World War and still occurred to some extent, when a State gave a private entity governmental authority to perform acts in the exercise of the sovereign authority of the State. For example, some commercial banks were authorized by a Government to deal with import and export licensing that fell exclusively within governmental powers. To the extent that private entities performed such governmental functions, they should be considered as the State for the purpose of the articles. The reference to "other entities" in paragraph 1 (b) (iv) was meant to cover non-governmental entities which were vested with governmental authority in exceptional cases. That subparagraph limited the definition of State to agencies or instrumentalities of a State and other entities only in so far as such bodies were entitled to perform acts in the exercise of the sovereign authority of the State.

27. Mr. Sreenivasa RAO said that he welcomed paragraph 1 (b) (iv), since the right to immunity for agencies, instrumentalities and other entities which performed State functions should be recognized. He would not object to the adoption of article 2 as a whole, despite the circular nature of the definition laid down in paragraph 1

(c) (i). There was, however, one point about that definition on which he would be grateful for clarification, and it concerned the notion of profit. A transaction entered into by a State or a private entity for the purpose of making a sale or a purchase with a view to earning a profit was clearly a commercial transaction. He wondered, however, what the position would be in the case of a purely financial transaction which was carried out for a public purpose and in which there was no profit motive; such a transaction might well involve the sale of, for instance, goods or services. Should such a purely financial transaction be assimilated to a commercial transaction or should it be treated somewhat differently, particularly since public purpose was one of the criteria recognized under paragraph 2 of article 2, for determining a commercial transaction?

28. Mr. McCaffrey said that, while he would not oppose the adoption of the article, he had some doubts about the inclusion of the words "and other entities" in paragraph 1 (b) (iv). He was not convinced that the kind of situation contemplated occurred frequently enough to warrant the inclusion of those words in the article. In his view, if a separate entity, even a corporate one, was to be regarded as a State, and hence entitled to jurisdictional immunity from the courts of other States, the majority of the shares should at least be owned by the State. In the provision in question, there was no requirement of any legal connection other than that a public function should be assigned to a private entity.

29. He also had doubts about the need for paragraph 2, and particularly the last clause. The first clause would be acceptable, particularly if the word "primarily", which cast doubt on whether a nature or a purpose test was being used, was omitted. The next clause, however, starting with the words "but its purpose should also be taken into account if . . ." did not make it clear whether a nature or a purpose test was being used even though, in the practice of States, the nature test was predominant. He would therefore like to know how the clause would be applied in practice and whether the burden of proof would be on the defendant State. It was a very important point affecting, as it did, all of the articles in parts III and IV of the draft. He would look to the commentary to the article for a further explanation.

30. Mr. Pellet said that, unlike Mr. McCaffrey, he thought the words "and other entities" had a role to play. He did, however, agree with Mr. McCaffrey about paragraph 2 and had fairly strong reservations as to the wording and the substance. The paragraph would not, for instance, permit a court to determine whether there was a commercial transaction, while the words "in the practice of the State which is a party to it" could open the door to much abuse and to highly subjective interpretations. Furthermore, paragraph 3, in the French text, was not altogether satisfactory, the words *ne préjudicient pas à l'emploi* being particularly unfortunate.

31. Mr. Tomuschat said that he was in favour of the words "and other entities" which would take account of the specific situation in which corporate bodies had an important role to play in cooperating in the discharge of public tasks. Even if such cases occurred infrequently, as Mr. McCaffrey suggested, they should not be

left out of account altogether. Furthermore, since it was recognized that agencies, instrumentalities and public bodies could wield public power, it seemed clear that there was no substantive difference between sovereign authority, on the one hand, and other elements of governmental authority, as defined under articles 7 and 8 of the draft articles in part 1 of the topic of State responsibility, on the other. For the sake of clarity, it would be better to delete the word "commercial" from paragraph 1 (c) (i), which contained a circular definition that confounded the elementary laws of logic.

32. He agreed with Mr. McCaffrey that it would have been better to restrict paragraph 2 to the first clause, adopting the nature test, for the use of the purpose test could lead to difficulty. He took it from the text, however, that the two tests were not on the same level and that recourse would be had, in the first instance, to the nature test, and to the purpose test only on a supplementary basis where there was a serious doubt whether a given transaction was of a commercial or non-commercial nature.

33. Mr. Arangio-Ruiz said he agreed with Mr. Pellet that the words "and other entities" added a useful element to the article. He also agreed with Mr. Tomuschat regarding paragraph 1 (c) (i).

34. He was in favour of keeping the text of paragraph 2 as it stood, but an appropriate explanation should be included in the commentary. It was quite clear, of course, that the nature test was the primary test and that the purpose test was only secondary. None the less, he considered that that secondary test should be retained. The words "if, in the practice of the State which is a party to it, that purpose is relevant" did not just mean that the defendant State would simply have to adduce evidence of its practice: the matter was obviously one that the court would have to decide in the light of all the facts.

35. Mr. Barsegov said that he favoured article 2 in the form in which it was proposed. It dealt with a matter of considerable importance, both in theory and in practice. It should be remembered that, in many legal systems, the nature test and the purpose test were given equal importance. The text now being proposed represented a well-balanced compromise.

36. Mr. Díaz González said he agreed with Mr. Tomuschat about paragraph 1 (c) (i). The definition of "commercial transaction" was consistent with the definition contained in a great many national commercial codes.

37. The Chairman said that, if he heard no objection, he would take it that the Commission agreed to adopt article 2.

Article 2 was adopted.

ARTICLE 3 (Privileges and immunities not affected by the present articles)

38. The Chairman invited the Commission to consider the text proposed by the Drafting Committee for article 3, which read:

Article 3. 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 under international law 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 privileges and immunities accorded under international law to Heads of State *ratione personae*.

39. He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 3.

Article 3 was adopted.

ARTICLE 4 (Non-retroactivity of the present articles)

40. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 4, which read:

Article 4. 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 present articles for the States concerned.

41. Mr. Sreenivasa RAO said that he had no objection to article 4 in principle, but the drafting did not make for easy reading.

42. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 4.

Article 4 was adopted.

ARTICLE 5 (State immunity)

43. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 5, which read:

Article 5. 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 article.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (Modalities for giving effect to State immunity)

44. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 6, which read:

Article 6. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State 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.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding;

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

45. Mr. EIRIKSSON suggested that the word "or" should be inserted in paragraph 2 at the end of subparagraph (a) in order to link it with subparagraph (b). A similar change should be made in articles 10, 11, 17, 18 and 19 where the connecting word "or" or "and" should be introduced at the appropriate place.

46. The CHAIRMAN said that the suggestion could be treated as a drafting point and taken up by Mr. Eiriksson with the Special Rapporteur and the Chairman of the Drafting Committee.

47. Mr. McCAFFREY noted that a change had been introduced in paragraph 1 of the article with the words "and shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected". The commentary should make it clear that the passage was not to be construed as an encouragement to the State concerned not to appear before the court.

48. Mr. OGISO (Special Rapporteur) said that the commentary would duly mention that point.

49. Mr. Sreenivasa RAO said that he had no objection to article 6 and disagreed with Mr. McCaffrey. The matter was one of great importance for developing countries. It should not be necessary to appear before a foreign court where the immunity was obvious. The practice of forcing foreign States to appear before the courts involved heavy expense for the States concerned and raised very serious problems for the less developed countries. He therefore urged that the commentary should carefully reflect the point that States were free to appear before the court or not.

50. Mr. McCAFFREY said that he had not suggested that States should be told that they must appear. However, the Commission should not seem to be advising States not to appear. In most cases the jurisdiction of the court was obvious, although the foreign State concerned might not think so.

51. Mr. TOMUSCHAT noted that there did not appear to be any real disagreement between Mr. Sreenivasa Rao and Mr. McCaffrey.

52. Mr. ARANGIO-RUIZ said a State was free to appear before a foreign court or not. That was the position in all national courts and in ICJ. It was, however, in the interest of the State concerned—whether developing or developed—to appear before the court and claim immunity, in order to avoid a decision being handed down against it.

53. Mr. OGISO (Special Rapporteur) said that the commentary would carefully reflect Mr. McCaffrey's point that States should not be discouraged from appearing before the court. It would also mention the reservation by Mr. Sreenivasa Rao.

54. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt article 6, on the understanding that the commentary would cover the points mentioned by the Special Rapporteur.

Article 6 was adopted.

ARTICLE 7 (Express consent to exercise of jurisdiction)

55. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 7, which read:

Article 7. Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

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

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 7.

Article 7 was adopted.

ARTICLE 8 (Effect of participation in a proceeding before a court)

56. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 8, which read:

Article 8. 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 the proceeding; or
- (b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

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

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted

as consent by the former State to the exercise of jurisdiction by the court.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 8.

Article 8 was adopted.

ARTICLE 9 (Counter-claims)

57. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 9, which read:

Article 9. Counter-claims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim 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 the court in respect of any counter-claim 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 the court in respect of the principal claim.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 9.

Article 9 was adopted.

ARTICLE 10 (Commercial transactions)

58. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 10, which read:

Article 10. Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

- (a) in the case of a commercial transaction between States;
- (b) if the parties to the commercial transaction have expressly agreed otherwise.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State to perform exclusively commercial transactions which has an independent legal personality and is capable of:

- (a) suing or being sued; and
- (b) acquiring, owning or possessing and disposing of property including property which the State has authorized it to operate or manage.

59. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in connection with article 2, he had explained the Special Rapporteur's proposal on State enterprises and entities engaged in commercial transactions. In the economic system of some States, certain transactions, which were characterized under the present articles as commercial, were conducted by enterprises and entities established by Governments and given by them

legal personality, independent from the State, to conduct those transactions. Therefore, in the event of a dispute, the independent legal personality of those entities should be recognized and State immunity from jurisdiction should remain intact. The claimant could only sue the enterprise or entity and collect from its assets.

60. Article 10 was an appropriate place for a provision on the commercial function of those entities, since the article dealt with "commercial transactions", and paragraph 3 had been added in order to deal with the commercial transactions of such State enterprises or entities. Under paragraph 3, the State enterprises concerned were required to have certain qualifications. In the first place, they must have been established by a State exclusively to carry out commercial transactions. In the second place, the enterprise or entity must have an independent legal personality, personality that must include the capacity to (a) sue or be sued; and (b) acquire, own, possess and dispose of property, including property which the State had authorized the enterprise or entity to operate or manage.

61. It would be noted that the requirements of subparagraphs (a) and (b) were cumulative; the presence of both was necessary. In addition to the capacity to sue or be sued, the enterprise or entity must also satisfy certain financial requirements as stipulated in subparagraph (b). The Drafting Committee had considered that the entities concerned must not be permitted to conceal their property behind the State and thus avoid claims from creditors. Usually, the State put at the disposal of the entity some State property to be operated or managed by it. In addition, those entities could themselves acquire property through their commercial transactions. Under subparagraph (b), the enterprises or entities must be capable of acquiring, owning or possessing and/or disposing of their property, namely, the property that the State had authorized them to operate or manage as well as the property they themselves gained as a result of their operations. The term "disposing" was essential because it made the property of the entities potentially subject to attachment for satisfaction of creditors.

62. Mr. EIRIKSSON suggested that the word "or" should be used in paragraph 2 to connect subparagraphs (a) and (b). A comma should be introduced in subparagraph 3 (b), after "property" and before the words "including property which the State".

63. Mr. McCaffrey said that he had serious reservations about the substance of paragraph 3, which had been introduced to meet the concerns of a limited number of States and the provisions of the paragraph were likely to thwart the whole object of the draft articles. The entire purpose of the draft was to ensure the enforcement of commercial transactions and the performance of contractual obligations. It must be remembered that State enterprises might be undercapitalized, the result being that creditors could not recover the amounts due to them.

64. Again, the first part of paragraph 3 was inadequately drafted. It said that the immunity from jurisdiction enjoyed by a State "shall not be affected with regard to a proceeding which relates . . .". The intention was perhaps to say that the immunity of the State "shall not be affected" by the fact that a proceeding relating to

a commercial transaction of a State enterprise was initiated.

65. Mr. FRANCIS said that he was speaking also on behalf of two members who were absent, namely Mr. Njenga and Mr. Koroma. He strongly supported article 10 and expressed gratitude to the Drafting Committee for inserting paragraph 3.

66. Mr. Sreenivasa RAO said he disagreed with Mr. McCaffrey's remark that paragraph 3 concerned only a limited number of States. In any case, from a perusal of the draft it was not difficult to see that many of the articles were based on the legislation and practice of only a few States. It was worth recalling that some members had made suggestions on the subject-matter of paragraph 3 that went further than the text now before the Commission. Although that text was not fully satisfactory to them, those members were prepared to accept it in a spirit of compromise. He too would accept it in that same spirit, despite its limitations. For example, the use of the word "exclusively" to qualify commercial transactions was not satisfactory. It was not uncommon for a State enterprise or entity to perform governmental functions, apart from commercial transactions.

67. He failed to understand the argument about under-financing. A State entity would have certain property allocated to it, and consequently, those who dealt with that entity would know where they stood and decide whether to carry out transactions with it.

68. Mr. PELLET said that, while he was prepared to accept paragraph 3 as a compromise solution, he was less than enthusiastic about it, for reasons closer to Mr. Sreenivasa Rao's than Mr. McCaffrey's. Introducing the criterion of the purpose for which a State established a State enterprise was dangerous, although possibly less so in the context of article 10 than elsewhere. Again, the last part of the paragraph, beginning with the words "which has an independent legal personality", was redundant and therefore infelicitous. He agreed with Mr. McCaffrey's criticism of the phrase "affected with regard to a proceeding", which, incidentally, was even less clear in French than in English, but did not share his fears about the possibility of a State enterprise having insufficient funds. The same risk existed in the case of purely private enterprises, and ordinary law was applicable in both cases. In short, the idea behind the text was satisfactory, but the drafting was not.

69. Mr. SHI said that he could not agree with the views on paragraph 3 expressed by Mr. McCaffrey. It was incorrect to think that the paragraph had been included to meet the concerns of a limited number of States. Today, the vast majority of States, not only developing but also developed, had State enterprises. Second, the allegation that State enterprises were often undercapitalized reflected a prejudiced or discriminatory way of thinking. He could not guarantee that all State enterprises in the world were not undercapitalized, just as no one could guarantee that all private enterprises were not undercapitalized; indeed, there were many cases of financially weak or unsound private enterprises, or even of fake enterprises which did not actually exist in law or in reality. It was, of course, true that private enterprises were independent of the State, but so were State enter-

prises in both law and practice. Why should the State be responsible for an independent State enterprise? If the State were to be held liable for liabilities which an independent State enterprise might not be able to meet, then the State of which a private enterprise was a national should also be held liable for liabilities which that private enterprise could not meet. If paragraph 3 could not stand for the reason that State enterprises were often undercapitalized, then a new article should be included in the draft to the effect that, if a private enterprise proved undercapitalized or financially weak or unsound, the State of which it was a national could be sued in a foreign court in a dispute between a private person and that private enterprise.

70. Mr. GRAEFRATH said that he was in favour of paragraph 3, which was the outcome of lengthy and serious consideration. The provision concerning State enterprises was, in his view, absolutely necessary under prevailing economic conditions. However, he doubted the usefulness of the word "exclusively" and would prefer to see it deleted.

71. Mr. MAHIU, speaking as the former Chairman of the Drafting Committee, explained that paragraph 3 had not, in fact, been considered by the Committee under his chairmanship. Speaking as a member of the Commission, he was in favour of adopting the paragraph even if the drafting was not entirely satisfactory. He agreed with Mr. Graefrath, however, that the word "exclusively" was unnecessary. As to Mr. Pellet's remark about the second part of the paragraph, the definition was indeed somewhat redundant, but in the case in point an excess of clarity was hardly a fault. With those reservations, he endorsed the paragraph.

72. Mr. BARSEGOV said that the article under consideration, and particularly paragraph 3, was extremely important in that it reflected the profound economic changes currently taking place in a number of countries. As other members had rightly pointed out, the provision in paragraph 3 was also highly important to all developing countries and even to many developed countries traditionally associated with an economic system of private ownership. With regard to the possibility of undercapitalization mentioned by Mr. McCaffrey, he agreed with Mr. Shi that the same possibility existed in the case of private companies. To fail to adopt the provision on such grounds would be to encourage a discriminatory approach; if States were to be held liable for the financial transactions of State enterprises, they should also be liable for those of private companies which were their nationals. He agreed that the text under consideration was not entirely satisfactory, and would personally have preferred paragraph 3 to form a separate article of the draft. However, the text did represent the result of lengthy discussion in the course of which full account had been taken of the law and experience of Western European and other developed countries. It was well-balanced and acceptable, and he hoped that it would help to promote international economic relations.

73. Mr. McCAFFREY said that his intention was not to prolong the debate but simply to explain his earlier remarks. In reply to Mr. Shi, he would point out that he had not said that State enterprises were "often" under-

capitalized but only that they "might be". The difference between a private enterprise and a State enterprise, as he saw it, was that a private enterprise did not purport to have anything behind it, whereas a State enterprise carried the possibly dangerous implication of being backed by the full resources of the State. He had not accused States of deliberately undercapitalizing their enterprises and he fully agreed that private enterprises, too, were sometimes financially unsound.

74. Mr. HAYES said that paragraph 3 was not strictly necessary, for the meaning was conveyed by the relevant part of article 2, on the use of terms, already adopted by the Commission. The only difference between article 2 and article 10 was the reference to "exclusively" commercial transactions.

75. Article 10 as a whole expressed the distinction between *acta jure imperii* and *acta jure gestionis*, which had formed the subject of lengthy debate over the years. He personally believed in the distinction and in the attribution of immunity in cases which fell in the former category but not in the latter. That principle was clearly stated in paragraph 1 of article 10, and paragraph 3—which, as it were, proclaimed the obverse of the principle—was therefore unnecessary.

76. It was not unknown in national experience for enterprises, mostly private enterprises, to go bankrupt, and undercapitalization of State enterprises could undoubtedly have certain similarities with bankruptcy. Just as in the case of bankruptcy the shareholders were not made liable, so also in the case of undercapitalization liability should not go behind the State enterprise to the State itself. So to provide would also run contrary to the basis for determining whether immunity might be invoked, thus making a breach in the very fabric of the draft articles as a whole.

77. Mr. RAZAFINDRALAMBO said that, as a member of the Drafting Committee, he agreed with the substance of paragraph 3 as approved by the Committee on second reading. However, the drafting was not entirely satisfactory and he wondered whether it might not be improved by replacing the words "with regard to" at the beginning of the paragraph by the word "if" and deleting the word "which". He also agreed with members who thought it better to delete the word "exclusively". On the other hand, he disagreed with Mr. Pellet that the end part of the paragraph was redundant; subparagraph (b), in particular, introduced the important new concept of property which a State enterprise was authorized to operate or manage, and it should be retained.

78. Mr. Sreenivasa RAO thanked Mr. McCaffrey for explaining his earlier remarks. To imagine, even by implication, that a State enterprise necessarily had the resources of the State behind it was, of course, mistaken.

79. Mr. OGISO, speaking as a member of the Commission rather than as the Special Rapporteur, said he associated himself with those who had stressed that paragraph 3 represented a compromise solution reached after very lengthy discussion. For that reason, he was inclined to think that it would not be helpful to change the paragraph at the present late stage. Like many other members, he was not entirely satisfied with the text and, in

particular, with the word “exclusively”, which, it would be recalled, had not appeared in the original proposal. In spite of those reservations, he was prepared to accept the compromise formulation as it stood.

The meeting rose at 12.55 p.m.

2219th MEETING

Wednesday, 5 June 1991, at 10.05 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING¹ (*continued*)

ARTICLE 10 (Commercial transactions) (*continued*)

1. The CHAIRMAN invited the Commission to resume its consideration of article 10.²

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that he had no problem with the drafting changes that had been proposed at the previous meeting to the first part of the text of paragraph 3. Noting that the word “exclusively” did not enjoy the support of all members of the Commission, he suggested holding a brief discussion on that point with a view to finding a solution that would not upset the balance of the Drafting Committee’s text.

3. Mr. MAHIOU said that he favoured the deletion of that word. In his view, the issue raised in article 10, paragraph 3, was governed by article 2, paragraph 1 (b)

(iv), which extended the term “State” to agencies or instrumentalities of the State and other entities acting in the exercise of the sovereign authority of the State. The deletion would therefore not give rise to any particular problems and would not leave a gap in the draft articles.

4. Mr. McCAFFREY said that he was in favour of retaining the word “exclusively” precisely because, if it was deleted, there would be no tangible difference between the definition in article 2, paragraph 1 (b) (iv), and article 10, paragraph 3. In other words, the State would enjoy jurisdictional immunity in all cases where a State entity engaged in non-commercial activities had the capacities referred to in paragraph 3 (a) and (b). The word “exclusively” should therefore be kept in order to limit the scope of the jurisdictional immunities of States.

5. Mr. DÍAZ GONZÁLEZ said that he was in favour of the deletion of the word “exclusively” for the same reason as Mr. Mahiou. He also thought that paragraph 3, subparagraphs (a) and (b), were superfluous since it was already stated that the entities in question had “an independent legal personality”.

6. Mr. TOMUSCHAT said that all that paragraph 3 meant was that a claim could not be brought against a State if a dispute arose between a commercial enterprise of the State and a third party. There was, however, nothing to prevent an action being brought against the State enterprise. The deletion of the word “exclusively” would thus have no effect on the basic problem, which was that of the responsibility of the State enterprise. Subparagraphs (a) and (b) should none the less be retained in order to make it perfectly clear that the entity existed as a legal personality and could therefore be sued.

7. Mr. THIAM said that he was in favour both of the deletion of the word “exclusively”, for reasons already stated by other speakers, and of subparagraphs (a) and (b), which were redundant. There was no need to explain what having a legal personality meant: it always entailed the capacity to sue or be sued and to acquire or dispose of property. The two provisions added nothing to paragraph 3, but might perhaps be more appropriately placed in the commentary to article 10.

8. Mr. PELLET said that, in his view, subparagraphs (a) and (b) were not relevant: the purpose referred to by Mr. Tomuschat would be better served by providing not that the entity must be capable of acquiring, owning or disposing of property, but that it must actually be in possession of the property. He would, however, not object if those provisions were retained.

9. As to the word “exclusively”, everything hinged on the intended meaning of paragraph 3. If the intention was to refer to State enterprises which performed commercial transactions, the word “exclusively” should be deleted, since the immunity of the State could not be challenged in that case. If, on the other hand, the provision was meant to refer to enterprises established by the State in order to perform commercial transactions, the word “exclusively” should be retained. He personally would prefer the text to refer to entities which performed commercial transactions; the deletion of the word “exclusively” would then follow.

¹ For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 7-12.

² For text, see 2218th meeting, para. 58.

10. Mr. SHI said that he was in favour of the deletion of the word “exclusively”. With regard to subparagraphs (a) and (b), he said he would join the majority view. He nevertheless thought that those subparagraphs were superfluous, since capacity to sue or be sued and to acquire, own or dispose of property was implicit in the concept of independent legal personality.

11. Mr. OGISO (Special Rapporteur) recalled that he had already spoken in favour of the deletion of the word “exclusively” (2218th meeting). With regard to subparagraphs (a) and (b), he explained that subparagraph (b) had been added to the text of paragraph 3 in order to replace the concept of “segregated State property”. It had therefore been necessary to indicate explicitly that the State enterprise had to be capable of disposing of the property entrusted to it by the State.

12. Moreover, the Drafting Committee had considered that, in the interests of clarity, it was better to spell out the meaning of the term “independent legal personality”, which could be interpreted differently from one country to another.

13. Mr. PAWLAK (Chairman of the Drafting Committee) said that although it seemed that the Commission was nearing agreement on article 10, he nevertheless proposed that the Commission should suspend its consideration of the article to enable him to hold further consultations with a view to arriving at a text which was satisfactory to all.

14. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to follow the suggestion of the Chairman of the Drafting Committee and to proceed to consider article 11 pending the results of the consultations on article 10.

It was so agreed.

ARTICLE 11 (Contracts of employment)

15. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 11, which read:

Article 11. Contracts of employment

1. 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 a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

(b) the subject of the proceeding is 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 when the proceeding is instituted;

(e) the employer State and the employee 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.

16. Mr. EIRIKSSON proposed that the word “or” should be added at the end of paragraph 2 (d).

It was so agreed.

17. Mr. McCAFFREY requested clarification of the meaning of the word “reinstatement” in paragraph 2 (b).

18. Mr. PELLET said that it would have been more logical first to establish the principle of immunity in the case of contracts of employment and then to list the exceptions. He would, however, not object to the adoption of the proposed text.

19. Mr. Sreenivasa RAO said that he would also like some explanations of the meaning and scope of paragraph 2 (b).

20. Mr. SHI said that, in a spirit of compromise, he was prepared to withdraw the reservations he had expressed at the preceding session concerning the inclusion of article 11 in the draft articles.³

21. Mr. OGISO (Special Rapporteur), replying to the questions raised with regard to paragraph 2 (b), said that the provision did not prevent an individual who had been wrongfully dismissed from bringing a claim for compensation. It simply meant that a court of another State would not be competent to rule on the recruitment, renewal of employment or reinstatement of the person concerned. He was prepared to provide more detailed explanations in the commentary to article 11.

22. Mr. MAHIOU, referring to the explanations just given by Mr. Ogisso, said that the scope of paragraph 2 (b) had been restricted by the words “the subject of the proceeding is” to indicate that a court could not compel a State to renew the contract of one of its employees. In the case of wrongful dismissal, however, the individual concerned could, as Mr. Ogisso had said, bring an action with a view to obtaining compensation.

23. Mr. TOMUSCHAT said that he had some reservations with regard to paragraph 2 (c). The provision, which seemed to mean that persons who were neither nationals nor habitual residents of the State of the forum would not enjoy any legal protection, was unfair. However, he did not intend to reopen the discussion on that point.

24. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 11 as amended by Mr. Eiriksson.

Article 11 was adopted.

ARTICLE 12 (Personal injuries and damage to property)

25. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 12, which read:

Article 12. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of an-

³ *Yearbook* . . . 1990, vol. I, 2158th meeting, para. 35.

other State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

26. Mr. SHI said that article 12 gave rise to some problems. In the first place, the question of the attribution of an act or omission to a State came within the scope of the international responsibility of States and a court which held a foreign State responsible for an act would be violating the principle of State sovereignty. Secondly, under customary international law, the State in whose territory the wrongful act had been committed could not exercise its jurisdiction if the act in question was attributable to a foreign State. Lastly, the fact that a State could not invoke immunity from jurisdiction in a proceeding relating to compensation for damage to or loss of tangible property might create friction between States. In his view, the situations referred to in article 12 should preferably be settled through diplomatic channels. He therefore had reservations with regard to article 12 as a whole, but would not oppose its adoption.

27. Mr. GRAEFRATH said that, in his view, draft article 12 was incompatible with the principle of diplomatic immunity.

28. Mr. SREENIVASA RAO said that the matters covered by article 12 were normally settled through diplomatic channels. Every victim must, of course, be able to obtain redress and that principle was recognized in practice. It was not essential, however, to have recourse to the courts for that purpose. The last part of the article also seemed to make the exception to the rule of immunity subject to the presence of the author of the act or omission in the territory of the State where the act or omission had occurred. In other words, if the author of the act or omission was not present in the territory, the victim would, it seemed, have no other solution than to follow the normal procedure and seek reparation through diplomatic channels. In the circumstances, it would be best to delete the article or at least to reword it. He would not, however, oppose its adoption if that was the wish of the Commission.

29. Mr. BARSEGOV said that he agreed with the reservations expressed by Mr. Graefrath and Mr. Sreenivasa Rao.

30. The CHAIRMAN invited the Commission to adopt article 12, taking note of the reservations which some members had expressed.

Article 12 was adopted.

ARTICLE 13 (Ownership, possession and use of property)

31. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 13, which read:

Article 13. Ownership, possession and use of property

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 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;

(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, the estate of a bankrupt or the property of a company in the event of its winding-up.

32. Mr. SREENIVASA RAO said he would like to be assured that the article did not apply to property used for official purposes by diplomatic missions, consular posts, special missions and other organs of the State.

33. Mr. TOMUSCHAT said that, in his view, the article was too broadly framed. In particular, the notion of interest, which was borrowed from the common law system, would be difficult to apply under other legal systems.

34. Mr. MAHIU assured Mr. Sreenivasa Rao that article 13 was to be interpreted in the light of article 3, which provided that the articles relating to jurisdictional immunities would not affect the privileges and immunities enjoyed by States under conventions on diplomatic relations, on consular relations, on special missions and on missions to international organizations. Property covered by those conventions was therefore not affected by article 13.

35. The Drafting Committee had decided after a lengthy discussion to retain the notion of interest, even though it realized that it might give rise to some problems under certain legal systems, because it felt that there were more advantages to retaining it than disadvantages.

36. Mr. McCAFFREY pointed out that article 9 of the European Convention on State Immunity also used the words "right or interest".

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 13.

Article 13 was adopted.

ARTICLE 14 (Intellectual and industrial property)

38. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 14, which read:

Article 14. Intellectual and industrial property

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 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 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 of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

39. Mr. Sreenivasa RAO said that, in his view, the draft article, which dealt briefly with a very important matter regulated by many international conventions, should not be included in an instrument dealing with jurisdictional immunities. In a spirit of compromise, however, he would not call for its deletion.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 14.

Article 14 was adopted.

ARTICLE 15 (Fiscal matters)

41. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 15, which read:

Article 15. Fiscal matters

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 a proceeding which relates to the fiscal obligations for which it may be liable under the law of that other State, such as duties, taxes or other similar charges.

42. Mr. SHI, supported by Mr. Sreenivasa RAO, said that he had strong reservations with regard to the article, since it would allow a State to institute proceedings against another State before the courts of the former State in violation of the principle of the sovereign equality of States.

43. Mr. TOMUSCHAT said that he too did not really see the need for the article.

44. Mr. MAHIU said that there had not been a definite trend of opinion in the Drafting Committee in favour of the deletion of the article. If it gave rise to too many objections, however, a decision could be taken in plenary as to whether the article was necessary in the context of the draft as a whole.

45. Mr. BARSEGOV said that, despite reservations, he would not oppose the adoption of the article.

46. Mr. OGISO (Special Rapporteur) said that, although the provisions of the article were not of a universal character, they appeared in the legislation of several States, including that of the United Kingdom of Great Britain and Northern Ireland, Singapore, Pakistan and Australia. In the United States of America, the Government was empowered to impose tax on income accruing to foreign States from commercial operations conducted in United States territory.

47. Moreover, even though the article had admittedly given rise to reservations on the part of some members of the Commission, it had thus far never really been called into question.

48. The CHAIRMAN suggested that the Commission should have time for reflection and revert to article 15 later.

It was so agreed.

ARTICLE 16 (Participation in companies or other collective bodies)

49. Mr. PAWLAK (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16, which read:

Article 16. Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction 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;

(b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can however invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

50. He said that the Drafting Committee had noted a few ambiguities in the article which it had decided to clarify.

51. In the version adopted on first reading, paragraph 1 had stated the general rule and had then set forth an exception, which read: "unless otherwise agreed between the States concerned"; that clause was repeated in all the articles in part III. However, in view of the special structure of article 16, which, unlike the other articles in part III of the draft, stated a general rule and then dealt with exceptions, the Drafting Committee had felt it would be preferable to move the clause to paragraph 2, to modify the wording slightly so as to adapt it to paragraph 2 and to replace the words "unless otherwise agreed between the States concerned" by the words "if the States concerned have so agreed". Paragraph 1 therefore dealt solely with the general rule and paragraph 2 with the exceptions.

52. In reviewing the English and French versions of paragraph 1 (b), the Drafting Committee had noted that there was no equivalent term in the French text for the word "control", which appeared in the English text. As the question of how a State could be in control of a corporate entity was very controversial, the Committee had decided, after further discussion, to replace the criterion of control by the criterion of the seat of the corporate entity, which was used in article 6 of the European Convention on State Immunity. Paragraph (b) as it stood therefore now provided that paragraph 1 would apply when one of the following three criteria was met: the corporate body was incorporated or established under the law of the State of the forum; the corporate body had its seat in that State; or the corporate body had its principal place of business in that State.

53. The Drafting Committee had also decided that it should be explained in the commentary that the words "the instrument establishing or regulating the body in question", in paragraph 2, applied only to the fundamental instruments of a corporate body and not to any type of regulation.

54. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 16.

Article 16 was adopted.

ARTICLE 17 (Ships owned or operated by a State)

55. Mr. PAWLAK (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 17, which read:

Article 17. Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to other ships owned or operated by a State and used exclusively on government non-commercial service.

3. For the purpose of this article, "proceeding which relates to the operation of that ship" means, *inter alia*, any proceeding involving the determination of a claim in respect of:

- (a) collision or other accidents of navigation;
- (b) assistance, salvage and general average;
- (c) repairs, supplies or other contracts relating to the ship;
- (d) [loss or damage resulting from] pollution of the marine environment.

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 a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of the action arose, the ship was used for other than government non-commercial purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2 nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

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 a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

56. He said that the Drafting Committee had discussed the article at length. In the previous version of the article, the main problem had been the use of the word "non-governmental" in paragraphs 1 and 4. The Drafting Committee had noted that article 96 of the 1982 United Nations Convention on the Law of the Sea defined the conditions under which a State-owned or State-operated ship enjoyed immunity and that the difficulty with article 17 was that it approached the issue from the opposite angle by trying to define the circumstances in which a State-owned or State-operated ship did not enjoy immunity. The Drafting Committee had felt that the best way of overcoming the difficulty was to provide that a ship would not enjoy immunity whenever the criteria set forth in article 96 of the United Nations Convention on the Law of the Sea were not met. It had therefore replaced the concluding phrase of paragraph 1 by the words "if, at the time the cause of action arose, the

ship was used for other than government non-commercial purposes".

57. It would also be noted that, in the text as thus amended, the ship was no longer "designed to be used" for commercial purposes, but was "used" for commercial purposes. Paragraph 1 presupposed the existence of a cause of action relating to the operation of the ship and it was difficult to imagine that such a cause of action could arise if the ship was not actually in use. The Drafting Committee had therefore deemed it preferable to retain only the criterion of actual use, particularly since the criterion of intended use was very vague and likely to give rise to difficulties in practice. Some members of the Committee had, however, expressed reservations about the deletion of that criterion.

58. The Drafting Committee had deleted the words "engaged in commercial [non-governmental] service" from the first part of paragraph 1 because it had viewed them as unnecessary, since the criterion the ship had to meet in order for the rule of immunity not to apply was defined in the second part of that paragraph.

59. For the sake of clarity, the Drafting Committee had slightly amended the first phrase of paragraph 2, replacing the words "does not apply to warships and naval auxiliaries nor to other ships" by "does not apply to warships and naval auxiliaries nor does it apply to other ships". The words "or intended for use" had been deleted, as in paragraph 1. Also, the last part of the paragraph had been brought into line with the wording used in article 96 of the United Nations Convention on the Law of the Sea and now read "... used exclusively on government non-commercial service".

60. Some members of the Drafting Committee had objected to the retention of the second half of paragraph 2 on the ground that the reference to "other ships owned or operated by a State and used exclusively on government non-commercial service" was unnecessary and confusing. In their view, it was self-evident, given the terms of paragraph 1, that that category of ships enjoyed immunity and that there was therefore no need to state expressly that such ships were excluded from the scope of the paragraph. It had also been noted that the reference in question would enlarge the scope of the exception provided for under paragraph 5, relating to cargoes, which would be undesirable. The prevailing view among members of the Committee was, however, that it would be preferable to retain the reference in paragraph 2 to "other ships owned or operated by a State and used exclusively on government non-commercial service", so that paragraph 2 would also cover customs inspection boats, hospital vessels and police-patrol boats. Elaboration of that point would be included in the commentary.

61. In paragraph 3, the main change concerned the addition of a new subparagraph (d) pursuant to suggestions made in the Sixth Committee at the last session of the General Assembly. The Drafting Committee, while realizing that the listing in paragraph 3 was purely illustrative, had felt that, in view of the importance attached by the international community to environmental questions and the increase in the number of cases of pollution of the sea by ships, there was merit in making special mention of claims arising from the pollution of the marine

environment. Some members of the Committee had, however, taken the view that an unqualified reference to claims in respect of "pollution of the marine environment" might serve as an encouragement to frivolous claims or claims in the service of mankind not involving specific loss or damage. They had therefore insisted on the inclusion of the words "loss or damage resulting from" before the words "pollution of the marine environment". Some other members had considered that the inclusion of those words might lead to an undesirable *a contrario* interpretation with regard to the types of claims referred to in subparagraphs (a) to (c). They had further noted that the words in question were unnecessary, since no claim would be entertained by a court if the claimant had not established that he had actually suffered a loss or damage: the new subparagraph merely indicated that, in case a claim was presented in respect of pollution of the marine environment, State-owned or State-operated ships would be treated in the same way as other ships and that the question of the legitimacy or admissibility of the claim would not be determined on the basis of the draft under preparation.

62. The Drafting Committee had not been able to reconcile those divergent points of view and had therefore decided to place the words "loss or damage resulting from" in square brackets.

63. The other changes made in paragraph 3 were of a purely editorial nature. In the English text, the words "the expression" had been deleted and the words "shall mean" had been replaced by the word "means". The words "of a claim in respect of", which had appeared in each of the three subparagraphs, had been placed in the *chapeau* in order to avoid unnecessary repetition.

64. Paragraphs 4 and 5 enunciated rules relating to the carriage of cargo that were parallel to those laid down in paragraphs 1 and 2, as amended by the Drafting Committee. It would be noted, however, that, in paragraph 5, the words "intended for use" had been retained because the cargo was not normally used while it was on board the ship and it was therefore its planned use which would determine whether the State concerned was or was not entitled to invoke immunity. In paragraph 5, the Drafting Committee had also replaced the words "belonging to" by the words "owned by" for the sake of consistency.

65. As to paragraph 6, some members of the Drafting Committee had pointed out that the rule enunciated applied in all proceedings in which State property was involved and not only in proceedings relating to ships and cargoes, so that the rule should either be repeated in all the articles in part III or form the subject of a general provision. The Drafting Committee had, however, noted that article 17 was modelled on the first paragraph of article 4 of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, which specified that States could, with respect to State-owned or State-operated ships, plead all measures of defence, prescription and limitation of liability which were available to private vessels and their owners, and had arrived at the conclusion that the elimination of paragraph 6 might give rise to problems of interpretation. It had therefore agreed to keep the para-

graph, on the understanding that the commentary would make it clear that States could plead all available means of defence in any proceedings in which State property was involved.

66. Paragraph 7, which was based on article 3 of the Convention, had been somewhat modified in its wording so as to indicate at the outset that the ships dealt with in the paragraph were State-owned or State-operated ships and State-owned cargoes. Furthermore, the definite article "the" before the words "diplomatic representative" had been replaced by the indefinite article "a". In the English version, the words "shall serve as evidence" had been borrowed from article 5 of the Convention, the French text of which used the words *vaudra preuve*. Although the Drafting Committee was aware that the two expressions were not quite equivalent, it had thought it preferable not to call into question the French version of the Convention by adopting another formula, such as *constituera une preuve de*. The commentary would make it clear that the certificate referred to in paragraph 7 was rebuttable evidence.

67. Other editorial changes were that the words "any proceeding" in paragraphs 1 and 4 had been replaced by the words "a proceeding" and the title had been simplified and now read: "Ships owned or operated by a State".

68. Mr. BARSEGOV said that he had no objection to the text proposed by the Drafting Committee, but pointed out that legislation of the Soviet Union granted immunity from jurisdiction in proceedings relating to ships owned or operated by a State and that, in practice, a *modus vivendi* made it possible to settle disputes. He also noted that such immunity did not apply in the case of ships on commercial service.

69. Mr. EIRIKSSON said that he had taken note of the explanations given by the Chairman of the Drafting Committee concerning the last phrase of paragraph 2. He nevertheless considered that that phrase was unnecessary and found it strange to explain the expression "other ships owned or operated by a State and used exclusively on government non-commercial service" in the commentary, since ships used exclusively on government non-commercial service were already excluded from the scope of paragraph 1. He would therefore like that phrase to be deleted. He reserved the right to come back later to the other paragraphs of the article.

70. Mr. HAYES said that he shared Mr. Eiriksson's reservations, which he himself had put forward in the Drafting Committee, but without going so far as to oppose the retention of the last part of paragraph 2.

71. He also had a reservation about paragraphs 1 and 2 and, in particular, about the use of two different terms to reflect the same idea: in paragraph 1, the term "for other than government non-commercial purposes" and, in paragraph 2, the term "on government non-commercial service". He had proposed that the Drafting Committee should keep the term "for government non-commercial purposes" or at least use the same term in both paragraphs. Just because the two terms were used in the United Nations Convention on the Law of the Sea did

not mean that they also had to be used in the draft articles.

72. He reserved the right to come back later to other paragraphs of the article under consideration.

73. Mr. Sreenivasa RAO said that, in general, he supported article 17, but would have preferred the words in square brackets in paragraph 3 (*d*) to be retained and the square brackets eliminated in order to make the effect of the provision clearer. Other drafting amendments, on which he would not insist absolutely, would also make the text clearer. In the English version of paragraph 4, for example, the term “that State” was somewhat ambiguous, since two different States were being referred to: it would be better to specify that the reference was to the first State. Similarly, reference was made throughout the article to “government non-commercial service” and, in paragraph 7, to the “government and non-commercial character” of a ship. What was meant in both cases, at least as he saw it, was “public” or “government” and therefore “non-commercial”. Moreover, the certificate issued by the State to serve as evidence of the government and non-commercial character of the ship was provided for in paragraph 7, but not referred to in any other article. The concept in question was, however, very important for the purpose of avoiding unnecessary complications before the courts and was enshrined in the practice of a number of States. It should appear more explicitly in the draft articles. Lastly, although the purpose of paragraph 2 was very clear, Mr. Eiriksson’s proposal for the deletion of the second part of the paragraph also had some merit.

74. Mr. DÍAZ GONZÁLEZ said that the Spanish text of article 17 contained terms which did not exist in that language. He would discuss the matter with the other Spanish-speaking members of the Commission in order to decide on new wording, which would be communicated to the secretariat.

75. Mr. RAZAFINDRALAMBO said that the wording of the last part of paragraph 2, which Mr. Eiriksson had proposed should be deleted, was taken from article 96 of the United Nations Convention on the Law of the Sea, which dealt with the non-commercial use of ships, even warships and naval auxiliaries. The French text of that article also referred to *service public*, not to *service gouvernemental*. In paragraph 3 (*d*), he was in favour of the deletion of the words in square brackets because the concept of “loss or damage” applied to all of the subparagraphs of the article, and not only to pollution. If those words were deleted, it might be necessary to use the indefinite article and say: “a pollution of the marine environment”.

76. Mr. MAHIU said that he supported article 17, but had two comments to make. The first, which was more a doubt than an objection, related to the term “intended for use”, which was now used only in paragraph 5 of the article, whereas it had also been used in paragraphs 1, 2 and 4 of the text adopted on first reading. The explanations given in that connection, both in the Drafting Committee and in plenary, were all the more unconvincing in that five of the seven States which had enacted legislation on the subject had used that term. The second comment related to paragraph 3 (*d*): he was in favour of the

deletion of the square brackets because the phrase in question explained the meaning of the subparagraph without limiting its scope, for the simple reason that the beginning of the paragraph stated that “For the purposes of this article, ‘proceeding which relates to the operation of that ship’ means, *inter alia*, any proceeding . . .”.

77. Mr. BARSEGOV said that he was also in favour of the deletion of the square brackets, since the phrase in question was necessary for greater precision. However, subparagraphs (*a*), (*b*) and (*c*) seemed very clear.

78. Mr. PELLET said that the explanation by the Chairman of the Drafting Committee was essential, namely, that the commentary would indicate that the words “shall serve as evidence” did not refer to irrefutable evidence. As to the deletion of the words “intended for use” in several paragraphs of the article, international instruments were just as valuable a reference as national legislation. The United Nations Convention on the Law of the Sea carefully avoided any reference to the intended use of ships, since that concept was always a source of confusion. He was surprised that Mr. Eiriksson, who was one of the architects of the Convention, wanted to delete the end of paragraph 2, whereas that formulation was used in article 96 of the Convention and, especially, in article 236, which dealt with sovereign immunity. Lastly, he failed to see why so much importance was being attached to whether the square brackets in paragraph 3 (*d*) should be retained or deleted. That phrase merely gave an example of a proceeding in which the problem might arise and paragraph 3 could in no way constitute a basis for jurisdiction.

79. Mr. EIRIKSSON explained that he found paragraph 2 to be illogical and inconsistent with paragraph 1. No interpretation of the law of the sea could be taken to mean that a ship used exclusively on government non-commercial service (para. 2) could be used for other than government non-commercial purposes (para. 1). With regard to paragraph 3 (*d*), it was less the wording of the phrase in square brackets than its interpretation which posed a problem, in view of the wording of the *chapeau* of the paragraph. Some members were already attempting to build substantive law into paragraph 3 precisely on the basis of that phrase. The best solution would be to delete it and explain in the commentary that there had been absolutely no intention of establishing substantive law in paragraph 3. In fact, paragraph 3 as a whole was unnecessary.

80. Mr. HAYES said he agreed that, as Mr. Pellet had pointed out, the purpose of paragraph 3 was simply to give some examples of proceedings in which immunity could not be invoked. The question of retaining or deleting the phrase in square brackets was none the less important, since retention would pave the way for the *a contrario* argument by comparison with the other paragraphs that, in the case of pollution of the marine environment, the proceedings referred to in paragraph 1 would not be possible unless there had been loss or damage. Those in favour of retaining the phrase held that it would help avoid frivolous actions against States. However, immunity had nothing to do with the merits of the case and could not be a means of avoiding that type of

action. He was therefore strongly opposed to the retention of that phrase in subparagraph (d).

81. Mr. SHI said that he was just as strongly in favour of retaining that phrase and deleting the square brackets.

82. Mr. FRANCIS said that any wording to which objections had been raised in plenary, even by only one member of the Commission, should be placed in square brackets. He suggested that the Commission should abide by that practice, the only other solution being to proceed to a vote, which had happened only once in 15 years.

83. Mr. McCAFFREY said that he was in favour of the deletion of the words in square brackets. He also wondered why the words "intended for use" appeared only in paragraph 5 and nowhere else in the article.

84. Mr. TOMUSCHAT said he endorsed Mr. Eiriksson's suggestion that the end of paragraph 2, after the words "naval auxiliaries", should be deleted. In his view, that part of the paragraph was a mere repetition of paragraph 1.

85. The CHAIRMAN, speaking as a member of the Commission, noted that there was a convergence of views on the new text of the *chapeau* of paragraph 3, but he too feared that the phrase in square brackets in subparagraph (d) would pave the way for an *a contrario* argument and thus have the opposite effect of that being sought by those in favour of retaining it.

86. Speaking as Chairman, he suggested that the Commission should continue its consideration of article 17 at a later time, following consultations.

It was so agreed.

ARTICLE 10 (Commercial transactions) (*continued*)

87. Mr. PAWLAK (Chairman of the Drafting Committee) read out the new text he was proposing for paragraph 3 following his consultations, namely:

"3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which performs commercial transactions and which has an independent legal personality and is capable of:

"(a) suing or being sued; and

"(b) acquiring, owning or possessing and disposing of property including property which the State has authorized it to operate or manage."

88. He said that the words "which performs", instead of the words "to perform", placed the emphasis on the activity of the enterprise rather than on the purpose for which it had been established. The main change in relation to the text proposed by the Drafting Committee was the deletion of the adverb "exclusively", which had qualified the words "commercial transactions".

89. Mr. HAYES said that the phrase "which performs commercial transactions" might simply be superfluous,

since the first part of the text stated that the case in question was that of a proceeding which related to a "commercial transaction".

90. Mr. PAWLAK (Chairman of the Drafting Committee) said that, although Mr. Hayes' comment was logical, he believed that, for the sake of clarity, it would be best to retain the phrase.

91. Mr. TOMUSCHAT said that he preferred the Drafting Committee's original text, which covered the two basic elements: the fact that there was a commercial transaction engaged in by a State enterprise and the fact that the State enterprise had been established to perform commercial transactions.

92. Mr. Sreenivasa RAO said that he endorsed the text just read out by the Chairman of the Drafting Committee and was satisfied with his explanations.

93. Mr. EIRIKSSON said that he shared Mr. Tomuschat's view.

94. Mr. SHI said that he also endorsed the new text. In order to avoid redundancy, he would propose simply that the words "which performs commercial transactions" should be replaced by the words "in order to perform commercial transactions".

95. The CHAIRMAN asked whether the word "which" in the phrase "which performs commercial transactions" referred to the State or to the enterprise.

96. Mr. GRAEFRATH said that, like Mr. Tomuschat, he believed that the original text was more satisfactory because it was clearer.

97. Mr. PAWLAK (Chairman of the Drafting Committee) said that the text that he had just introduced had been designed solely to overcome some problems to which attention had been drawn. His own preference was also for the Drafting Committee's original text, although he would agree to the deletion of the word "exclusively", which was unnecessary and might be misleading. In any case, the reservations of the members of the Commission would be reflected in the summary records of the meetings and in the Commission's report.

98. Mr. FRANCIS said that he supported the revised text, in which the deletion of the word "exclusively" guaranteed the necessary flexibility. In such changing times, it could not be claimed that commercial transactions were an exclusive domain belonging only to enterprises established especially for that purpose.

99. Mr. PELLET said that, in his opinion, Mr. Shi's suggestion was simply a return to the text which had been adopted, after much hesitation, by the Drafting Committee. It involved a question of form rather than of substance. On the other hand, the revised text certainly differed in thrust from the original text. The problems of interpretation to which reference had been made seemed to relate only to the English version. In French at least, there was no doubt that it was the State enterprise that performed the commercial transactions, not the State.

100. He therefore preferred the new text, which had two advantages by comparison with the original text. First, the deletion of the word “exclusively” brought the objective into sharper focus. Secondly, and above all, the purpose for which an entity had been established would have no bearing in the case of a proceeding and had nothing to do with the problem of the immunity of the State in a given situation. The State might have wanted to establish a commercial entity which would, in fact, carry out activities other than commercial activities: in that case, immunity would apply. It might also have wanted to establish a primarily governmental entity which engaged in commercial transactions: in that case, immunity would not apply. Thus, it was not the purpose for which the State enterprise or other State entity had been established which counted, but its activity at the time when the problem of immunity arose.

101. He did not consider that provision to be essential, but he understood the concerns of some members of the Commission who had raised the question of the immunity of the State that had established an enterprise which did not enjoy immunity and did not want the provision to prejudice the answer. That answer would, however, depend on the draft as a whole.

102. Mr. TOMUSCHAT said that the discussion had taken a new turn, whereas a consensus had seemed to be emerging.

103. The Commission could stay with the original text proposed by the Drafting Committee by deleting the word “exclusively”—the main bone of contention—and replacing the words “with regard to” by the word “in” in the English version. Mr. Pellet’s fears could be dispelled. The case of an entity established initially to perform government service and then transformed by the State to perform commercial transactions was covered by the words “to perform” contained in the Drafting Committee’s original provision.

104. The CHAIRMAN invited the members of the Commission to continue their consultations on article 10, paragraph 3.

ARTICLE 15 (Fiscal matters) (*continued*)

105. Mr. McCAFFREY emphasized that article 15 was based on extensive legislative practice.

106. The CHAIRMAN suggested that consultations should continue and that the Commission should come back later to article 15.

It was so agreed.

The meeting rose at 1.05 p.m.

2220th MEETING

Thursday, 6 June 1991, at 10.10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING¹ (*continued*)

ARTICLE 10 (Commercial transactions) (*concluded*)

1. The CHAIRMAN invited the Commission to resume consideration of article 10.²

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that, at the previous meeting, he had proposed a revised draft of paragraph 3.³ Following consultations and in view of the fact that the draft had not enlisted the support of the majority of members in plenary, he wished to withdraw it and, instead, to put forward another solution. It should be emphasized that the provision contained in paragraph 3 was most important. Its purpose was to indicate that a State enterprise or an establishment set up by the State could not be identified with the State. It had to have separate legal personality and had to be liable for its actions. His new proposal, which, he believed, preserved that central meaning yet met the concerns expressed by some members, was that the words “to perform exclusively commercial transactions”, in the text proposed by the Drafting Committee,⁴ should simply be deleted.

3. The CHAIRMAN thanked the Chairman of the Drafting Committee for his efforts to arrive at an acceptable solution. He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10, as amended.

Article 10, as amended, was adopted.

¹ For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 7-12.

² For text, see 2218th meeting, para. 58.

³ For text, see 2219th meeting, para. 87.

⁴ See footnote 2 above.

4. Mr. McCaffrey said that, while he had not wanted to obstruct the adoption of paragraph 3 as amended, he continued to have serious reservations as to whether the provision it contained was supported in State practice, was workable as a practical matter, or was generally acceptable to States.

ARTICLE 15 (Fiscal matters) (*concluded*)

5. Mr. MAHIU, speaking as the former Chairman of the Drafting Committee, said that, in accordance with the Chairman's suggestion, he had held consultations with other members of the Commission and was now in a position to suggest the deletion of article 15⁵ subject to certain explanations which he intended to present very briefly so as to avoid reopening the debate.

6. An article adopted by the Drafting Committee on second reading obviously could not simply disappear without trace; the reasons for deleting it had to be clear. The first was that the article concerned only relations between two States, the forum State and the foreign State; it therefore dealt with a bilateral international problem governed by existing rules of international law and, as such, covered by the provisions of article 3, already adopted by the Commission. The second reason was that the draft as a whole dealt with relations between a State and foreign natural or juridical persons, the purpose being either to protect the State against certain actions brought against it by such persons or, conversely, to enable those persons to protect themselves against the State. Hence, article 15, dealing as it did solely with inter-State relations, did not fall within the real scope of the draft articles: it merely gave rise to problems of interpretation *vis-à-vis* the diplomatic and consular conventions. In his opinion, therefore, it should be deleted.

7. Mr. OGISO (Special Rapporteur) said that he had been consulted by Mr. Mahiou about the proposal and would not oppose it if the majority endorsed it. However, since article 15 had been included in the draft articles from the first and since a number of domestic legislations referred to similar, though not identical, matters, it was advisable to retain the article in a somewhat amended form. It could read:

“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 a proceeding which relates to the fiscal obligations derived from the commercial transactions engaged in by the former State in the territory of the latter State.”

8. Deletion of the article had been suggested first by a member from one of the European Community countries, which were now approaching harmonization of all their fiscal regimes. Quite understandably, the subject dealt with in the article was of no particular interest to those countries. It might, however, be of some interest to others, particularly countries which had legislation on the matter. Since no member from those countries was present in the Commission, he was hesitant about delet-

ing the article at so late a stage. Secondly, it would be noted that he had narrowed the matter down to the fiscal obligations derived from the commercial transactions engaged in by States. Since, under the draft articles, a State had no immunity in respect of commercial transactions, the question of fiscal obligations might arise in future in countries which did not belong to the European Community, and some of them might consider it desirable to keep the subject in the draft. However, if most members thought the article should be removed he was ready to withdraw his proposal for the sake of achieving consensus.

9. Mr. McCaffrey said that, as already stated at the previous meeting, he would normally feel rather uncomfortable about deleting an article which had been adopted on first reading, and was in the process of being considered on second reading. Although he still believed the article had some basis in international law, as Mr. Ogiso had demonstrated at the previous meeting, he was appreciative of Mr. Mahiou's explanations and the efforts to reach a mutually acceptable decision. Accordingly, he would not stand in the way of deletion of the article, provided it was made entirely clear, in the commentary or elsewhere, that the deletion did not in any way prejudice the question of State immunity in fiscal matters.

10. The CHAIRMAN thanked members for their conciliatory attitude.

11. Mr. TOMUSCHAT said that he agreed with the reasons given by Mr. Mahiou in support of deleting the article, which was on relations between two States and thus failed to fit into the framework of a draft in which the foreign State appeared in the role of a potential defendant. However, he also concurred with Mr. McCaffrey that the commentary should clearly indicate that the deletion of the article did not prejudice the question of State immunity in fiscal matters.

12. Mr. DÍAZ GONZÁLEZ said he, too, agreed with the proposal to delete the article, but endorsed the points made by Mr. McCaffrey and wondered whether the Commission should not pursue the search for a compromise solution.

13. Mr. PELLET said that, like Mr. McCaffrey, he had serious doubts about deleting article 15. At the same time, he had doubts about the principle of absolute non-immunity of States in fiscal matters set forth in the article and about the wording proposed by Mr. Ogiso, for he failed to see why fiscal obligations derived from commercial transactions should be singled out for special treatment. For those reasons, he was prepared, although with little enthusiasm, to accept the proposal to delete the article, but would wish to see it stated explicitly—if possible in the body of the draft rather than in the commentary—that the draft articles did not cover the question of relations between States.

14. Mr. MAHIU, speaking as the former Chairman of the Drafting Committee, said that the Commission had to choose between deleting article 15, in which case the Special Rapporteur's views should be reflected in the commentary to article 10, paragraph 1, and maintaining

⁵ For text, see 2219th meeting, para. 41.

the article but amending the wording, possibly on the basis of the Special Rapporteur's proposal.

15. Mr. OGISO (Special Rapporteur) said that none of the members who had spoken preferred his proposal. Consequently, he was prepared to withdraw it for the sake of consensus, on the understanding that the commentary to article 10 would state that the non-immunity of States in connection with commercial transactions also included non-immunity in fiscal matters arising from commercial transactions.

16. The CHAIRMAN thanked the Special Rapporteur for his spirit of cooperation. He said that, if he heard no objection, he would take it that members agreed to delete article 15.

Article 15 was deleted.

ARTICLE 17 (Ships owned or operated by a State) (*continued*)

17. The CHAIRMAN invited the Commission to resume consideration of article 17.⁶ Although doubts had been expressed during the earlier discussion, particularly about the deletion of the criterion of intended use from paragraphs 1 and 2, he believed that only two points had given rise to actual divergences of views. One concerned the second half of paragraph 2, which some members considered unnecessary and illogical. Perhaps they would not object to adoption of the paragraph in its present form, on the understanding that their reservations would be duly recorded in the summary record. The second point concerned the bracketed phrase in paragraph 3 (*d*). He suggested that the Commission should examine it after considering paragraph 2.

18. Mr. EIRIKSSON said that, at least, the first part of paragraph 2 was not illogical. As for the second part, he still believed it was both illogical and unnecessary.

19. Mr. OGISO (Special Rapporteur) said he had reservations about the deletion of the words "intended for use" from paragraphs 1, 2 and 4, for reasons stated at the previous meeting by Mr. Mahiou. For his own part, he would add further reasons in support of the contention that the removal of the words "intended for use" left an undesirable gap in the draft articles.

20. For example, State A could order from a shipbuilding yard in State B a ship intended to be used for commercial purposes. After it was built, the ship sailed from a port in State B to a port in State A. During that first voyage the ship was not being actually used for commercial purposes, but was intended for future commercial use. With the deletion of the words "intended for use" that situation would not be covered by article 17.

21. Again, a training ship might sail from a port in State A to a port in State B. That type of ship was usually owned or operated by the Government and would enjoy immunity during the voyage in which the training took place. After the arrival of the ship in State B, however, the men who had been trained during the voyage

might be assigned to another vessel. The training ship would then return to State A, without trainees, to pick up another group on arrival at State A. The situation was one in which the ship was not in actual use but was "intended for use" as a training ship. There again, the elimination of the words "intended for use" would mean that that situation would not come under the terms of article 17.

22. Mr. McCAFFREY associated himself with the Special Rapporteur's reservations regarding the deletion of "intended for use", particularly since those words were to be found in practically all relevant provisions of the legislation of States. The deletion would also have the undesirable effect of broadening the meaning of the term "use". For example, a ship which was undergoing repairs would have to be said to be "used" for a commercial purpose.

23. Mr. PAWLAK (Chairman of the Drafting Committee) said the point had been discussed at length in the Drafting Committee, which had considered the Special Rapporteur's views but had decided to remove the words in question. The important thing, it had been felt, was what the ship was doing at the time of transport of the goods. The operation of the ship "at the time the cause of action arose"—the wording of paragraph 4—indicated whether the ship was being used for a commercial purpose or not. It was the actual use that mattered, not the intention. The issue of intention was material with regard to the cargo but not to the ship.

24. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 2 on the understanding that members' reservations were placed on record.

It was so agreed.

25. The CHAIRMAN pointed out that the phrase "loss or damage resulting from", at the beginning of paragraph 3 (*d*), had been placed between square brackets so as to indicate clearly that the Drafting Committee had not been able to reconcile differing views; the same divergence was apparent in the Commission's debate. He believed it was unprecedented for the Commission to leave formulations in square brackets in drafts adopted on second reading. On the basis of established practice, he would therefore have no choice but to put the issue to the vote. An alternative course—one which he himself favoured—would be to depart from the Commission's practice and to leave the text as it stood, in other words, with the square brackets, so as to signal the problem to the Sixth Committee and elicit comments which would help in solving the problem when final action was taken on the Commission's draft. Again, it had been suggested that, as far as paragraph 3 (*d*) was concerned, the Commission was not in fact engaged in a second reading. The idea embodied in paragraph 3 (*d*) was a new one and had been put forward only recently.

26. Speaking as a member of the Commission, he urged the Commission to show flexibility. He was in favour of retaining the square brackets, a course that would place the issue clearly before Governments.

⁶ For text, see 2219th meeting, para. 55.

27. Mr. BARSEGOV said he remained convinced that the words in square brackets were necessary in paragraph 3. As far as procedure was concerned, however, he would reiterate his view that the issue should be decided by consultation and not by a vote.
28. Mr. HAYES said that he continued to object to the phrase "loss or damage resulting from". The divergent views of members on the subject would be seen from the summary record.
29. Mr. FRANCIS said that sound arguments had been advanced on both sides with regard to the words in question. Personally, he was convinced that the issue should not be put to a vote. If it did not prove possible to arrive at a decision by consultations, the appropriate thing would be to retain the square brackets, even if, as had been suggested, such a course was being adopted for the first time.
30. Mr. McCAFFREY said he agreed with Mr. Barsegov and Mr. Hayes on the desirability of not putting the matter to a vote, even though it was undoubtedly important. It would not be appropriate to place the phrase between square brackets, thereby suggesting to the General Assembly that it was the one issue on which the Commission had been unable to decide, when it was obvious from the draft that decisions had been taken on a great many more important issues. He therefore suggested that the square brackets around the words "loss or damage resulting from" should be eliminated and paragraph 3 (d) should be adopted.
31. The CHAIRMAN said that he had specifically pointed out that the Commission's practice would require a vote. He did not favour one and it was not his intention to force one.
32. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the Commission should close its debate on article 17. The paragraph in question did not create any obligations. It simply gave examples and he agreed with Mr. McCaffrey that the subject should be placed in its proper perspective.
33. Mr. OGISO (Special Rapporteur) said that a lot of time had been spent on a problem that was not of great substance and did not create rights or obligations.
34. Mr. THIAM said that it was not correct to say that a vote had never been taken in the Commission on second reading; he remembered such a case, namely, on the topic on the succession of States in respect of State property, archives and debts, because he himself had been chairman at the time.⁷ He was not against taking a vote. The Commission should not shy away from difficulties by sending the Sixth Committee a text containing square brackets. When all possibilities of reaching a compromise had been exhausted, which he did not consider to be the case at hand, the Commission must vote.
35. The CHAIRMAN said he agreed with Mr. Thiam that the Commission had in the past voted on second reading, but it would be preferable if that could be avoided.
36. Mr. AL-KHASAWNEH said he seemed to recall that a phrase had been left in square brackets in the text of the draft articles on the law of treaties between States and international organizations or between international organizations. If such a precedent had already been established, it would be useful.
37. The CHAIRMAN said that paragraph 3 (d) was not being considered on second reading. It was based on the desire to take account of environmental issues. The subject had arisen in 1991 and had not been discussed, voted on or accepted previously. Thus, the situation was sufficiently unusual for the Commission to decide what procedure it intended to adopt in the particular case.
38. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that the phrase in the square brackets should be deleted and replaced by "consequences of".
39. Mr. BARSEGOV said he regretted that the word "injurious" was not used before "consequences". As it stood, the proposal left a large area in which State immunity could not be invoked and it went much further than had the Third United Nations Conference on the Law of the Sea.
40. The CHAIRMAN thanked Mr. Barsegov for not opposing the proposed change, despite his reservations.
41. Mr. Sreenivasa RAO said that the subparagraph was no clearer with the proposed amendment and it was to be hoped that that situation could be remedied in the commentary. He objected to deleting the words "loss or damage". Environmental protection was an emotional issue and that made it all the more inappropriate to leave such a broad formulation as "consequences of" in a text on the jurisdictional immunities of States. If his fears could be allayed in the commentary, however, he could withdraw his objection.
42. The CHAIRMAN suggested that reference might be made to the fact that paragraph 3 (d) was being adopted on first reading and that it was an important enough issue to be included in the draft. Perhaps the Special Rapporteur could be asked to produce an acceptable commentary.
43. Mr. BARSEGOV expressed strong reservations about the text. Such a broad provision might cause enormous loss to international shipping, especially that of developing countries. However, he would not stand in the way of the provision's adoption and would not ask for a vote.
44. Mr. SHI said that he could accept the compromise proposal of the Chairman of the Drafting Committee only if the commentary to the paragraph made the Commission's position clear. Otherwise, he was in favour of retaining the text in the square brackets and referring it to the Sixth Committee. As already pointed out, the provision was new and was therefore being considered on first reading. Hence, it would be appropriate to let Governments decide.

⁷ See *Yearbook... 1981*, vol. I, p. 270, 1692nd meeting, paras. 86 *et seq.*

45. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the Special Rapporteur should reflect the discussion in the commentary. For his part, he considered that the words “loss or damage” should be used in the commentary and that an explanation should be added on the position taken in the Commission.

46. Mr. BARSEGOV said that it was plain that the question had not yet been resolved. He suggested postponing a decision until conditions for reaching a compromise were ripe.

47. Mr. Sreenivasa RAO said that, if the commentary explained the scope and structure of the provision and made it clear that it was not too general, that would allay his fears and he could support the provision. He was not asking for a precise wording yet—simply one or two sentences that captured the general sense of what later would become the final formulation.

48. Mr. EIRIKSSON said that it would be preferable to take account in the commentary of the views of Mr. Barsegov and others. He would not object to seeing more of the commentary before the actual form of language was adopted. The proposal by the Chairman of the Drafting Committee was a compromise. The formulation of the subparagraph should not be viewed as having the dire consequences to which reference had been made. Clearly, that was not the intention.

49. Mr. HAYES said it would be better for paragraph 3 (*d*) to begin with the word “pollution”, but he could agree to inserting the words “consequences of” in order to arrive at an agreement and avoid a vote.

50. In his view, paragraph 3 did not, and could not, create any exceptions to immunity. Paragraph 1 did so, and paragraph 3 gave examples of proceedings in which a court was otherwise competent, competence being a matter of national and not international legislation in those circumstances. Paragraph 3 must not have any other function than to give those examples. Specifically, he could not accept that it should have the effect of modifying the basic provision in paragraph 1 by saying that some kinds of actions in which a court might otherwise have competence would not be the kind of actions in which, in the circumstances in paragraph 1, immunity could not be invoked. In other words, paragraph 3 could not be a substantive article changing the meaning of paragraph 1. The law on the immunity of States was not concerned in any way with the merits of litigation. Thus, the argument about facilitating frivolous or vexatious litigation was invalid in the context of the provisions on the immunity of States now being prepared. For that reason, he had objected to the words “loss or damage resulting from”, but he could agree to the formula “consequences of”. In his opinion, the commentary should explain fully the two points of view, but it must not indicate that the effect of the revised formula was the same as that sought by including the words “loss or damage resulting from”.

51. Mr. TOMUSCHAT said that, admittedly, the Commission was not drafting substantive rules, but the text of the article might have repercussions, or might be interpreted as having repercussions, on substantive law. Given the marked divergence of views in the Commission,

he would prefer to retain the words “loss or damage resulting from” between square brackets. If those words were deleted, however, the two points of view in the Commission should be carefully reflected in the commentary. It might therefore be better to defer final adoption of article 17 until the Commission had before it a commentary which commanded the support of both sides.

52. Mr. BARSEGOV said it had been argued that paragraph 3 was merely illustrative and did not enlarge the sphere of immunity. The Commission’s practice in cases where a list was not exhaustive—such as the list of crimes in the draft Code of Crimes against the Peace and Security of Mankind—was not to give illustrations. He therefore proposed, in line with that practice, that paragraph 3 as a whole should be omitted.

53. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 3 was indeed meant to be illustrative and non-exhaustive. It was also a new provision, which allowed for a measure of flexibility so far as procedure was concerned. It was an *a contrario* argument to say that the inclusion of the words “loss or damage resulting from” would not have the effect of restricting immunity. He also agreed that subparagraph (*d*) was not the same as the other subparagraphs, but that it should be. To that end, the Commission might wish to consider adding the words “consequences of”, or a similar formulation, to the opening clause of paragraph 3 or, alternatively, to each of subparagraphs (*a*), (*b*), (*c*) and (*d*). Again, it could add the words “loss or damage resulting from” to each of those subparagraphs. In that way, the Commission would underline the importance it attached to the issue without over-emphasizing it in such a way as to give rise to misinterpretation. In other words, there was perhaps room for constructive ambiguity.

54. In his view, although the members of the Commission did not differ greatly in their motivation, they had still not arrived at a fully satisfactory solution to the problem and should therefore explore further all the drafting possibilities.

55. Mr. FRANCIS said that he was concerned to note that both the Special Rapporteur and Mr. Thiam had indicated their readiness to accept a vote. True, a vote had once been taken in the Commission, but it was the only occasion he could remember in all his 15 years as a member. He particularly welcomed the attitude of Mr. Barsegov, who, in voicing the opinion that the Commission should not proceed to a vote, had carried on in the tradition of his eminent predecessor, Mr. Ushakov, who had always favoured decisions by consensus. A vote by the Commission on the issue at hand could only have serious repercussions for the future. Though it might be laborious, it would be better for the Commission to settle issues by consensus rather than by a show of hands.

56. Mr. Sreenivasa RAO said that, having re-read the article, he was reassured by the words “determination of a claim in respect of”, which went to the heart of the matter. In a court of law, it was not so much a question of voicing opposition to pollution as of showing that damage had occurred. On that basis, he could go along with the wording of the article. He would suggest that the commentary should make it quite clear, first and

foremost, that all members were opposed to pollution of the seas. He would also like to be certain that the possibility of vexatious and frivolous claims was precluded.

57. Mr. PAWLAK (Chairman of the Drafting Committee) said that the wisest course would be to defer further discussion so as to draft a commentary that would reflect all views. At the same time, it should be remembered that a commentary merely reflected intentions, whereas the text of an article was binding.

58. The CHAIRMAN suggested that further discussion of article 17 should be postponed and that the Special Rapporteur should be asked to draft a commentary to the article for consideration by the Commission at the next meeting.

It was so agreed.

ARTICLE 18 (Effect of an arbitration agreement)

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 18, which read:

Article 18. 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 transaction, 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.

60. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in line with its decision on article 2, paragraph 1 (c), the Drafting Committee had opted for the term "commercial transaction". It would, of course, be interpreted by the courts in the light of their respective legal systems. The advantage of that term over "civil or commercial matter" was that it would not force an interpretation on States that might be inconsistent with those systems. After consideration, the Drafting Committee had decided not to include a subparagraph (d) on recognition of the award since it was a matter that pertained more to immunity from execution and, accordingly, had no place in article 18.

61. The Drafting Committee had deleted former article 20, on cases of nationalization.

62. Mr. EIRIKSSON proposed that the word "or" should be added at the end of subparagraph (b).

It was so agreed.

63. Mr. Sreenivasa RAO said that he had no objection to the article, but would like some clarification. Normally, where a State and a natural or legal person agreed on arbitration, the relevant procedural matters—for example, the venue and the applicable law—were laid down in the arbitration agreement. Thus, the court which was appointed pursuant to such an agreement would deal with the question of immunity rather than the court of any other State, and the arbitration procedure prescribed in the arbitration agreement would govern the three mat-

ters referred to in subparagraphs (a), (b) and (c) of article 18. He trusted that his understanding was correct and that no fundamental change in arbitration law was contemplated by the article.

64. Mr. OGISO (Special Rapporteur) said that Mr. Sreenivasa Rao's interpretation was correct. Normally, the arbitration agreement provided for the arbitration procedures. In cases where the arbitration agreement was not sufficiently clear in that respect, however, the matter could be dealt with by the supervisory jurisdiction of the court which was otherwise competent in the proceeding.

65. Mr. McCAFFREY said that he wished to enter a reservation with regard to the article, as it did not appear to provide for enforcement of the agreement to arbitrate. While it could be argued that that point was covered by subparagraph (a), it was not clear to him that that was the case.

Article 18, as amended, was adopted.

TITLE OF PART III (Proceedings in which State immunity cannot be invoked)

66. Mr. PAWLAK (Chairman of the Drafting Committee) reminded members that the Commission, having been unable to agree on first reading whether part III should be entitled "Limitations on State immunity" or "Exceptions to State immunity", had finally decided to place the words "Limitations on" and "Exceptions to" between square brackets and to consider the matter further on second reading. Although many members of the Committee had favoured the words "Exceptions to", the title "Proceedings in which State immunity cannot be invoked" had been adopted as a compromise in the belief that the title "Exceptions to State immunity" might give rise to objections in view of the strong views voiced earlier by a number of members. Should that belief prove unfounded, the Commission might wish to consider replacing the proposed title by "Exceptions to State immunity". He would none the less propose that the title should be retained.

It was so agreed.

The title of part III (Proceedings in which State immunity cannot be invoked) was adopted.

The meeting rose at 1.05 p.m.

2221st MEETING

Friday, 7 June 1991, at 10.10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González,

Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (continued) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING¹ (continued)

ARTICLE 17 (Ships owned or operated by a State) (continued)

1. The CHAIRMAN invited the Commission to resume its consideration of article 17.²

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that, following consultations on paragraph 3, a commentary had been drafted for subparagraph (d) which reflected the difficulties encountered and the positions taken.

3. Mr. OGISO (Special Rapporteur) said that the commentary read:

Paragraph 3 (d) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the unabated problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail.

The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible damage or loss to the claimant. Some other members, on the other hand, felt that this concern was unjustified inasmuch as no claim would be entertained by a court if the claimant did not establish that he had suffered loss or damage. After extended discussion, the Commission agreed to insert the words "consequences of", on the understanding that the latter would include loss or damage resulting from pollution of the marine environment.

It should be noted that subparagraph (d) serves merely as an example of the claims to which the provision of paragraph 1 would apply, and, as such, does not affect the substance or scope of the exception to State immunity under paragraph 1. It should be noted also that subparagraph (d) does not create substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be decided by the competent court. One member considered, however, that a more qualified wording such

as "injurious consequences" would have been acceptable to him. He therefore wished to reserve his position on this subparagraph.

4. He said that if the second paragraph of the commentary gave rise to any difficulty, there was no reason why it should not be deleted. He suggested that the adoption of the commentary should be deferred until members had had time to reflect upon it.

5. Mr. EIRIKSSON and Mr. McCAFFREY observed that they would have some suggestions to make on the commentary.

6. Mr. HAYES said that he too wished to propose certain changes to the commentary, which, in his view, was not altogether satisfactory. He would, however, have no objection to paragraph 3 (d) as it stood.

7. Mr. SHI recalled that his acceptance of the compromise formula for subparagraph 3 (d) was dependent on the commentary. Since the text of the commentary had been distributed only shortly before the meeting, he would request the Commission not to take a decision in haste on either the draft article or the commentary.

8. The CHAIRMAN, noting that consultations would have to be held on the commentary which the Special Rapporteur had read out, suggested that the Commission should take up article 19, article 18 having been adopted at the previous meeting, and that it should revert to article 17 after further consultations had taken place on the commentary to paragraph 3 (d).

It was so agreed.

ARTICLE 19 (State immunity from measures of constraint)

9. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 19, which read:

Article 19. State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract;

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) The property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

¹ For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 7-22.

² For text, see 2219th meeting, para. 55.

10. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the title of part IV adopted on first reading read: "State immunity in respect of property from measures of constraint". As part IV of the draft dealt only with measures of constraint which related to a proceeding before a court, some members of the Drafting Committee had felt that the title should be changed accordingly. Some other members of the Committee, who did not attach so much importance to the titles of the various parts of the draft and of the articles, had nevertheless agreed to the new title. The words "in respect of property" had been deleted, since it was obvious that a question of immunity of State property was concerned.

11. The Special Rapporteur had proposed that articles 21 and 22 adopted on first reading should be merged and that proposal had met with the support of the Commission since the ideas expressed in the two articles were closely related: article 21 dealt with State immunity from measures of constraint and article 22 with consent to such measures. The introductory phrase of article 19, paragraph 1, therefore embodied the general principle of State immunity from measures of constraint and the subparagraphs which followed stated the exceptions to that principle. The Drafting Committee had deleted from the introductory phrase the words "in the territory of a forum State", which appeared to introduce an unnecessary limitation that had not in fact existed in the original text of article 21. The Drafting Committee had, however, added to the new text the clause which appeared in the original text of article 21 and which stated that the article applied only to measures of constraint relating to State property "in connection with a proceeding before a court of another State". Also, the words "foreign State" and "forum State" had been replaced by the words "the State" and "another State" to conform to the terms used in the rest of the articles.

12. Subparagraph (a) corresponded to paragraph 1 of original article 22. The introductory phrase had been simplified without changing its meaning. The order of modalities by which a State could indicate its consent had been slightly changed as compared with the text adopted on first reading. Obviously, subparagraph (a) should be read together with the introductory phrase of paragraph 1; accordingly, a "declaration before the court" meant a declaration before the court of the State of the forum.

13. Subparagraph (b) corresponded to subparagraph (b) of article 21 adopted on first reading, apart from a minor drafting change because of the structure of the new introductory phrase.

14. Subparagraph (c) corresponded to subparagraph (a) of article 21 adopted on first reading, except that the expression "commercial [non-governmental] purposes" had been changed to "other than government non-commercial purposes", as in the earlier articles.

15. Paragraph 2 corresponded to paragraph 2 of article 22 adopted on first reading, with some minor drafting changes.

16. Lastly, the title of article 21 adopted on first reading had been maintained for article 19.

17. Mr. Sreenivasa RAO said he understood that subparagraph (b) had been adopted on first reading at the time when the concept of State enterprise had not been introduced into the draft. Even if a State had earmarked or allocated funds to a State enterprise, immunity should not operate in favour of that enterprise, since the property in such funds would have passed to it; accordingly, the enterprise should be held responsible for its activities. To infer from such situations that there was an exception to State immunity was neither necessary nor logical.

18. Mr. PAWLAK (Chairman of the Drafting Committee), noting that the draft should be considered as a whole, said he would interpret Mr. Sreenivasa Rao's comment as underlining the complexity of paragraph 1 (b) and not as a reservation.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 19.

Article 19 was adopted.

ARTICLE 20 (Specific categories of property)

20. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 20, which read:

Article 20. Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (c) of article 19:

(a) property, including any bank account, which is used or intended for use for the purpose 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;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to paragraph 1 (a) and (b) of article 19.

21. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 20 (originally article 23) was designed to protect certain specific categories of property by excluding them from any presumption of consent to measures of constraint.

22. Paragraph 1 sought to prevent any interpretation to the effect that property classified as belonging to one of the categories listed fell under the exception provided for

in article 19, paragraph 1 (c). The cross-reference to that particular provision had, of course, been adjusted in the light of the merger and renumbering of original articles 21 and 22. The Drafting Committee had made two changes in the introductory phrase of paragraph 1. The first concerned the words “for commercial [non-governmental] purposes”, which, as in other provisions, had been replaced by the words “for other than government non-commercial purposes”. The second consisted in the addition of the words “in particular” after the words “the following categories” to indicate that the enumeration in subparagraphs (a) to (e) was merely illustrative.

23. With regard to subparagraphs (a), (c), (d) and (e), the Drafting Committee had observed that, since the criteria listed in article 19, paragraph 1 (c) already included the requirement that the property should be “in the territory of the State of the forum”, the phrase “which is in the territory of another State” was unnecessary. In subparagraph (e), the Drafting Committee had deemed it useful to add the word “cultural” after the word “scientific”.

24. Some members of the Drafting Committee had wondered whether paragraph 2 was necessary, since the sovereign power of the State to dispose of its property as it saw fit was already safeguarded by article 19, paragraph 1 (a) and (b). The Committee had concluded that, in the light of those subparagraphs, article 20, paragraph 2, did not have to be as elaborate as it was in the draft adopted on first reading. It had, however, felt that a reference to article 19, paragraph 1 (a) and (b), would serve as a useful reminder in view of the categorical language used in paragraph 1.

25. The title of the article remained unchanged.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20.

Article 20 was adopted.

ARTICLE 21 (Service of process)

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 21, which read:

Article 21. Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) in the absence of such a convention:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (b) (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.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 21 largely corresponded to the text of article 24 adopted on first reading. Paragraph 1 as adopted on first reading had been much too detailed and had given preference to special arrangements between the claimant and the State over other means. The Committee had considered it unnecessary to go into too much detail on modes of service of process, which could be placed in three general categories: arrangements made in a binding international convention to which both States concerned were parties; diplomatic channels; and other means agreed between the claimant and the State concerned.

29. The Committee was of the view that there should be a preference for treaty provisions in force, where such provisions existed, and that it was only in the absence of a convention that service of process could be made either through diplomatic channels or by any other means. In that case, the parties should be free to agree on their own method of service of process, provided, however, that the method chosen was not precluded by the law of the State of the forum. The State concerned could also indicate by unilateral declaration that it would accept service of process through certain means. If those means were accepted by the claimant and were not precluded by the law of the State of the forum, they were valid under paragraph 1 (b) (ii).

30. Paragraphs 2, 3 and 4 were the same as those adopted on first reading and the title of the article remained unchanged.

31. Mr. Sreenivasa RAO said that he had no objection to the proposed article, but recalled that there were problems involved in going through diplomatic channels.

32. Mr. DÍAZ GONZÁLEZ, supported by Mr. BARBOZA, said that he could not endorse article 21 as it was drafted in Spanish.

33. Mr. AL-KHASAWNEH pointed out that, in the vast majority of cases, there was no international convention applicable in the matter. The exception appeared to have been taken as the starting point rather than the general situation, in which the solution was to go through diplomatic channels.

34. Mr. MAHIU said that, in the French text of paragraph 1, the words *peut être effectuée* should be replaced by the words *est effectuée*.

35. Mr. PAWLAK (Chairman of the Drafting Committee) said it was understood that all the language versions would be harmonized and brought into line with the English text, which did not give rise to any problems.

36. Mr. THIAM proposed that the words *ou de toute autre pièce* should be used in the first line of the French text of paragraph 1.

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 21, taking into account the drafting comments made on it.

Article 21 was adopted.

ARTICLE 22 (Default judgement)

38. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 22, which read:

Article 22. Default judgement

1. A default judgement shall not be rendered against a State unless the court has ascertained that:

(a) the requirements laid down in paragraphs 1 and 3 of article 21 have been complied with;

(b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 21; and

(c) the present articles do not preclude it from exercising jurisdiction.

2. A copy of any default judgement 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 21.

3. The time-limit for applying to have a default judgement set aside shall not be less than four months and shall begin to run from the date on which a copy of the judgement is received or is deemed to have been received by the State concerned.

39. Mr. PAWLAK (Chairman of the Drafting Committee), noting that article 22 had originally been numbered 25 when adopted on first reading, said that the Drafting Committee had felt that paragraph 1 would be clearer if the conditions required for a court to be able to render a default judgement were dealt with in three separate subparagraphs. The words "except on proof of" had been replaced by the words "unless the court has ascertained that" in the phrase introducing the three conditions in question so as to indicate clearly that it was incumbent on the court to ascertain that the required conditions were met and that it had to do so prior to rendering its judgement.

40. The text of subparagraph (a) was the same as that of the provision adopted on first reading, except for the renumbering of the cross-reference. That was also true of subparagraph (b), except that the time-limit had been increased from three to four months because it might take over a month for the document instituting the proceeding to reach the authorities of the State concerned and as much time for those authorities' reaction to reach the forum State. Subparagraph (c) had been introduced in response to a suggestion supported by several delegations in the Sixth Committee. The new subparagraph, nevertheless, had no bearing on the question of the competence of the court, which was a matter for each legal system to determine.

41. As to paragraph 2, the text adopted on first reading had dealt in one single sentence with two separate issues, namely, the transmittal of the text of the default judgement and the time-limit for requesting the setting aside

of the judgement. The Drafting Committee had considered that it was preferable to devote separate paragraphs to each of those issues. Paragraph 2 reproduced without change the first part of the former paragraph 2. Paragraph 3 did not differ in substance from the latter part of paragraph 2 of the original text, except that, for the reasons explained in connection with paragraph 1, a four-month time-limit had been substituted for the six month time-limit envisaged in the original text.

42. Mr. McCAFFREY proposed that, in the introductory phrase of paragraph 1, the word "ascertained" should be replaced by the word "found".

43. Mr. THIAM said that he doubted whether the four-month period referred to in paragraph 1 (b) could be applied uniformly to all States without taking account of the distance between the State serving process and the addressee State. There might be some unfairness involved.

44. Mr. HAYES supported the proposal made by Mr. McCaffrey with regard to the introductory phrase of paragraph 1.

45. At the end of paragraph 2, he proposed that the words "and in conformity with the provisions of the said paragraph" should be added for the sake of clarity. The requirement was not simply to resort to one of the means specified in article 21, paragraph 1, but to do so in accordance with the order set out in the paragraph.

46. Mr. PAWLAK (Chairman of the Drafting Committee) said that he had no objection either to Mr. McCaffrey's proposal or to that of Mr. Hayes, which would be useful. With regard to Mr. Thiam's comment, he believed that, in the age of facsimile transmission, the problem of distance did not arise.

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 22, as amended by Mr. Hayes and Mr. McCaffrey.

Article 22, as amended, was adopted.

ARTICLE 23 (Privileges and immunities during court proceedings)

48. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 23, which read:

Article 23. Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding 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 shall not be 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.

49. Mr. PAWLAK (Chairman of the Drafting Committee) said, for the purposes of convenience and drafting, that text combined what had originally been article 26 (Immunity from measures of coercion) with what had originally been article 27 (Procedural immunities), both of which had been designed to reduce the exercise of coercive measures on States to achieve compliance with court orders. Although the form of the two original texts had been changed, their content was the same.

50. Paragraph 1 was the result of the merger of article 26 adopted on first reading and paragraph 1 of article 27 adopted on first reading. Paragraph 2 corresponded to paragraph 2 of article 27 adopted on first reading, except that the words "a State is not required" had been replaced by the words "a State shall not be required" for drafting purposes only.

51. The new title reflected the Drafting Committee's belief that the article in fact dealt with certain privileges and immunities granted to States, for example, those relating to the provision of securities or deposits.

52. Mr. TOMUSCHAT said that he endorsed paragraph 1, but had a reservation with regard to paragraph 2. A foreign State, acting as defendant, should not be bound to provide security. However, acting as plaintiff, the foreign State should be required to provide security, since the defendant might find it difficult or even impossible to obtain reimbursement from that State for the costs of the proceedings. The rule enunciated in paragraph 2 was thus unfair and accorded an unwarranted privilege to States. None the less, he would not oppose the adoption of article 23.

53. Mr. EIRIKSSON, supported by Mr. McCAF-FREY, Mr. HAYES and Mr. THIAM, said that he shared Mr. Tomuschat's view.

54. Mr. Sreenivasa RAO said that, while he understood those reservations, he believed that paragraph 2 met a practical need and was entirely logical when read in conjunction with paragraph 1, which enumerated the cases in which a State was or was not required to perform a particular act, provide a document or disclose any other information.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 23.

Article 23 was adopted.

56. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee was recommending the deletion of article 28 (Non-discrimination), which had been approved on first reading, albeit with considerable reluctance on the part of some members. Several delegations in the Sixth Committee had indicated that they favoured the deletion of article 28. The same differences of opinion had resurfaced at the time of the second reading.

57. The arguments in favour of the retention of the article had been, first, that paragraph 1 embodied the universally accepted principle of non-discrimination and should thus not give rise to any difficulty, secondly, that paragraph 2 (a) was based on the concept of reciprocity,

which was also a generally recognized concept, and, thirdly, that subparagraph (b) had the advantage of safeguarding the position of States that were parties to regional conventions providing for a treatment different from that required by the draft articles.

58. The prevailing view in the Drafting Committee had been that article 28 created more problems than it solved. It had been emphasized in particular that paragraph 2 contradicted paragraph 1 and allowed States so much leeway that it might be used to undermine the principle of immunity, which all States recognized as covering *acta jure imperii*. The Drafting Committee had concluded that, while none of the provisions of article 28 contradicted State practice, it might be better to rely on general international law and, in particular, on the law of treaties.

TITLES OF PART I (Introduction), PART II (General principles), PART IV (State immunity from measures of constraint in connection with proceedings before a court) and

PART V (Miscellaneous provisions)

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the titles of parts I, II, IV and V of the draft articles.

The titles of parts I, II, IV and V were adopted.

60. The CHAIRMAN suggested that the Commission should consider agenda item 6 while awaiting the results of the consultations on the commentary relating to article 17, paragraph 3 (d).

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/437,³ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR⁴

61. The CHAIRMAN invited Mr. Barboza, the Special Rapporteur, to introduce his seventh report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/437).

62. Mr. BARBOZA (Special Rapporteur) said that he had tried to comply with the suggestion of one delegation in the Sixth Committee of the General Assembly that the Commission should prepare an overall review of the current status of the topic and indicate the direction it intended to take in the future, instead of continuing with an article-by-article analysis.⁵ The texts of the articles

³ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

⁴ For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

⁵ *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee*, 30th meeting, para. 69.

submitted thus far had therefore been referred to in his report simply to facilitate the work of the Commission and he suggested that members should focus not on those texts, but rather on the basic issues.

63. The debate in the General Assembly had proved that, while agreement had not been reached on certain aspects of the topic, consensus had definitely been emerging with regard to some important points. In his opinion, the General Assembly had answered very clearly the questions put to it by the Commission. The majority of the delegations had been opposed to establishing a list of dangerous substances and in favour of providing for the liability of the State of origin in the case of transboundary harm caused by an activity carried out by a private enterprise under its jurisdiction. In the light of those trends and since the task at hand was the development of the law rather than its codification, he believed that negotiations were inevitable and that, instead of continuing the debate on issues on which consensus had not yet been reached, the Commission should consider the possibility, at least for certain articles, of submitting several alternatives to the General Assembly. To that end, it must identify first the main issues and then the various currents of opinion on those issues. It could then suggest the legal formulas which would give expression to those opinions. He was thus not proposing that the general debate should be reopened. The seventh report was an attempt to sum up and assess the situation; it was for the Commission to decide whether that assessment was accurate or not.

64. Another preliminary question was that of the Commission's contribution to UNCED, to be held in Brazil in 1992, and to the United Nations Decade of International Law. Since the Drafting Committee would apparently be unable to consider the articles submitted to it, particularly those relating to principles, in time for them to be presented to the Conference, it might be appropriate to establish a working group to study those principles in particular, so that the Commission could discuss them at its current session, with a view to the 1992 Conference.

65. Opinions were divided on the nature of the instrument that the Commission was drafting. Some members were of the opinion that if the Commission did not concern itself with drafting rules for a convention which required acceptance by States, it could more easily accept certain hypotheses and draft articles, but there was a strong current of opinion in favour of some type of framework convention. In the end, it was the General Assembly that would make the final decision on that issue, and the Commission should postpone its recommendation as to the nature of the instrument.

66. As a preliminary solution to the problem of the English title of the topic, which seemed to be more restrictive in terms of the Commission's mandate than it was in the other language versions, he thought that the current title could be replaced by "Responsibility and liability regarding the injurious consequences of activities not prohibited by international law", although he did not think that the Commission should consider that issue at the current session.

67. With regard to the scope of the draft articles, the main question was to determine whether article 1 should include both activities involving risk and activities with harmful effects or whether those two types of activities should be covered by two separate instruments. The majority of members and of delegations to the Sixth Committee seemed to be in favour of the first solution. Even if the scope in that case might seem somewhat broad, it should be remembered that the obligations arising from the provisions of article 1 were not too burdensome.

68. As to the principles contained in draft articles 6 to 10, a broad consensus seemed to exist on the basic principle (art. 6), the wording of which was inspired by Principle 21 of the Stockholm Declaration.⁶ The same was true of the principle of international cooperation (art. 7). The principle of prevention assumed preventive action in order to avert transboundary harm or to reduce the risk of such harm to a minimum or, if harm had already been caused, in order to minimize the harmful effect. Two types of obligations derived from that principle: procedural obligations, which consisted mainly in assessing the transboundary effects of the intended activities, notifying the State presumed affected and holding consultations; and unilateral obligations, namely, the adoption by States of the necessary legislative, regulatory and administrative measures to ensure that operators took all steps to prevent harm, minimize the risk of harm or limit the harmful effects that had been unleashed in the territory of the State of origin. The principle of reparation (art. 9) should reflect the majority opinion in the Sixth Committee, namely that compensation was the responsibility of the operator, under the mechanism of civil liability, with the State assuming residual liability; that was in conformity with many conventions governing specific activities. The principle set forth in draft article 9 therefore needed to be reformulated. The Commission might also consider extending the liability of the State to cases where the victim was unable to obtain compensation because the operator could not provide restitution in full or to cases where the responsible party could not be identified. As indicated in the report, the question should be settled on the basis of negotiations between the State of origin and the State presumed affected. The principle of non-discrimination (art. 10) had given rise to very few objections because it was essential to the proper functioning of the system of civil liability.

69. Referring to article 2, which dealt *inter alia* with dangerous activities, he recalled that most delegations in the Sixth Committee had favoured a general definition of activities involving risk and had felt that a list of substances would be unhelpful and inappropriate. In his opinion, it would be preferable to include in an annex an illustrative list of substances which could help determine the activities which, by virtue of using one of the substances listed, presented a significant risk of transboundary harm. However, that was a matter for the Commission to decide.

⁶ 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.

70. The issue of prevention was dealt with in greater detail separately in the report. The procedural obligations gave rise to a problem in that it would be difficult to burden States with obligations of that kind within the framework of a legal regime as general as that envisaged in the draft articles. However, such obligations were fairly well established in international law and States usually required previous authorization for activities of the type described in article 1, in order to protect their own population. The procedure should therefore be simplified, possibly by allowing the State presumed affected some degree of participation in the authorization procedures for the activity in question. In addition, the procedure should not be made a condition for the granting of the authorization, it being understood that the State of origin would be liable in the event of actual harm. Furthermore, no State could be compelled to tolerate significant harm or a significant risk of harm. That brought in the idea of the prohibition of an activity and the need to establish a threshold for prohibition, which was in turn related to the idea of a threshold for harm or risk, bearing in mind the balance of interests and the factors referred to in draft article 17. It remained to determine how to settle possible disputes: the Commission would have to decide whether there should be a mandatory system or whether the methods of general international law should be applied. As had been indicated, prevention included procedural obligations and unilateral measures. While the former might or might not be mandatory, depending on the case, some were of the opinion that the latter certainly should be, and that meant that failure to give effect to them would entail the consequences provided for by general international law.

71. The last chapter of the report dealt with State liability and with civil liability. There seemed to be a majority in favour of residual State liability. The question was whether there should be an "original" State liability in cases where the author of the damage could not be identified and whether the State should have an obligation to notify, inform and consult with the States presumed affected. The report considered three possible approaches to civil liability. The first would be not to deal with civil liability at all in the draft. However, the Sixth Committee had already rejected that approach. The second would be to regulate only the interrelationship between State liability and civil liability, in which case claimants would have to deal with the national law of the State of origin. The third would be to include in the draft articles provisions designed to ensure the application of the principle of non-discrimination and certain other international standards. The report also considered the question of the channelling of liability, to which there was no simple answer in the context of a general instrument. There seemed to be three possible solutions, first, not to deal with the question in the articles, leaving the court to decide who was liable according to the criteria of existing national law, the solution adopted in the sixth report;⁷ secondly, to establish criteria whereby liability would be attributed to the person exercising control of the activity at the time when the incident had taken

place, the solution adopted in the European draft;⁸ and thirdly, to impose the obligation on States to establish the criteria for channelling liability in their domestic legal systems, in the light of the activity in question.

72. With regard to liability for damage to the environment in areas not under national jurisdiction (the "global commons"), he did not think that the Commission was in a position to consider the question immediately, since it did not yet have all the information it needed to reach a decision.

73. In conclusion, he emphasized that he had no wish to reopen a general debate on the draft articles. His report merely attempted to evaluate the present situation and to consider certain methods of work.

74. The CHAIRMAN thanked the Special Rapporteur for his introduction of the seventh report.

Jurisdictional immunities of States and their property (continued) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf. Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING⁹ (continued)

ARTICLE 17 (Ships owned or operated by a State) (concluded)

75. The CHAIRMAN invited the Commission to resume its discussion of article 17, paragraph 3 (d).

76. Mr. OGISO (Special Rapporteur) read out the revised text of the commentary on article 17, paragraph 3 (d):

Paragraph 3 (d) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail.

Since subparagraph (d), like subparagraphs (a) to (c), serves merely as an example of the claims to which the provisions of paragraph 1 would apply, it does not affect the substance or scope of the exception to State immunity under paragraph 1. Nor does the subparagraph establish substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be decided by the competent court.

The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible loss or damage to the claimant. One member, indeed, considered that a more qualified wording such as "injurious conse-

⁸ Council of Europe, document CDCJ (89) 60, Strasbourg, 8 September 1989.

⁹ For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook... 1986*, vol. II (Part Two), pp. 7-12.

⁷ *Yearbook... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1.

quences" would have been necessary and he therefore reserved his position on the subparagraph. Some other members, on the other hand, felt that this concern was unjustified since no frivolous or vexatious claims would be entertained by a court and that furthermore it was not the function of rules of State immunity to prevent claims on the basis of their merits.

77. Mr. TOMUSCHAT, speaking also on behalf of Mr. SEPÚLVEDA GUTIÉRREZ, Mr. Sreenivasa RAO and Mr. SHI, said that he endorsed the commentary, since the word "tangible" had been added in the third paragraph before the words "loss or damage". That word introduced a shade of meaning which he felt was necessary. It should also be pointed out that the article did not establish any substantive rule relating to the legitimacy or receivability, as such, of a claim and it made no difference to the law already applicable.

78. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the text of the commentary read out by the Special Rapporteur.

It was so agreed.

79. Mr. SOLARI TUDELA said that he could accept article 17, paragraph 3 (d), with or without square brackets, even though he thought that the words in brackets were redundant, since pollution of the marine environment was itself a consequence and where pollution occurred, there was necessarily loss or damage.

80. Mr. HAYES said that he associated himself with the reservations expressed in connection with the second part of paragraph 2 of article 17.

81. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 17 as a whole.

Article 17 was adopted.

82. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee had also considered the question of the immunity of State-owned or State-operated aircraft engaged in commercial service. The Committee had noted that the Special Rapporteur had tackled the issue in an addendum to his second report¹⁰ and had reviewed the existing treaties on international civil aviation law, pointing out that aircraft used for military, customs and police service were deemed to have immunity. The Special Rapporteur had also stated that, apart from that rule, there did not seem to be any clear rule conferring immunity on planes and that the practice of States was not entirely clear. He had therefore come to the conclusion that it was preferable to deal with the matter in a commentary instead of including a special provision concerning aircraft in the draft.

83. The Drafting Committee had also considered the possibility of including in the draft articles certain rules on immunity applicable to aircraft and objects launched into outer space. It had observed that the matter was a

complex one and that a definition of specific categories of aircraft, such as presidential planes, civil aircraft chartered by Government authorities for relief operations and planes used by diplomatic missions, would require a thorough analysis of existing conventions, domestic legislation and case law. Because of the lack of time and documentation, however, it had been able only to examine briefly a draft article prepared at its request by the Special Rapporteur. The Drafting Committee nevertheless recognized that the question was a topical one and was aware that the absence of provisions on aircraft in the draft might be viewed as a lacuna, particularly in the light of the general principle embodied in article 5. It therefore wished to draw the Commission's attention to the question of the status, from the point of view of immunity, of aircraft and objects launched into outer space. The Commission might in turn wish to draw the attention of the General Assembly to the matter.

84. He explained that Mr. Pellet had stated that he was in favour of the inclusion in the draft articles of provisions on the immunity of aircraft and objects launched into outer space.

ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

85. The CHAIRMAN invited the Commission to take a decision on the draft articles as a whole, as amended.

The draft articles on jurisdictional immunities of States and their property as a whole, as amended, were adopted on second reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

86. The CHAIRMAN thanked the Chairmen of the Drafting Committee at the forty-second and forty-third sessions of the Commission, Mr. Mahiou and Mr. Pawlak respectively, and the Special Rapporteur, Mr. Ogiso, for the work they had done to enable the Commission to complete its consideration of the topic. The Commission still had to formulate its recommendations to the General Assembly on the action to be taken on the draft articles, but meanwhile he was sure that the Commission would wish to express its gratitude to the Special Rapporteur. He therefore proposed that it should adopt a draft resolution, which read:

"The International Law Commission,

"Having adopted the draft articles on the jurisdictional immunities of States and their property,

"Expresses to the Special Rapporteur, Mr. Motoo Ogiso, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of draft articles on jurisdictional immunities of States and their property."

¹⁰See *Yearbook... 1989*, vol. II (Part One), document A/CN.4/422/Add.1.

87. Mr. JACOVIDES said that he supported the draft resolution and that all members of the Commission could not but recognize the excellent work done by Mr. Ogiso.

The draft resolution was adopted.

The meeting rose at 1.05 p.m.

2222nd MEETING

Tuesday, 11 June 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

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. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR² (*continued*)

1. Mr. JACOVIDES, congratulating the Special Rapporteur on the progress achieved in a difficult and challenging area of the law, said that there was sufficient agreement on the underlying principles to enable the Commission to finalize its work on the topic. The final form the draft should take, whether a convention, a code of conduct or some other form of legal guidelines should none the less be decided later, in the light of the views of Governments expressed at the General Assembly or in their written comments. It would also be useful if the results of the Commission's endeavours, and in particular the draft articles prepared by the Special Rapporteur and referred to the Drafting Committee, could be presented to UNCED, to be held in Brazil in 1992. In that way, the

Commission would make a contribution to the global efforts to protect the environment, something which deserved high priority in the United Nations Decade of International Law. In voicing that opinion, he was in no way underestimating the continuing difficulties that would have to be faced. The questions of methodology would, for instance, have to be tackled and an overall assessment made of the status of the item, of the direction it should take, and of the pace at which work should proceed. The approach might not be orthodox, but, then again, neither was the topic, for it was concerned more with progressive development than with codification of the law and should be examined accordingly.

2. One positive element was the response by the Sixth Committee to the two policy questions raised in the Commission's report on the work of its forty-second session.³ The Commission might wish on the basis of that precedent to put to the General Assembly further policy questions: the resulting interaction between the two bodies would be particularly appropriate in such a new area of the law. That did not, of course, mean that the Commission could simply pass on its responsibility to the General Assembly. There was much legal material and State practice, and also many treaties, particularly regional treaties, which were of relevance to the topic and should be studied first.

3. The Special Rapporteur had rightly urged the Commission to concentrate not on the draft articles he had submitted earlier but on certain important issues. The first of them, a decision on the nature of the instrument could, as the Special Rapporteur had stated at a previous session, wait until coherent, reasonable, practical and politically acceptable draft articles had been developed,⁴ after which the Commission could consider whether to recommend that the articles should be incorporated in a draft convention or in some other legal instrument.

4. With regard to the title of the topic, he saw merit in using in the English version the words "responsibility and liability" and in replacing "acts" by "activities"; that would more closely reflect the broadening of the scope to encompass activities involving risk and activities with harmful effects. The fundamental principle underlying the topic was acceptable, though the drafting of certain articles should be re-examined.

5. As to the procedural obligations regarding prevention, the obligation of due diligence should be "hard". Also, in the absence of some form of dispute settlement under Article 33 of the Charter of the United Nations, a compulsory system for the settlement of disputes should be introduced. As he had long advocated, a comprehensive system of third-party dispute settlement must form an integral part of any treaty if the rule of law among nations was to acquire real meaning.

6. The aim with regard to responsibility and liability should be to provide for State responsibility for breach of due diligence and for original State liability where it

¹ Reproduced in *Yearbook... 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook... 1990*, vol. II (Part Two), chap. VII.

³ *Yearbook... 1990*, vol. II (Part Two), para. 531.

⁴ *Yearbook... 1987*, vol. II (Part Two), p. 49, para. 192.

was not possible to determine individual liability because those who had committed the damage could not be identified. Wherever possible, there should initially be redress against the private individual who was responsible and the State should have only residual responsibility. Liability should be extended to cover the "global commons", as part of the broad objective of protecting the environment. Given the diversity of views on the matter, however, it would be wise to defer a decision until the subject had been further developed. Lastly, the Commission owed it to the international community and to itself to chart its course and it should seek, with the General Assembly's guidance on policy issues, to provide the Special Rapporteur with the basis on which to continue his work.

7. Mr. MAHIU noted that, in the seventh report, the Special Rapporteur had departed from the usual practice of carrying out an article-by-article analysis and had opted for the method of overall review, first drawing attention to the major problems, then suggesting possible solutions and, finally, seeking some pronouncement from members on the subject. He fully understood the Special Rapporteur's concern to remove any doubts or ambiguity which, if not cleared up, at least in large measure, might prevent the Special Rapporteur and the Commission from establishing the basic elements of the work of codification. That would be particularly unfortunate after 10 years of endeavour. The drawback to the new method was that it could none the less give rise to misunderstanding and cause the general debate to be reopened, something the Special Rapporteur had warned against (2221st meeting).

8. He would be grateful for clarification of the somewhat enigmatic statement at the beginning of the report to the effect that the Special Rapporteur's task was to try to offer alternatives to make viable a possible negotiation, perhaps at a later stage of the development of the topic. He wondered what negotiation the Special Rapporteur had in mind, and in what context and at what stage in the work on the topic it would take place.

9. In an informal paper circulated among members,⁵ the Special Rapporteur had indicated the main issues on which he sought the Commission's response. The first question concerned the nature of the instrument, in which connection the Special Rapporteur considered a solution would be premature at that stage and had stated in his report that it was neither possible nor desirable to anticipate the action of the General Assembly. It was quite true that, when it came to deciding whether the instrument would eventually take the form of a binding convention or some other legal form, the General Assembly would have the last word. It was true, too, that when work on the topic had started it had not been thought opportune for the Commission to concern itself with the precise nature of the draft. As the Special Rapporteur had stated at the time, the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles, on the basis of criteria

⁵ This paper, which summarized the issues raised by the Special Rapporteur in his introductory statement made at the 2221st meeting, was not issued officially as a document of the Commission.

that were scientific, identifiable and logical.⁶ Yet the Commission had been working on the topic for 10 years and States themselves had now entered the discussion; they fell into two broad groups, one favouring a binding instrument and the other favouring a code of conduct or set of directives. Perhaps it was time to ask whether the nature of the instrument could have a decisive influence on the progress of the present work. Furthermore, since the Commission was engaging in an overall assessment of the most controversial points in particular, it should be able to determine the degree of acceptability of the draft and hence of its nature. If the Commission was moving in the direction of a binding instrument, the contents and scope of the draft would increasingly lean towards the establishment of the minimum obligations for States: the draft would have to have a low profile, as it were, in order to be politically acceptable. In other words, the Commission would realize that there were bounds that could not be crossed.

10. If, however, the Commission was moving towards the more flexible form of a code of conduct, the content and scope could be more ambitious and new rules that took account of technological progress, the dangers and the challenges, could be evolved. At the present time, the Commission seemed to be thinking more in terms of a binding instrument, which explained the underlying controversy and the difficulty in finding solutions to the main issues. If the position of members on the main issues was determined by the nature of the instrument, would it not be more logical to have a thorough discussion and draw the necessary conclusions rather than to allow any misunderstanding to persist?

11. The second question concerned the scope of the draft. He agreed that it should deal with activities rather than acts, and that the English version should be brought into line with the other language versions, which spoke of "activities". What, however, were the activities in question? Once again, opinions were divided, and the Commission would have to make a choice. It had been suggested that there were three types: activities involving risk; activities with harmful effects; and hazardous activities, as well as a possible fourth category, activities involving unforeseeable harm. In fact, there could never be an exhaustive list because of the infinite variety of activities, and the Commission should not make the mistake of trying to provide for every situation. For the purposes of the draft, there were only two types of activity: those involving risk and those with harmful effects, since hazardous activities were but one component of activities involving risk. Activities involving unforeseeable harm could not be counted as a fully separate category because they necessarily had some link with the others. The two concepts of risk and harmful effects were therefore sufficiently flexible to cover any regime to redress harm suffered in one State by reason of activities carried out on the territory of another State, and the draft should be built around them. As work on the topic progressed, the Commission should consider whether the two groups of activity were sufficiently close to come under a single legal regime or whether the differences justified separate sets of rules. In his view, there were rules common to the

⁶ See footnote 4 above.

two kinds of activity but that did not preclude a few rules specific to each activity. In other words, there should be a common basic regime and it would probably be necessary to take account later of any special features linked to risk or to harmful effects.

12. The third question concerned prevention, an area in which the Commission was concerned with primary rules, namely, with setting forth the obligations incumbent on States with respect to activities undertaken on their territory. In that connection, the Special Rapporteur had identified two types of obligations. The first type involved procedural obligations under which the State of origin was required to assess the transboundary impact of its activities and subsequently notify or consult the State that might be affected by the risk or harmful effect. Establishment of those procedural obligations perhaps was the most fundamental aspect of the draft. Since the activities in question were not prohibited by international law and States were thus free to act without external interference, the States that were potentially in danger remained unaware of any risk or harmful effects until such time as actual harm had occurred. In consequence, those States had no possibility of making preparations; they could act only when the harm was actually taking place, in other words, when it was already too late. With all due respect to the notion of State sovereignty, such an inequitable arrangement seemed difficult to accept. Appropriate procedures were therefore needed to enable the State involved to be aware of potential risks. Yet, implicitly, any procedures established for notification or consultation would not prevent States from carrying out their activities. In his opinion, the principle of establishing such procedures was beyond doubt. The point was to find a means of reconciling the State's obligations with its right to undertake any activities not prohibited by international law, but ensure at the same time the protection of States at risk. Such a compromise would not be easy to achieve and would require on the part of the Commission an approach that was both creative and realistic.

13. The second type of obligation consisted of legislative and administrative measures designed to minimize risk and harmful effects. In general, most activity that might involve risk or give rise to harmful effects was already regulated by States, and further obligations were not necessary unless the objective was to harmonize the existing prevention norms or make them more rigorous. In that case, new constraints would be needed, including the possibility of prohibiting an activity, something that raised two issues: the threshold above which the affected State could request prohibition of an activity and the mechanism by which disputes between the State of origin and the affected State with regard to the threshold could be settled.

14. It was not clear whether such a threshold could apply to activities involving risk. Needless to say, harmful effects above a certain threshold were unacceptable and should lead to prohibition, but it was difficult to imagine prohibition of an activity solely as a function of risk. In that domain, there might be a distinction between activities involving risk and activities with harmful effects. The establishment of a threshold could be based on an agreement between the States concerned or on interna-

tional norms. Failing that, and if prohibitions were limited solely to activities with harmful effects, ways and means would have to be envisaged of settling disputes.

15. The issue of reparation involved determining whether the victims should seek compensation from the State on the territory of which the harmful activity was taking place or from the operator, i.e. the person carrying out the activity. There were, in theory, three possible solutions: (a) sole liability on the part of the State; (b) sole liability on the part of the operator; or (c) joint liability, where the State had primary liability and the operator had residual liability or vice versa.

16. The solution assigning sole liability to either the State or the operator was difficult to accept and could in some cases mean no reparation. Article 3 of the draft signified that a State was not responsible for a private activity where it might, in good faith, be unaware of the risk or the harmful effects. For example, many States, including the most developed, had been unaware for a number of years of the final destination of some of their waste products. In such cases, victims had not been able to seek redress from the State of origin and had been unable to obtain compensation. The solution assigning sole liability to the operator also had drawbacks: the harm might be so substantial as to result in insolvency on the part of the operator, thus leaving the victim without adequate compensation or even with no compensation at all.

17. The equitable solution was therefore a type of joint liability, but it was still to be determined whether primary liability should be assigned to the State or to the operator. In making such a determination, account should be taken of whether or not the State had had obligations and of the type of activity that had caused the harm. State obligations were essentially those of prevention; therefore if the State had failed to respect one of those obligations, and harm had resulted from that fact, the State should bear primary responsibility. The draft articles supplemented those on State responsibility for wrongful acts. However, the present draft differed from the other one in two ways: the State of origin was liable only if harm had actually occurred and the operator was assigned residual responsibility.

18. Where there was no failure by the State to respect its obligations, primary responsibility should be assigned to the operator. The State should then be assigned residual responsibility, in particular in the case of partial or total insolvency on the part of the operator. In general, it was for States to take any additional measures necessary to regulate the relationship between the State and operators with respect to liability.

19. In conclusion, it was time for the Drafting Committee to begin its work on the articles, so that the general debate could come to an end and give way to an approach that would lend concrete shape to the ideas proposed thus far. He hoped that, at the next session, the Special Rapporteur would focus solely on the chapter on prevention and, in so doing, would review existing conventions and State practice, thus enabling the Commission to produce a final chapter. At UNCED in 1992, the Commission should demonstrate its interest in environmental issues by offering a review of its work on inter-

national liability and on the non-navigational uses of international watercourses.

20. Mr. BEESLEY said that, for the moment, he wished not to embark on substantive matters but to congratulate the Special Rapporteur on the flexibility and open-mindedness with which he had always approached the topic and which was reflected in the seventh report. The two statements that the Commission had just heard would provide an excellent foundation for its work.

21. While some considered the topic to be a new branch of law and one that had burst on the scene unexpectedly, he had never viewed the matter in that fashion. There were, in fact, a wide variety of relevant precedents to be found in both conventional and customary law. Grotius might well be regarded as the first environmentalist, as the term had come to be understood, when he had said that the seas could not be exhausted by any of the means known to man. The ensuing debate had led to the establishment of one of the fundamental principles of international law, namely, the freedom of the high seas, linked with the concept of a circumscribed State sovereignty extending in ocean space to a relatively narrow distance from the shore. With certain exceptions, that system of law had been in use for some 300 years. Implicit in Grotius' statement was the notion that, if the oceans could in fact be exhausted by man's activities, then those fundamental principles needed to be re-examined.

22. Some members of the Commission had been involved for many years in an attempt to elaborate new rules of law in that field which were not based on the either/or concept of freedom of the high seas or State sovereignty. In his opinion, the new law-of-the-sea convention was based on the concept of rights and duties that went hand in hand—the hallmark of any system of law, however primitive or sophisticated it might be.

23. The Commission had been considering the topic of international liability for the past 10 years. Everyone was in agreement that the topic did encompass some principles of environmental law, either those that already existed or those that needed to be elaborated. A frequently cited principle was one that stated that the innocent victim should not be left to bear the cost. It was a sound principle and one he endorsed, yet it was neither a new idea nor adequate. If the Commission was genuinely concerned about the innocent victim, it needed to go beyond that principle, and he believed that it had, in fact, already done so, regardless of the debate on whether liability should be founded on appreciable harm or foreseeable risk.

24. In attempting to set down principles of international liability, the Commission had not only to take into account past precedents and contemporary thinking but also look to possible problems in the future. Noteworthy among the established decisions and principles were the *Trail Smelter*⁷ case, for which the first decision had been handed down in 1938; the *Lake Lanoux* case,⁸ which was

cited by some as having environmental consequences and for which a decision had been handed down in 1957; the 1958 Convention on the High Seas, which contained some provisions the sole purpose of which had clearly been to embody environmental principles; the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water;⁹ the Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies;¹⁰ and the current draft Code of Crimes against the Peace and Security of Mankind.

25. The Commission should be very clear about its objectives: was it attempting to establish the principles which led to liability or was it addressing the circumscribed subject of limiting liability? Most likely, it would have to achieve both objectives. In its thinking on the topic of liability, the Commission would do well to return to basic concepts. It was difficult, for example, to improve on Stockholm Principle 21, of 1972,¹¹ which in his view reflected customary law as it had existed at the time. The principle had been the subject of intense debate; it had finally been unanimously approved at the Stockholm Conference on the Human Environment and subsequently endorsed by the United Nations General Assembly. Principle 21 had been linked with Principle 22: Principle 21 had postulated the responsibility of States not to damage the environment of their neighbours, and Principle 22 that States should cooperate so as to develop both substantive and adjectival law.

26. As a contribution to UNCED, to be held in Brazil in 1992, the Commission might wish to reaffirm Principle 21 and to remind the Conference that the principle had formed the basis for the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, concluded in 1972, and that Principle 21 and the Convention had been the basis for Part XII of the United Nations Convention on the Law of the Sea. Principle 21 could then be assessed and, if found appropriate, might provide a basis for elaborating further principles.

27. It would not be in the interest of the Commission to say that it was starting anew. Rather, it had to take earlier environmental jurisprudence into account. Climate change, for example, had been a matter of concern for nearly 20 years. One of the recommendations of the Stockholm Action Plan for the Human Environment¹² was that Governments should carefully evaluate the likelihood and magnitude of the climatic effects of planned activities and should disseminate their findings to the maximum extent possible before embarking on such activities. Another recommendation was that Governments should consult fully with other interested States when activities carrying the risk of such effects were being contemplated or implemented. The issue of climate change had even been referred to in treaty instruments, among them, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Other treaties and draft codes also

⁷ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

⁸ *Ibid.*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*

⁹ United Nations, *Treaty Series*, vol. 480, p. 43.

¹⁰ *Ibid.*, vol. 610, p. 205.

¹¹ See 2221st meeting, footnote 6.

¹² *Ibid.*

contained provisions relevant to environmental issues. In short, the task of the Commission was to select principles relating to the environment, on the basis of earlier precedents in both treaty and customary law, rather than to assume that there was no existing law.

28. The CHAIRMAN said that, although normally reluctant to speak from the Chair as a member of the Commission, he wished to do so now in response to the questions raised by the Special Rapporteur and in view of the fact that the present quinquennium was drawing to a close and it was appropriate for each member to make his views known on every topic.

29. Without wanting to reopen the debate on issues which went back over 10 years, he thought the time had come to formulate certain basic principles for submission to the Sixth Committee and eventual transmission to the Rio Conference. In that regard, it was regrettable that the Special Rapporteur had not been more bold, assertive and categorical in his latest report. The question of the title of the topic was one point on which the Commission could reach a clear-cut decision without delay. It seemed beyond doubt that the English should be aligned with the other language versions, so that the title should read: "International liability for injurious consequences arising out of activities not prohibited by international law", a change that could in fact have been made sooner. Again, there seemed to be general agreement on the question of the distinction between responsibility and liability. There was a school of thought, outside the Commission, which held that the present topic was not fundamentally different from State responsibility, but the Commission had maintained all along that the two topics were distinct and separate. State responsibility was primary responsibility, whereas liability was secondary or residual responsibility which arose in the event of a breach of the primary responsibility. To go back on that definition would, in his opinion, merely cloud the issue.

30. Another area in which a conclusion could and should be reached was the issue of risk and harm. No one denied that risk played a part in determining harm, but risk alone could not form the basis of liability, which did not arise unless harm had been caused. The same applied to the test of foreseeability; in his view, which he understood to be shared by the Commission as a whole, foreseeability alone did not constitute a basis for liability: it entered into play only if harm had been caused.

31. As to the question whether, in some cases, States should not be held liable for private acts committed in their territory, if an individual was responsible for harm caused it was for the domestic regime to settle the matter between that individual and the State, whether through insurance, a lump-sum payment or some other method. But the topic under consideration was international liability, and it seemed clear that the victim State should not be placed in a position in which it had to conduct investigations to determine who was responsible and who should be sued. The State in which the harmful activity took place should be held responsible in all cases. Lastly, he could not fail to stress the continuing relevance and validity of the principles enunciated in the *Trail Smelter* case.

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

[Agenda item 8]

STATEMENT BY THE CHAIRMAN OF THE PLANNING GROUP

32. Mr. BEESLEY, speaking as Chairman of the Planning Group, proposed that the Group should consist of the following members: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Roucounas and Mr. Tomuschat, with Mr. Pawlak (Chairman of the Drafting Committee), attending meetings *ex officio*. Mr. Arangio-Ruiz had indicated that he did not wish to be considered a member of the Group, but would probably attend its meetings. The Group's meetings would in fact be open-ended and all members of the Commission were welcome to participate.

33. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the proposed membership.

It was so agreed.

34. Mr. BEESLEY said that a list suggested for inclusion in the Planning Group's agenda would be circulated shortly. A summary of the discussion on each topic had been prepared with the assistance of the secretariat. The list was not intended for submission to the General Assembly, but might be of use to the newly constituted Commission during the next quinquennium.

The meeting rose at 11.35 a.m.

2223rd MEETING

Wednesday, 12 June 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, 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. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR²
(continued)

1. Mr. FRANCIS said that, before commenting on the important issues set out in the informal paper circulated by the Special Rapporteur to the members of the Commission,³ he wished to make a few remarks, first, on the Commission's mandate and the way in which it should pursue its work and, secondly, on how he saw the matter.

2. It was certainly no mere chance that the Special Rapporteur's seventh report opened with a footnote referring to paragraph 450 of document A/CN.4/L.456, which summarized the position of the Sixth Committee of the General Assembly on the working methods adopted by the Commission for its consideration of the topic. That paragraph, after referring to the efforts of successive Special Rapporteurs since 1978 to develop a schematic outline and produce draft articles on the topic, stated that, in the interest of the progressive development of the law, the Commission had developed its study in directions which had been scarcely imaginable in 1978 and had increased its scope to such an extent that completion of the work seemed a distant prospect. The message was clear and it did indeed appear that the Commission had departed from the general mandate the Sixth Committee and the General Assembly had originally had in mind. The Special Rapporteur, of course, was not to be castigated on that account: the criticism, which was couched in measured terms, was addressed to all members of the Commission who had contributed to that state of affairs or who had allowed it to happen. Now that everyone had had the chance of expressing his views, however, the Commission should redefine its objectives and endeavour to respond to the General Assembly's expectations by presenting it with an overall review of the status of its work on the topic and an indication of the direction it intended to take in the future, in accordance with the wish expressed by the Sixth Committee.

3. So far as his personal expectations as to the basic premise on which the articles should rest were concerned, he would take as his point of departure article 35 of part 1 of the draft articles on State responsibility.⁴

4. That article seemed to him to be the genesis of the whole exercise of responsibility, for it stated—albeit in different terms—that it was not necessary that the act of a State should be wrongful for the question of compensation to arise. That being so, the Commission must make a clear distinction, in its work, between activities not prohibited by international law and the wrongful acts

that formed the basis for part 1 of the draft articles on State responsibility except, of course, for one particular case: lawful acts carried out with the deliberate intention of causing transboundary harm, which would therefore no longer be lawful acts, but would become wrongful acts and thus engage the international responsibility of the author State.

5. With regard to procedural obligations, including those relating to information, negotiation, notification and prevention, the Commission should stay within the domain of soft law. It was compensation that should constitute the quintessence and ultimate purpose of the draft articles. Only when the State failed to effect compensation should its international responsibility be incurred. It was, of course, apparent from the history of the Commission's work on the topic that the previous Special Rapporteur had initially ventured into the realm of responsibility in the broad sense of the term and of the primary obligations attaching thereto, but he had very soon been overtaken by events.

6. Turning to the important issues listed in the Special Rapporteur's informal paper, he agreed that the Commission should not be in any hurry to give a particular form to the draft articles.

7. As to the title of the topic, he was not convinced that it would be advisable to opt for the word "activities" rather than the word "acts", though he was ready to go along with a consensus on the matter. If reference were again had to the draft articles on State responsibility, it would be noted that the word "act" was used throughout the text. It had been logical to move on from the area of wrongful "acts" to that of lawful "acts". But to refer now to activities, including activities carried out by entities other than the State itself, rather than to acts of the State seemed to him to involve a shift in meaning and a departure from the mandate laid down by the Sixth Committee.

8. With regard to the scope of the draft articles, he considered, again in the light of the Commission's mandate, that there was no need to categorize the activities. The Commission could adopt a simpler approach, for what mattered in the final analysis was damage and compensation for damage. He was satisfied at the decision not to draw up a list of substances and at the emphasis placed on prevention. He also considered that the draft should include a general article on dangerous activities which would emphasize that aspect of the matter.

9. He noted that the Commission had already drafted articles on the principles—the next point in the Special Rapporteur's paper—and was particularly interested in what Mr. Beesley had said in that connection (2222nd meeting).

10. With regard to liability, the State should, in his view, have only residual liability. Also, the articles should not be too detailed and should not go so far as to spell out what States would have to do in such matters as prevention. A State which had recognized that it had an obligation should be able to determine how it complied with that obligation.

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

³ See 2222nd meeting, footnote 5.

⁴ For text, see *Yearbook . . . 1980*, vol. II (Part Two), p. 61.

11. In the case of the obligation to compensate, a procedure should be found whereby interested parties themselves would be able to seek satisfactory remedies. Only when the remedy was not forthcoming should the State become involved.

12. He did not support the proposal of the Special Rapporteur to leave the question of the "global commons" in abeyance. The problems and preoccupations of developing countries regarding the environment were also indicative of their concern over the "global commons", a subject which did not, in his view, come within the framework of the draft articles. Nevertheless, the Commission, as the principal codification organ of the United Nations, could not afford to do nothing—given that the Sixth Committee of the General Assembly had drawn its attention to the matter. The very least the Commission could do was to take the initiative in suggesting to the General Assembly the need for urgent co-ordinated action, which could be pursued in two stages, first, by recommending that an expert should be recruited to the Codification Division of the Secretariat to do the necessary preliminary work, and, secondly, by referring the matter to the Commission at the appropriate time for it to be pursued through the appointment of a Special Rapporteur. Naturally, there would be financial implications, but the importance of the matter warranted any such expenditure.

13. Mr. CALERO RODRIGUES said that, although the Sixth Committee had not followed up the idea put forward by one of the delegations in the General Assembly of inviting the Commission to submit a report to it on the state of development of the topic, such a document would be useful not only for the General Assembly, but also for the Commission. The Special Rapporteur had endeavoured to follow that suggestion in his seventh report. He was to be congratulated on having once again placed the emphasis on questions of principle in introducing his report and in his informal list of important issues. In his own view, therefore, it would not be very helpful for the Commission to concern itself for the time being with the articles grouped together by the Special Rapporteur.

14. Some members seemed to fear that the debate might be reopened. But why not reopen or simply continue it if a particular basic issue needed clarification, since the Commission had not reached the point of referring the articles to the Drafting Committee? Members should not hesitate to take a position on such basic issues, without, of course, reverting to points that had already been the subject of a detailed exchange of views.

15. He considered that the Special Rapporteur's idea of appointing a working group to synthesize in a report the status of the Commission's work on the topic and to indicate the direction it intended to take was interesting. He did not, however, think it necessary to prepare a document for UNCED, since the Commission had nothing concrete to propose.

16. He agreed that the Commission should be concerned with drafting coherent, reasonable, practicable and politically acceptable articles; that the factors or criteria chosen should be scientific, identifiable and logical, with the aim of improving international law and inter-

State relations; and that, in the final analysis, the provisions would win support and compliance because of those factors and not necessarily because of the form in which they appeared. There was, however, one question relating to the nature of the instrument, which had not been dealt with in depth. In developing the elements of the schematic outline proposed by the former Special Rapporteur, Mr. Quentin-Baxter,⁵ the Special Rapporteur had tried to produce a complete and coherent set of rules which, because of the very wide scope of the topic, were intended to be applicable to a broad spectrum of activities and situations. Many of those activities and situations, probably the most important ones, were already covered by specific international instruments and it seemed impossible to draw up the same type of rules for an instrument of general application. In his sixth report,⁶ the Special Rapporteur had explained that his first nine articles were the product of successive drafts which incorporated ideas from various quarters and he had admitted that, at times, the desire to remain true to those ideas had resulted in cumbersome and clumsy juxtaposition, which ought to be remedied. But how could such a shortcoming be remedied if the articles aimed to deal in detail with all the situations covered by the topic? The Commission should perhaps be more modest in its ambitions and limit the articles to the enunciation of principles or general rules, spelling out only the essentials and expressing certain rights and obligations in legal terms. Provisions of a procedural nature would then be reduced to a minimum, or could even be dispensed with, and the general outline of the instrument would not differ much from the one suggested by Mr. Quentin-Baxter.

17. He agreed that the title of the topic should refer to "activities" rather than to "acts". The Commission was already heading in that direction and, if the title was to be changed, now was the time to do it. However, he would interpret the word "activities" to include "acts" as well and he considered that transboundary harm caused by an isolated act came within the scope of the articles.

18. The scope of the articles was the most difficult problem facing the Commission. The starting-point should be the twofold idea of activities involving risk and activities with harmful effects. In the seventh report, the Special Rapporteur defined the former as those which have a higher than normal probability of causing transboundary harm—an unsatisfactory definition because it was not clear what was meant by "normal"—and the latter as those which cause transboundary harm in the course of their normal operation. In that connection, he drew attention to an error in the penultimate line of the English text, which used the words "or those which", whereas there was no alternative involved. In fact, there was something missing in that part of the report, which did not refer to the idea of a threshold. The Special Rapporteur also said that the two types of activities should be dealt with together, his argument being that limits to a State's freedom of action within its terri-

⁵ Reproduced in *Yearbook... 1982*, vol. II (Part Two), pp. 83-85, para. 109. Subsequent changes are indicated in *Yearbook... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

⁶ See 2221st meeting, footnote 7.

tory, cooperation, non-discrimination, prevention and reparation were principles applicable to both types of activity. That was correct if the Commission was dealing only with activities which were known to entail a risk of transboundary harm or which, as discovered after harm had occurred, involved an inherent risk of harm. The Special Rapporteur further mentioned a point of view which he himself shared, namely that the draft should be extended to cover unforeseeable harm. However, he would not go so far as to say that any transboundary harm must be compensated. In his view, only transboundary harm above a certain threshold should be taken into account.

19. He recalled that the topic had been included in the agenda as an "offshoot" of the topic of State responsibility and, in that connection, paragraph 83 of the Commission's report on its twenty-first session stated that:

The Commission also agreed in recognizing the importance, alongside that of responsibility for internationally illicit acts, of the so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities. However, questions in this latter category will not be dealt with simultaneously with those in the former category, mainly in order to avoid any confusion between two such sharply different hypotheses, which might have an adverse effect on the understanding of the main subject. Any examination of such questions will therefore be deferred until a later stage in the Commission's work.⁷

The Commission had reiterated and developed the same idea in paragraphs 38 and 39 of the report on its twenty-fifth session.⁸ The topic had thus originated in the idea of compensation. In his preliminary report,⁹ however, Mr. Quentin-Baxter had added to that basic consideration the idea of prevention. In paragraph 9 of that report, Mr. Quentin-Baxter gave pride of place to prevention, relegating international responsibility as such to second place, and he personally found that unacceptable. Moreover, although the suggestion that the topic should be extended to questions of prevention had never been called into question in later years, it was open to doubt whether the Commission had ever actually decided that the primary aim of the draft articles should be to promote the construction of regimes to regulate the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects, as Mr. Quentin-Baxter had stated. In his seventh report, the Special Rapporteur had expressed the view that the topic should not be looked at exclusively from the standpoint of the harm produced. He himself was in agreement with that view and thought that transboundary harm should be the key element.

20. In any event, the draft articles had to deal with the problem of the injurious consequences which were sustained, or might be sustained, by a State as a result of activities conducted in another State. However, Mr. Quentin-Baxter, who had introduced the concept of prevention into the topic, had written in his third report two years later that:

... in relation to the establishment of regimes of prevention and reparation, all loss or injury is prospective; in relation to the establishment of an obligation to provide reparation, all loss or injury is actual.¹⁰

It might therefore be considered that, in the case of activities involving risk, the Commission was dealing with prospective harm, whereas, when harm had actually occurred, it was dealing with actual harm. Everything thus came down to a question of harm and it was therefore not at all strange that emphasis should be placed on the key role of that concept. He could nevertheless not accept the idea that the draft articles should leave aside certain types of harm—except, obviously, for harm arising from internationally wrongful acts—and that such harm should be compensated by virtue of the general principles of international law. To cover such harm, there was no need for the Commission to change the scope of the draft; it simply had to deal with prevention and compensation in different sections, as had already been done both in the schematic outline¹¹ and in the articles submitted in Mr. Barboza's sixth report.¹² It was not true that the Commission could not do so because States would not agree; the Commission did not know what the reaction of States would be and, if the approach seemed to be a useful one, it should not be deterred by imaginary fears. The draft should therefore be very broad in scope and cover all types of harm, except for harm caused by a wrongful activity.

21. He had no objection to the principles embodied in the draft articles.

22. With regard to dangerous substances, he reiterated his view that a list would considerably limit the scope of the topic. The Commission had taken a major step forward in accepting the Special Rapporteur's opinion that only physical transboundary harm should be covered, but it still had to settle the question of the threshold by qualifying the harm as "appreciable" or as "significant".

23. As to prevention, he thought that the procedural obligations could either be further simplified or eliminated.

24. Referring to the relationship between responsibility and civil liability, he said that it might be tempting to include civil liability within the scope of the draft articles, but that was virtually impossible, since civil liability was governed by national systems of law. The Commission should therefore simply state in the draft that responsibility should be considered in cases where civil liability did not give rise to compensation. Thus, the Commission would not be transposing civil liability into provisions of international law, but it would not be excluding it from the draft altogether.

25. The question of harm to the "global commons", was clearly important and needed to be considered so that rules in that area could be formulated. From the outset, however, the Commission had worked on the basis of the assumption that the harm to be dealt with was

⁷ *Yearbook* ... 1969, vol. II, p. 233, document A/7610/Rev.1.

⁸ *Yearbook* ... 1973, vol. II, p. 169, document A/9010/Rev.1.

⁹ *Yearbook* ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2.

¹⁰ *Yearbook* ... 1982, vol. II, (Part One), p. 59, document A/CN.4/360, para. 35.

¹¹ See footnote 5 above.

¹² See footnote 6 above.

harm which was caused by activities carried out under the jurisdiction or control of a State and which arose “in the territory or in [places] [/areas] under the jurisdiction or control of another State and was [appreciably] [significantly] detrimental to persons, [objects] [property], the use or enjoyment of areas or the environment” (art. 2, subparagraph (g)). It was true that, as stated by the Special Rapporteur, if there was no obligation under international law to compensate for harm to the environment in areas beyond national jurisdiction, then such an obligation should definitely be established. The question arose, however, whether the draft articles, as they currently stood, could encompass that type of harm. As it had been conceived, the topic dealt with harm caused to States. At the current stage, the Commission should perhaps recognize that the issue of harm to such areas should not be overlooked and decide to undertake a study of the matter when work on the current topic had been completed, subject to the approval of the General Assembly. It might even inform the General Assembly that it was ready to begin such an undertaking.

26. In order to sum up the principles which should be taken into account in preparing a report to the General Assembly on the question as a whole, he had drafted two texts which were in no way meant as drafting proposals but which dealt with prospective harm, namely, risk, and with harm as such, namely, actual harm. The texts read:

“*Proposition 1* (Prospective harm = risk)

“Where activities carried out under the jurisdiction or control of a State appear to involve significant risk of causing substantial physical transboundary harm, that State shall:

“1. Assess the risk and the harm;

“2. Take all possible measures within its power to eliminate or minimize the risk and to reduce the extent of the foreseeable harm;

“3. Provide information to the potentially affected States and, if necessary, enter into consultations with them, with a view to establishing cooperation for the adoption of further measures with the same purposes.

“*Proposition 2* (Harm = actual harm)

“1. Where substantial physical harm is caused to persons or things within the jurisdiction or control of a State as a result of activities carried out under the jurisdiction or control of another State, the former State is entitled to obtain from that other State compensation for damages, unless compensation has been obtained under applicable rules on civil liability of the domestic legislation of the States concerned.

“2. The compensation should in principle fully cover the damage. However, the amount of compensation should be agreed upon by the States concerned, with recourse to determination by a third party if no agreement is reached within a reasonable time.

“3. A reduction in the amount of compensation shall be considered, taking into account the elements and circumstances of the specific situation, including the relative economic and financial conditions of the States concerned.”

27. Mr. PELLET said that, in introducing his seventh report, the Special Rapporteur had partially, but only partially, dispelled the perplexity he had felt when he had read the report; questions therefore remained about certain points.

28. First of all, he was not sure about the Special Rapporteur’s role. The Special Rapporteur claimed to be entirely neutral. Was that really true? Article 16 of the Statute of the Commission did not impose any such obligation; rather, special rapporteurs were mandated to give impetus to the drafts with which they were entrusted, not only by leaving several possibilities open, as a matter of course, but also by indicating the choices they preferred and the reasons for their preferences and for any doubts they might have. That was the philosophy of the codification and progressive development of the law. In any event, the Special Rapporteur considered himself to be neutral and it should be recognized that, in general, he was, but at the price of some vagueness, since, in the name of that neutrality, he was not suggesting any guidelines in relation to which the members of the Commission could define their positions.

29. Furthermore, despite his outright choice of neutrality, the Special Rapporteur provided some answers in his report to some of the questions in abeyance. For example, he seemed to be choosing between the two possible grounds for liability—risk or harm—by inviting the Commission to focus the topic on activities themselves, namely, on risk rather than on harm. In his own opinion, both approaches had advantages and disadvantages, but he was convinced in any case that a clear position should be taken on the issue, since liability based on risk did not give rise to the same consequences as liability based on harm. The Commission therefore had to make a choice. He was prepared to opt for risk, of which the Special Rapporteur seemed to be in favour, provided that the Commission followed the logic of that choice and the Special Rapporteur drew all the possible conclusions from it. That was not, however, always the case. As another example, the Special Rapporteur considered the possibility of bringing the procedural obligations into play only in the event that transboundary harm resulted. In that case, the concept of risk was replaced by that of harm. The same was true of what the Special Rapporteur had said, in introducing his report (2221st meeting), with regard to State responsibility and liability: his comments on that point seemed to indicate an approach based on harm rather than on risk.

30. As to the important issues on which the Special Rapporteur had asked the Commission to decide, he would not comment on the title of the topic, since that question did not affect the French version, and, as to the issue of the “global commons”, he referred to the statement he had made the previous year,¹³ adding that, like the Special Rapporteur, he believed that the issue was not ripe for detailed consideration at the current session.

31. With respect to the nature of the instrument to be drafted, he did not share what appeared to be the Special Rapporteur’s view that it was “urgent to wait”. He be-

¹³ *Yearbook* . . . 1990, vol. I, 2185th meeting, para. 44.

lieved that the Commission should take a stand immediately, since the wording of the draft articles would depend on the choice that was made. Moreover, that did not mean that that question always had to be answered in the same way; the different sections of the draft articles seemed to call for different solutions. It was therefore not necessary to take rigid positions on that aspect of the problem.

32. Recalling the position he had adopted at the preceding session,¹⁴ he said he continued to believe that, as positive law now stood, there were no specific or general rules concerning liability *stricto sensu*, and reparation in particular, for transboundary harm caused by activities involving risk. That was clearly an area in which progressive development was the appropriate choice. The Special Rapporteur was also aware of that fact, as he was insisting that negotiations would be essential. However, the Commission was not the appropriate forum for such negotiations, for two reasons. First, it was composed of independent experts who, on their own, could not take decisions on such significant questions of principle. Secondly, the subject was both technical and, above all, extremely diverse, and although the Commission was free to call on outside expertise, as authorized under its Statute, it had rarely done so. For example, he did not think that acid rain posed the same problems as an accident such as the one at Chernobyl or that harm from acid rain could be compensated in the same way as harm caused by oil pollution. In that connection, he did not share the view of Mr. Mahiou, who, at the preceding meeting, had said that it would be enough to identify two types of activities: those which caused harm and those which were dangerous. In fact, the range of the latter activities was extremely varied and he strongly doubted, for example, that the uses of nuclear energy for peaceful purposes or the construction of a major dam could be covered by the same rules.

33. In his view, it would be reasonable for the Commission simply to propose standard clauses which States, if they found such clauses to be satisfactory, could incorporate into their treaties, domestic legislation or transnational contracts, but which would be adaptable enough to cover extremely different situations. Such a goal corresponded to two realities: States would be free to implement such rules, without being compelled to do so, and such rules would by their nature be adapted to very different types of problems. If those clauses were well designed and frequently used, they would then create a practice that might be codified at a later stage, although that did not seem to be possible at present.

34. The issue took on an entirely different aspect with regard to the obligation of vigilance, whether or not it was combined with the prevention procedure envisaged by the Special Rapporteur. On that matter, it would make sense to move ahead and, in the usual way, establish a genuine set of draft articles which could be turned into a convention, as necessary.

35. Those comments on the nature of the instrument provided a partial answer to the question of the scope of the draft articles. The duty of prevention related only to

activities involving risk. The problem of reparation, which was connected with harm, arose in all cases, with regard both to activities involving risk and to activities causing transboundary harm. Since he himself was not in favour of codification in the area of reparation because he did not believe it possible, he considered that the scope of the draft articles had to be defined by reference to the concept of risk, on the understanding that risk was connected with the activity in question and that the use of certain substances was always only one of many factors of risk. In that connection, he was still sceptical about the possibility of drawing up an exhaustive list of dangerous substances. Like the Special Rapporteur, he believed that the Commission could propose an indicative list. Moreover, since he was opposed in principle to the idea of a convention containing examples, he would be satisfied with a list of examples in the commentary, but not in the form of an annex to the convention. If the Commission were to adopt another position, the list would then have to be exhaustive, be drawn up with the assistance of experts and have a mechanism for keeping it constantly up to date; that would make the instrument very cumbersome and would complicate the Commission's discussions.

36. The nature of risk still had to be determined. All human activities involved risk, but the articles relating to prevention could certainly not be applied to just any type of risk. As the Special Rapporteur had pointed out, some delegations in the Sixth Committee would like the draft to apply only to exceptional risks. He himself could endorse that solution, but he did not believe that it would make for greater progress than using the idea of serious, significant, appreciable or grave risk. In any event, there was still the problem of the threshold and it arose both for risk and for harm. He would not go into detail, but drew the attention of the Special Rapporteur and the Commission to an article by Sachariew,¹⁵ in which the author, who did not take a definite stand, made a scholarly analysis of a sensitive problem that the Commission would have to solve.

37. With regard to the question of principles, it was important to give different treatment to cooperation, prevention and, if the Special Rapporteur so wished, non-discrimination, on the one hand, and to reparation, on the other, the first three principles being ripe for codification, while the fourth was not.

38. He recalled that he had spoken at length on prevention at the preceding session¹⁶ and had shared the view of those who found that the obligations provided for in the draft article proposed on that subject by the Special Rapporteur were too "soft". He therefore noted with satisfaction that the Special Rapporteur was considering the possibility of "hardening" it. The question was, however, how that would be done. If it was by imposing a strict obligation of conduct on the State in whose territory the activity involving risk was carried out by requiring it to take all the necessary precautions and penalizing

¹⁴ *Ibid.*, para. 36.

¹⁵ K. Sachariew, "The definition of thresholds of tolerance for transboundary environmental injury under international law: development and present status", *Netherlands International Law Review*, vol. XXXVII, 1990, No. 2, p. 193.

¹⁶ See footnote 13 above.

it for its negligence in accordance with the case law resulting from the *Trail Smelter* decision,¹⁷ he would be in agreement, for the Commission would then remain within the realm of codification, with development being very gradual and very reasonable. He also agreed that there should be an obligation to inform the States that were particularly likely to be affected, even if that meant entering the realm of progressive development, for he did not think that positive law contained an obligation of that kind. He did not believe, however, that it was necessary to go so far as to make the authorization of the activity subject to consultation, negotiation or—more serious still—the agreement of the State or States likely to be affected: that would be tantamount to altering the very nature of the activity in question. The topic related to activities which were not prohibited by international law: that was the starting-point. If those activities were made subject to consultation, negotiation or prior agreement, they would become suspect and subordinated to a joint decision that would be hard to imagine.

39. He was thus not opposed in principle to the Special Rapporteur's proposals concerning prevention, but not in the form of obligations. At the present stage, encouragement seemed to be the only reasonable solution: international cooperation could be provided for in the future convention, but in the form of something of which the parties were desirous. The case would then be one of substantive "soft" law because of its content. Alternatively, encouragement could take the form of a recommendation or it could be the subject of an optional protocol annexed to the future instrument. In the last two cases, there would be formal "soft" law because of the nature of the instrument embodying it. In all cases, no particular penalty would be envisaged if the State of origin had been vigilant enough and it should be all the more vigilant if the risk was greater. On that point, he agreed with Mr. Francis that the State had to be made to assume its responsibilities, but that the Commission should not take the place of the State and legislate for it.

40. In other words, he was in favour of a "hard" regime of prevention, but with flexible procedural obligations.

41. He reiterated his view that the question of responsibility and liability was not yet ripe for codification, at least in the form of a convention. At the current stage, he would merely indicate that, if it was really necessary to go as far as reparation, he would urge that the principle of the primary liability of the operator, regardless of the definition of that term, should be stated very strongly. The liability of the State could only be residual. In that connection, he did not share the view of Mr. Calero Rodrigues, who considered that the draft articles should not deal with civil liability. In his own view, the draft articles could and should state the principle of the civil liability of the operator, while making it an obligation of the State to organize that civil liability in its internal law. He also believed that the only feasible system would be to make it the obligation of the State of origin to take the necessary measures, as the Special Rapporteur himself had suggested. On that point as well, however, he doubted whether uniform rules were possible.

42. To sum up, he suggested that the Commission should propose to the General Assembly that the work should be divided into two parts. In the first stage, the Special Rapporteur would try to propose, as from the next session, a precise and complete set of draft articles on the duty of prevention, without necessarily dealing with the consequences of failure to perform that duty, because that would mean entering the realm of responsibility for internationally wrongful acts. That draft would, of course, be based closely on existing case law and on the conventions in force: on that point, he agreed with the comments Mr. Mahiou had made at the preceding meeting. In the second stage—or perhaps simultaneously, as long as the two things were kept separate—the Commission could try to formulate standard clauses relating to reparation, taking care to make the necessary distinctions on the basis of the categories of activities in question and the type and subject of the harm caused (human losses, economic damage, environmental harm).

43. He was surprised that, at the preceding meeting, some members of the Commission, in particular, Mr. Beesley and Mr. Koroma, had placed emphasis only on environmental protection. The liability of States for activities which were not prohibited by international law could, of course, be incurred in the event of harm to the environment and he was not unaware of the importance of that problem. He nevertheless believed that the Commission, in its wisdom, should refrain from bowing to fashion and that it should not forget that those activities could directly cause human or economic losses, of which the draft articles had to take account. It would be deplorable if the Commission were to concern itself exclusively with the problem of the environment, however serious it might be, on the pretext that it was now the concern of many of its members and of the international community.

44. Lastly, he was aware that the very principle of the draft articles was being criticized and that doubts were being widely expressed as to their value, but he did not share that pessimistic view, even if it was necessary to take account of the doubts and concerns that had been expressed. The overall review the Special Rapporteur had rightly invited the Commission to carry out should be an opportunity for firm and moderate decisions that would make it possible to achieve progress.

The meeting rose at 11.45 a.m.

2224th MEETING

Thursday, 13 June 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis,

¹⁷ See 2222nd meeting, footnote 7.

Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR²
(continued)

1. Mr. BARBOZA (Special Rapporteur), noting that Mr. Mahiou (2222nd meeting) had raised the question of the precise meaning of the reference to “possible negotiation” in the seventh report and that Mr. Pellet (2223rd meeting) had alluded to the same passage in emphasizing the independent expert status of Commission members, said that the term “negotiation” was employed in its widest sense. As everyone was aware, the Drafting Committee was a convenient forum for dialogue between Commission members representing different positions, and discussions in the Committee—which could be described as negotiations *lato sensu*—had given rise in the past to useful compromise solutions. Of course, such discussions could not commit Governments, but inasmuch as the Drafting Committee’s reports were approved in plenary meetings, the solutions in question did represent the opinion of the Commission as a whole. Other possibilities of negotiation in the widest sense were offered by the General Assembly. In that connection, he stressed how encouraged he had been by the concrete and satisfactory manner in which the Sixth Committee had answered the questions addressed to it on the present topic. Negotiations in that context meant the possibility of reaching agreement or at least of identifying a majority in favour of one or other of the alternatives which might be proposed in future.

2. As to a point raised by the Chairman in his statement made as a member of the Commission (2222nd meeting), he was grateful for the opportunity to explain once more that liability could in no circumstances be founded on risk. It could be founded solely on damage. That position had been adopted from the start and was clearly reflected in the draft articles and in the report. Risk was, of course, closely connected with prevention. A State in which an activity involving risk took place would be subject to certain obligations, in order, among other things, to minimize the risk of occurrence of actual damage; it would have to take certain procedural measures and impose obligations of due diligence on operators, enact the necessary laws and regulations to ensure that those obligations were adequately fulfilled, and enforce those laws and regulations through administrative

or police action. There was no question of basing liability on risk; the issue of risk arose exclusively in connection with the scope of the articles.

3. Mr. BENNOUNA said that the very title reflected the exceptional complexity of the topic. In his opinion, the time for theorizing about the topic was over. By engaging in further discussions of an almost metaphysical nature, the Commission could only bring discredit on itself. What was needed was dialogue, followed by action. He had no doubt that adequate and innovative formulations would be found in the Drafting Committee. The topic was certainly ripe for such treatment. Everyone was agreed about its importance and about the strength and urgency of the demand for concrete proposals in the form of a framework agreement. Failing such proposals, the Commission ran the risk of being overtaken by other forums, such as UNCED, to which some contribution by the Commission should undoubtedly be made.

4. As to the issues raised by the Special Rapporteur in an informal note circulated at an earlier meeting,³ like Mr. Pellet (2223rd meeting) he was opposed to the idea of leaving aside the question of the nature of the proposed instrument for the present. To attempt to regulate every aspect of the problem would, of course, be over-ambitious. The Commission should not embark on impossible tasks, such as drawing up a list of dangerous activities, for which it simply lacked the necessary technical expertise. It should clearly state that the draft in preparation was intended to be a framework agreement setting forth certain general principles for the guidance of States. He fully endorsed the view that the word “acts”, in the title of the topic, should be replaced by “activities”. In the matter of the scope of the draft, he was in favour of including activities involving risk and activities with harmful effects and of excluding a list of dangerous substances. There was no disagreement in the Commission on the principles set forth in the articles and he could see no reason why the Drafting Committee, busy though it was, should not tackle articles 1 to 10 forthwith.

5. He agreed that procedural obligations in the field of prevention, namely, not causing harm to others, and settling any disputes by peaceful means, were already established in general international law, but he saw no need for the draft to provide any sanctions in the event of non-observance of those obligations. The question of unilateral measures of prevention, too, was a matter of the implementation of general international law. The draft should set out the obligations in general terms, without attempting to go into the details of domestic legislation. On the question of the interrelationship between State and civil liability, he considered that international liability should always be viewed as the last resort. Civil liability should come first, the liability of the State coming into play only if the parties remained unsatisfied or if domestic law remedies had been exhausted. He agreed with the Special Rapporteur that to discuss the subject of the “global commons” at the present stage would be premature. Lastly, he reiterated that articles 1 to 10

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

³ See 2222nd meeting, footnote 5.

should be referred to the Drafting Committee as soon as possible.

6. Mr. TOMUSCHAT said that there was an urgent need for the Commission to know where it stood with regard to the topic under consideration. UNCED, to be held in 1992, afforded a welcome opportunity to assess what had been achieved so far and to plan future action. Like the Special Rapporteur, he would welcome it if the Commission could submit a set of coherent principles to the Conference, but he also agreed with Mr. Calero Rodrigues (2223rd meeting) that such a set of principles and rules should embody the Commission's finest intellectual virtues and should be innovative and unchallengeable.

7. He had grappled with the present subject for many years, but still did not find the Special Rapporteur's seventh report easy to understand, possibly because, well-drafted though it was so far as any specific point was concerned, the report was generally couched in abstract legal terms. Too little effort had been made to show what adoption of the draft articles would actually mean in terms of hard facts. Yet there was an obvious need to explain to the Sixth Committee and the public at large what the articles were all about. Anyone taking an interest in the topic should be able to learn without encountering major difficulties of communication. He was not proposing that the Commission should engage in a public relations exercise, but there was no denying the fact that, after so many years, the Commission could be called to account by the international community. It was therefore important to highlight the positive impact the proposed draft rules might have in the potential field of application. In that respect, he disagreed with Mr. Bennouna; a clear framework had to be established, and he failed to see how that could be done simply by drafting.

8. When the Commission, at its thirtieth session, in 1978, had begun its study of the topic by setting up a working group, environmental law had been largely undeveloped. Now there was an abundance of specific, but only partial, legislation, so that it might be asked whether the Commission's draft could still serve a purpose, and whether there were still any gaps requiring regulation by means of an overall instrument. The Special Rapporteur's seventh report avoided touching on that issue but did stress the need for new rules, without however identifying the relevant areas.

9. Many problems were inherent in the provision on scope. The Special Rapporteur rightly distinguished between two categories of activities, namely those involving risk and those which actually caused transboundary harm. Yet the categorization was not complete. For instance, it did not cover the construction of major-works which could entail adverse consequences for a neighbouring State, such as building airports or high-speed motorways. Another question was whether the burning of fossil fuels constituted an activity involving risk. Under the definition in article 2 (c), it did not. On the other hand, it was certainly an "activity causing harm". However, the burning of wood, coal, oil and gas, as an activity carried out in every human society, called for specific rules.

10. The situation in the *Trail Smelter* arbitration,⁴ where specific and clearly identifiable damage had been caused in the United States of America by a smelter in British Columbia, could not be treated in exactly the same way as the present situation in western Europe or in North America, in particular, where air pollution was omnipresent and could only be measured overall in millions of tons of sulphur dioxide. In the *Trail Smelter* situation, the focus was on the specific source of the noxious gases, but the general problem of air pollution could only be dealt with by introducing global quantitative limitations. States had in fact embarked on that course by pledging to reduce by agreed percentages the quantities of, for example, gases destroying the ozone layer.

11. The task faced by the Special Rapporteur was a formidable one, but it could be considerably facilitated by distinguishing more carefully between the different areas of application of the draft articles, and also between the different categories of acts and activities which needed to be taken into consideration. Only in that way could the Commission expect to win sufficient support for the draft. As long as Governments did not fully understand the scope of the draft articles, they would be reluctant to commit themselves.

12. Under the draft articles submitted by the Special Rapporteur, the legal relationships were conceived as being bilateral. The leitmotiv was: the affected State versus the author State. That approach, although not wrong in itself, needed to be brought up to date. In most fields of life today, international multilateral standards had become the relevant yardstick for measuring the acceptability of a given activity that might cause harm. Nuclear power plants, for example, had to comply with IAEA standards. If they failed to do so, a neighbouring State could rightly complain and request remedial action; if on the other hand, they did comply, an objection stood little chance of success. As for air pollution, many arrangements had been concluded in recent years. A State which fulfilled its duties under such an arrangement could not be challenged by another party; conversely, it became the subject of criticism if it failed in its commitments. Thus, many conflicts of interest were settled within a multilateral setting because of the existence of applicable standards. International standard-setting could be expected to increase considerably over the years to come, as regards both prohibition and prevention. That fact should be taken into consideration in the draft, even if reference could only be had to rules to be established by other bodies.

13. He agreed that the title of the topic was inadequate. The aim was to establish a coherent system of rules for activities with harmful transboundary effects. The Commission should therefore move away from the cold logic of the original heading and, in what was a complex topic, should come up with clear choices whose practical consequences could be clearly perceived, if it wished to receive meaningful advice from the Sixth Committee. The difficult task of working out a suitable legal regime rested almost entirely with the Commission. Even now,

⁴ Ibid., footnote 7.

the Commission was being overtaken by developments in other forums. It meant that space for innovative regulation was shrinking, something that might be of benefit to the international community, but not necessarily to the Commission.

14. The Commission should agree on a concrete strategy. The Special Rapporteur's idea of setting up a small working group seemed excellent. The approach should be realistic and should focus on what could be achieved within the next five years. The liability topic should not share the long life of its sister topic, State responsibility. Lest that happen, a stock-taking exercise should be undertaken. The Special Rapporteur had attempted to review the work done so far, but had confined himself to the legal plane. More generally, an assessment was required of the real needs of the world community—an assessment that was overdue and could impart a new direction to the Commission's work.

15. Mr. NJENGA congratulated the Special Rapporteur on his excellent report on a most intractable topic. He said that the Commission had worked on the topic for over 10 years and despite the efforts of the Special Rapporteur and his predecessor, the late Mr. Quentin-Baxter, was still grappling with its scope, which would determine the course of the subject. The topic's importance, however, was clearly manifested by the numerous activities of international and regional institutions, for example, the forthcoming UNCED. Preparations were well in hand and it was appropriate that the Commission should be discussing the subject at its present session, at the end of which it should be able to agree on the general direction that the topic should take.

16. When the Special Rapporteur had submitted a set of draft articles in his sixth report,⁵ he had clearly stated that his aim was to facilitate concrete discussion of the approach and scope of the topic. The Commission itself, in the report on the previous session, had stated that:

The new articles were only an outline of the topic; they were put together with the purpose of giving the Commission a panoramic view of the topic. . . .⁶

Noting that the sixth report had raised some complex technical issues, the Commission had further stated:

Many members of the Commission felt that they needed more time to reflect on the issues raised in the report and were able to make only tentative remarks. The Commission therefore decided to revert to the issues raised in the sixth report at its next session.⁷

17. When, therefore, the Special Rapporteur had urged the Commission not to reopen the general debate, his intention had simply been to discourage repetition of arguments made previously. Members should go to the essence of the proposals contained in the sixth report and provide the Special Rapporteur with guidelines on how to proceed with the work. The short list of important issues circulated informally by the Special Rapporteur was extremely useful and should serve to concentrate the debate on fundamentals.

⁵ See 2221st meeting, footnote 7.

⁶ *Yearbook . . . 1990*, vol. II (Part Two), para. 471.

⁷ *Ibid.*, para. 472.

18. As to the nature of the future instrument, it would be helpful in the interests of future progress if the Commission were to decide right away that it was working towards a framework convention that would contain, in the words of the Special Rapporteur, coherent, reasonable and politically acceptable articles. In view of the many lawful activities, namely, those not prohibited by international law, that had transboundary consequences it was the only realistic goal, since the Commission could not provide a comprehensive binding convention to cover them all.

19. Present State practice was to regulate various specific activities, more particularly by binding bilateral or multilateral conventions, in such varied areas as transport of dangerous goods, disposal of hazardous waste, nuclear liability or liability for space objects. On the whole, therefore, the draft articles should be of a residual character; they should be modest and should concentrate on the essentials, leaving the establishment of specific regimes to bilateral or multilateral agreements, which of course could draw inspiration from the proposed draft.

20. A framework convention of that kind could include provisions on State freedom of action and the limits thereto, as contained in the draft article 6, modelled on Principle 21 of the Stockholm Declaration,⁸ which recognized the sovereign right of a State to carry out lawful activities within its territory but at the same time stressed its responsibility to ensure that the activities did not cause transboundary damage to other States or to areas beyond the limits of national jurisdiction.

21. The draft should also incorporate the principle of cooperation to prevent activities from causing transboundary harm or to minimize such harm. The principle of prevention through legislative, administrative steps and the monitoring of activities could also be included. Similarly, the principle of reparation in the event of significant harm should be incorporated in order to ensure that an innocent victim of such harm was not made to bear the loss or injury. A very important principle that could be considered was non-discrimination, so as to make sure that domestic remedies available in the State where the activities causing harm were equally available to those affected beyond the State's frontiers. He was convinced that a draft convention which addressed that fundamental issue could command broad international support.

22. The provisions contained in articles 11 (a), 13 and 14 on notification, consultations and negotiations, and possible establishment of a regime for the activity, were much too broad for a general framework convention that would regulate all sorts of activities with the potential, however remote, of causing transboundary harm. It would also be too much of an inhibition on the right of States to conduct lawful activities within their own territory. Support for his objection to those procedural obligations lay in the lack of legal consequences in the event of failure to comply with them. If such failure did not result in any transboundary harm, neighbouring States concerned had no basis for a complaint. On the other

⁸ See 2221st meeting, footnote 6.

hand, if harm did occur, the State of origin would be bound to make reparation even if it had strictly complied with the provisions on procedure. In the matter of failure to comply with the procedural obligations the Special Rapporteur offered two alternatives, discussed in the report. However, both alternatives dealt with the same situation, namely, when harm had actually occurred, for only then could a State be affected. In such a general field the precautionary principle should not be elevated to a binding legal principle and it could easily be dealt with at length in the commentary. He, for one, did not favour including any "soft" law provisions in the draft.

23. It should be easy to accept the proposal for the title to speak of "activities" not prohibited by international law, rather than "acts". The change was not a matter of harmonizing the language versions but of correctly reflecting the issue with which the Commission was dealing. The Commission was trying to regulate not the acts but the activities having the potential to cause transboundary harm.

24. As to the vexed question of scope, the adoption of the risk approach was likely to have stemmed from the primacy given to prevention over reparation by the first Special Rapporteur. Of course, the element of risk was still the primary basis for provisions on preventive measures, such as article 16. Once it was established that a given activity caused or might cause transboundary harm, the State of origin was obliged to take appropriate measures in accordance with the best available technology. But even in those cases of high-risk activities, the basis of the obligation was harm, or the probability of harm. He emphasized the need for agreement on the threshold of harm, for the purposes of compensation.

25. It was futile to attempt to draft a list of dangerous activities in a framework convention which covered a whole range of activities. The Council of Europe Directive cited as a precedent by the Special Rapporteur in the report contained a list of more than 1,200 dangerous substances as well as activities that produced hazardous radiation or genetically altered organisms and microorganisms introduced into the environment. In a framework convention, a list of that kind would not help to identify activities that would require precautionary measures. Furthermore, it could never be an exhaustive list and could in no way exclude liability for activities not on the list. Significantly, most of the lists contained in multilateral conventions were considered to be illustrative. That was the case with regard to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa.

26. The draft should assign civil liability to operators and residual liability to States, either where the operator could not be identified or where compensation was not adequate. Such an approach was more important than ever in view of the global trend towards the withdrawal of States from commercial activity, with the concomitant encouragement of private enterprise. There was no reason why private enterprises engaging in activities with the potential to cause transboundary harm, particularly

multinationals with budgets several times greater than those of most developing countries, should not bear primary civil liability, leaving residual liability to the State, except in those situations which had been identified by the Special Rapporteur. The Commission should be guided in that field not by theoretical considerations of State liability but by current practice, including that of the channelling of liability. The Special Rapporteur had cited several examples of current practice, *inter alia*, the Vienna Convention on Civil Liability for Nuclear Damage; article 5 of the International Convention on Civil Liability for Oil Pollution Damage, under which the owner of the vessel at the time of the incident was liable for all pollution damage; the provisions contained in the report of the Ad Hoc Working Group on Legal and Technical Experts to Develop Elements which Might be Included in a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, which had concluded its work earlier in 1991 and which had been chaired with distinction by the Special Rapporteur. It was to be hoped, incidentally, that the report would be made available to the Commission, as it contained several features of importance to the topic, including the establishment and operation of a compensation fund.

27. In his sixth report,⁹ the Special Rapporteur had been very reluctant to deal with liability for harm to the environment in areas beyond national jurisdiction—the "global commons". His reservations had been based on, *inter alia*, the fact that significant harm to the environment of the "global commons" might not lead to significant harm to human beings; that under general international law there was no liability for that harm to the environment of the "global commons" which did not affect persons or property; and that it was difficult to identify the affected States in the context of the "global commons". Personally, he thought that approach was unduly conservative and, in adopting it, the Commission would be out of touch with the general orientation of the international community, which was increasingly asserting the importance of protecting the "global commons". That concept had found expression in numerous international and regional forums and decisions, including the 1972 Stockholm Declaration,¹⁰ which had expressly referred to the "common good" of mankind; General Assembly resolution 45/53, which had explicitly stated that climate change was a common concern of mankind; and two meetings of legal experts held at the initiative of UNEP. In addition, the need to protect intergenerational equities had been receiving increasing emphasis within the context of sustainable development and environmental law.

28. In theory, it was a good idea for the Commission to present its work to UNCED, but unfortunately, it was simply not in a position to do so. The Drafting Committee would not be able, during the present session, to conclude its consideration of the articles. Even if a working group was set up, it would not have enough time to agree

⁹ *Ibid.*, footnote 7.

¹⁰ *Ibid.*, footnote 6.

on even the most generalized principles for adoption in 1991.

29. Lastly, he wished to draw attention to the fact that the secretariat of UNCED had prepared a check-list of elements for the elaboration of principles by Working Group III on legal, institutional and all related matters, to be incorporated under the general rights and obligations in the field of environment and development, for inclusion in whatever instrument, charter or statement the Conference might adopt. The following elements had been identified under the heading of basic duties: (a) common responsibilities of nations and peoples for the survival/integrity/sovereignty of the Earth; (b) avoidance of harm to future generations; (c) equitable sharing of responsibilities and benefits; (d) protection of individual rights to the environment and development; (e) protection of indigenous peoples; (f) access to information and environmental risks; and (g) promotion of environmental education and awareness (A/CONF.151/PC/WG.III/2). The check-list had also identified issues relevant to the elaboration of principles of decision-making and principles of transnational relations. While it was doubtful that the Commission could make any useful contribution to the 1992 Conference, he wished in no way to discourage future efforts on the topic under consideration.

30. Mr. GRAEFRATH, expressing his gratitude for the seventh report, which summed up a wealth of earlier material and sought to respond to the many suggestions made at the previous session and in the Sixth Committee, said that he none the less continued to experience difficulties with the content of the report: it seemed to be a mixture of taking stock of what had gone before and of suggesting changes in articles that had already been proposed. At the same time, the Special Rapporteur was cautioning against reopening the general debate. The topic was not, as some maintained, a new one and had been before the Commission for more than 10 years. It was too late at that stage to reopen the general debate, unless the Commission wanted to change its fundamental approach to the topic. That, however, did not seem to be the intention of the report.

31. The only new aspect to the report was its consideration of the interrelationship between the civil liability of the operator and State liability. In that connection, one important issue was to establish the basic premise: either the State had to make reparation or it had to make sure of certain conditions. All the relevant conventions of which he was aware, with the exception of the Convention on International Liability for Damage caused by Space Objects, were based on the liability of the operator. Those conventions clearly defined the obligation of States to: (a) take the necessary measures for protection of, preparedness for, and response to transboundary harm; (b) ensure that activities within their jurisdiction and control were carried out in conformity with certain provisions; and (c) ensure that recourse was available, in accordance with their legal systems, for compensation and relief in respect of transboundary damage caused by activities within their jurisdiction and control. That was also the approach of articles 139 and 235 of the United Nations Convention on the Law of the Sea and the 1991

draft Convention on the Transboundary Impacts of Industrial Accidents.¹¹

32. It still had to be determined whether or to what extent the State should be assigned subsidiary liability, if the insurance or other financial guarantees provided by the operator turned out to be insufficient. However, it was not a simple matter of saying that the State was liable either where the operator was unable to compensate the injury or where the operator at fault could not be identified. In the former instance, the question was why the State should be liable if it had adopted laws and regulations and taken administrative measures which were reasonably appropriate for securing compliance by persons under its jurisdiction, as established in article 4 of annex III to the United Nations Convention on the Law of the Sea. If the obligation of the State to ensure compliance was established, and by respecting those obligations the State could not be held liable, there must be a good reason to introduce an obligation to make reparation. It was at that point that the concept of activity involving risk came into play. First, that concept provided the basis for specific obligations of prevention. Secondly, it provided the grounds, in the case where damage occurred, for invoking the subsidiary liability of the State if the operator was unable to respect its obligation to make reparation. As to the case of inability to identify the operator at fault, the question was why the State should be liable for damages in cases where the harmful effect originated in an entire region or was the result of the regular activities of industrialized States—for example, the depletion of the ozone layer. He was not at all convinced that such cases could be successfully approached on the basis of a philosophy of reparation. Such a philosophy could not be the basis for the elaboration of both a convention on liability for transboundary harm caused by accidents and a convention for the protection of the environment; they were two different things.

33. Lastly, he was not clear as to the purpose of taking stock at the present stage in the Commission's work, of something that seemed to take the Commission back to 1987, when Mr. Shi had concluded that the Commission should either request the General Assembly to defer consideration of the topic or adopt a working hypothesis.¹² The Commission had precedents for either alternative. If the proposed working group could arrive at a working hypothesis that was acceptable to the Commission, then the Special Rapporteur would have achieved an extremely important goal.

34. Mr. BARBOZA (Special Rapporteur) said that he would appreciate clarification regarding Mr. Tomuschat's conclusion that the construction of major works and normal activities, such as driving a car or burning fossil fuels, were not covered by the topic. In his view, they were activities that should be and were included in the scope. If that was not the case, any obstacles to including them should be removed.

¹¹ The draft Convention, subsequently renamed "Convention on the Transboundary Effects of Industrial Accidents", was adopted at Helsinki on 18 March 1992.

¹² *Yearbook . . . 1987*, vol. II (Part Two), p. 43, para. 144.

35. Mr. TOMUSCHAT said that, according to the definition in the introductory articles, which limited risk to certain activities, the construction of major works did not fall into the category of activities involving risk. That type of construction activity did not cause immediate harm. Rather, it contained potential risks, which could materialize at a later stage. For example, it was clearly open to question whether noise should be considered as harm in the traditional sense, as understood by international law and as reflected in awards by international arbitration tribunals. A distinction had to be drawn between two types of activities which involved harm: activities which gave rise to clearly identifiable specific harm, such as in the *Trail Smelter* case,¹³ and activities in which harm was the result of an accumulation of various factors, which was true of the normal activities engaged in by industrialized societies. The latter type should be governed by specific rules and should receive specific treatment.

The meeting rose at 11.30 a.m.

¹³ See 2222nd meeting, footnote 7.

2225th MEETING

Tuesday, 18 June 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

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. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR²
(continued)

1. Mr. ROUCOUNAS recalled that, in 1973, when the question of liability for risk had briefly attracted the Commission's attention, the United Nations Conference on the Human Environment had completed its work and

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

UNEP had just been established. Nearly 20 years later, the international community, which had gradually entered what was probably sarcastically being called "the ecological age", had made some slight progress in the regulation of certain specific questions. A number of international instruments, which were, moreover, not all the same in scope, thus showed how much headway had been made, but they showed mainly how much more still had to be made in order to achieve universal results. The Commission, which had begun to study the question as an offshoot of the question of State responsibility, gave the impression to outsiders that, despite its lengthy debates, which reflected the fascination created by the idea of common areas beyond the jurisdiction of any State, it was not yet sure what major options it had with regard to the draft articles on international liability for injurious consequences arising out of activities not prohibited by international law.

2. Nevertheless, he did not believe that the Sixth Committee had wanted to put the Commission to a pointless test comparable to the physical contests to which the gods of antiquity had subjected mortals. On the contrary, the discussions in the General Assembly and the Commission itself showed that the Commission was being called upon to follow the direction the law was actually taking.

3. A recent United Nations study revealed that 80,000 compounds of organic or inorganic chemical substances were now being commercially produced and that 1,000 to 2,000 new chemical products came on the market each year. The effects of such industrial activity, both on human health and on matters relating to transport, marketing, utilization and elimination, were being discussed by international bodies and some conventions and other texts were trying to establish either State control, primarily of a preventive nature, or international cooperation. In that connection, he referred to the 1972 Convention on International Liability for Damage Caused by Space Objects, 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 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. Apart from those specific fields, however—and that was where the importance of the work undertaken by the Commission lay—there were no specific provisions on the consequences of the violation of a rule or on conditions for the compensation owed to the victims of harm caused by an activity involving risk. To take a few recent examples, there were no provisions on liability in the 1986 Convention on Early Notification of a Nuclear Accident, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal or even in the draft convention prepared in 1991 by the Economic Commission for Europe on the transboundary impacts of industrial accidents,³ article 18 of which read:

³ See 2224th meeting, footnote 11.

LIABILITY

The Parties shall cooperate with a view to considering appropriate ways and means of elaborating, within an appropriate framework, international rules, criteria and procedures in the field of liability and compensation to deal with damage resulting from the transboundary effects of industrial accidents.

4. There had thus been some developments with regard to prevention and international cooperation for exchanges of information and assistance, but no rules had been worked out in the field the Commission was considering, and that was why its task was of crucial importance, provided that it led to concrete results. To that end, the Commission had to formulate basic rules to which the States could refer when they wished, first, to leave aside the question of the lawfulness or wrongfulness of an activity which caused transboundary harm and, secondly, to provide compensation for transboundary harm caused by risk in the broad sense of the term.

5. Lengthy doctrinal discussions could be held on the basis for that approach. The main problem was, however, to find the necessary tools to allow for reparation and to encourage operators to take preventive measures. Obviously, there was a theoretical problem: that of the link between prevention and reparation by means of harm. A substantial body of opinion did not see why the breach of an obligation of prevention did not fall within the general regime of responsibility or how there could be an obligation to make reparation even if there had been prevention. That theoretical problem was a very real one, but the Commission could very well leave it aside and formulate specific rules allowing for reparation. He recalled that he had already had occasion to point out that the Commission was being called on to draft two instruments at the same time, one on prevention and the other on reparation.

6. There were nevertheless two things to bear in mind. The first was that, so far, the Commission had never drafted a text providing for an institutional mechanism, whereas the adoption of most instruments on industrial risks had been accompanied by the establishment of bodies to monitor their implementation. The second was that the reparation of harm caused by certain activities was covered by the insurance policies taken out by the operators. In that connection, regulations encouraging States to legislate to require a comprehensive insurance system might help to introduce the regime which the Commission was being called upon to set up. No useful purpose would be served by imposing liability on the State when it was well known that there were some States which could not pay, whereas enterprises could.

7. In his informal note on the important issues,⁴ the Special Rapporteur had recommended that no time should be spent on the question of the nature of the instrument. In that connection, he (Mr. Roucounas) observed that that problem was linked to another one, on which the Special Rapporteur had requested the Commission's opinion namely, procedural obligations; that the ultimate form of the draft depended not on the Commission, but on the General Assembly; and that the Commission was not being asked to define to what extent

its articles would be binding. He also noted that "soft" law, despite its usefulness, was still not fully understood and that, whether with regard to form or to substance, there was some "soft" law in all "hard" law and vice versa. The main point was to establish basic rules that were flexible, sufficiently modest, and useful. The rest would come with time.

8. Another problem which the Commission had to solve at the current session in order not to give the impression that it had wasted its time was that of the fate of the draft articles which had been awaiting consideration by the Drafting Committee for some time. That consideration would make it possible, as Mr. Mahiou had said (2222nd meeting), to assess the extent of the consensus in the Commission, at least on the general principles or, in other words, on the scope of the draft articles, international cooperation, preventive measures, the threshold of harm, the range and modalities of reparation and non-discrimination in the compensation of victims.

9. Some of those articles were, moreover, not altogether satisfactory. Draft article 4, for example, was supposed to be based on article 30 of the Vienna Convention on the Law of Treaties, but it dealt with a situation that was not exactly the same as the one referred to in article 30: it stated the obvious, namely, that a specific regulation prevailed over a general regulation, whereas article 30 of the Vienna Convention referred to texts relating to the same subject-matter. What that provision should bring out was the residual nature and complementarity of the draft articles.

10. In conclusion, he believed that a working group might be better able than the Drafting Committee to formulate such general principles at the current session, as well as to identify the broad outlines of the draft in order to show that the Commission was involved in initiatives being taken at the international level.

11. Mr. OGISO, said that, while focusing on the important issues stressed in the Special Rapporteur's informal note, he also wished to reaffirm his personal approach to the topic and, in particular, to the issue of the nature of the instrument.

12. With regard to the question of the title of the topic, he agreed that the word "acts" should be replaced by the word "activities".

13. Turning to what he regarded as one of the most important issues, he could agree with the Special Rapporteur on the need to draft coherent, reasonable, practical and politically acceptable articles, but he did not believe that the question of the nature of the instrument should be left aside for the moment. All future work on the formulation of the draft articles would depend closely on the nature or character of the proposed instrument. If it was to be legally binding, its core would have to be drafted to reflect at least *lex lata*, under present international law. If, on the contrary, it was to be only recommendatory or a code of conduct, rules and principles could be created that were new under present international law. The nature of the instrument therefore had to be decided before going any further. Moreover, the delegation which had proposed that the Commission should carry out an overall review of its work on the topic

⁴ See 2222nd meeting, footnote 5.

seemed to have had the same concern: that the Commission should first agree on a clear working hypothesis relating to the legal nature of the instrument or instruments to be worked out.

14. His own view was that the Commission should be prepared to draft two separate instruments: one dealing with the issue of liability, including reparation for damage, and another with the issue of prevention. The first of those instruments would be binding and the second would take the form of recommendations. That approach would have two advantages. The first was that it would avoid the use of the controversial concept of activities involving risk, which was in fact unnecessary if the sole concern was liability arising out of the harmful physical consequences of the activities in question, since only actual harm was taken into account. Because it had no direct link with the reparation of that harm, the concept of risk would then come into play only in connection with the duty of prevention. The second advantage was that there were already certain conventions, such as the Vienna Convention for the Protection of the Ozone Layer and the Convention on Early Notification of a Nuclear Accident, which laid down rules and procedures for prevention and focused on the types of activities that called for preventive measures and on the rules and procedures necessary to prevent possible harm.

15. It was on the basis of that assumption that he wished to comment on some of the important issues raised by the Special Rapporteur. The first instrument, the legally binding one which would deal with liability, including reparation, should, in his view, set forth only certain fundamental rules and principles concerning the legal consequences of transboundary physical harm, such as reparation, non-discrimination before the courts of the forum State and exhaustion of local remedies. With regard more particularly to reparation, certain points merited attention. First, it should be recognized as a legal principle that the innocent victims of transboundary harm should be compensated, primarily through civil liability regimes. That, of course, raised the question whether the principle of causal liability should apply to compensation for damage caused by activities not prohibited by international law. In his view, under the civil law of the majority of States, the principle of causal liability in that field was still not generally recognized; nor was the principle of residual State liability, in the event that reparation was not obtained under the civil law procedure. Moreover, existing conventions on the subject also did not provide for the residual or strict liability of the State, apart from the Convention on International Liability for Damage Caused by Space Objects. The famous *Trail Smelter*⁵ principle might not be applicable to all cases, regardless of the actual situations in which transboundary harm occurred. Article 139, paragraph 2, of the United Nations Convention on the Law of the Sea and article 4, paragraph 4, of annex III thereto provided a typical illustration of the reluctance of States when it came to bearing liability for activities conducted by contractors, even when such activities were sponsored by States. He was therefore somewhat hesitant to recognize, under the existing rules of international law,

the automatic application of the principle of the strict liability of the State, even if it was only residual liability. That led him to the conclusion that the principle of compensation should be set forth in general terms only and should not go so far as to cover causal liability under the civil law and the residual liability of the State. Those issues would be better dealt with in instruments covering well-defined areas, such as nuclear damage and environmental pollution caused by oil spillage.

16. He agreed with the Special Rapporteur that the primary liability should be civil liability, but he doubted whether the rules of civil law were sufficient, in most countries, to cover transboundary physical harm arising out of activities not prohibited by international law. Without excluding the possibility of setting forth certain international rules and standards concerning civil liability in specific instruments, including the question of the channelling of liability—he was thinking, for instance, of the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources—he considered that in principle those matters still fell within the rules of internal law. The principle of causal liability was in fact recognized only in the context of certain ultra-hazardous activities. It was true that a recent German Act, the 1990 Environmental Liability Act, was said to have considerably broadened the scope of that principle, but such a comprehensive approach was not yet common. Consequently, even the fundamental principle of reparation, to which he had referred earlier, needed to be crystallized under specific conventions, by the development of national legislation or through the jurisprudence of national courts. That was all the more so in the case of principles which, at the international level, were of only a recommendatory nature, such as those affecting the details of civil liability.

17. With regard to the Special Rapporteur's question concerning the scope of the future instrument, the concept of activities involving risk should not, in his view, be used in an instrument dealing with reparation. Since almost all human activities involved an element of risk, some threshold would have to be set. That, however, would be very difficult in practice. Furthermore, the concept of risk could lead to confusion in the context of reparation because it could be wrongly regarded as the foundation of the obligation to make reparation or to compensate.

18. Prevention would be the subject of the second instrument, in which most of the provisions on the obligations of the State of origin set forth in draft articles 11 to 20 submitted by the Special Rapporteur would be reproduced in the form of guidelines or a code of conduct. That did not mean that the substantive and procedural rules relating to prevention were not as important as those relating to reparation: on the contrary, the rules on prevention set forth in articles 11 to 20 could be very useful if they were conceived in more precise terms and specifically in relation to ultra-hazardous activities. There was, however, considerable controversy on whether such obligations of the State of origin as those concerning, for instance, assessment, notification, information, consultation and negotiation with affected States

⁵ *Ibid.*, footnote 7.

or States presumed to be affected, and unilateral measures of prevention, were already well-established principles of international law applicable to all situations or activities not prohibited by international law, regardless of the nature of such activities or the area where they were carried out. In particular, the substantive and procedural rules concerning prevention, as well as the mechanism for their implementation, might be fairly different according to the type of activity concerned or even according to the phase reached in the course of the same activity. For instance, some conventions, such as the International Convention for the Prevention of Pollution from Ships, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and the Vienna Convention for the Protection of the Ozone Layer, approached the question mainly from the angle of the activities that should be prohibited or of the conditions under which a particular activity should be allowed, whereas other conventions, such as the Convention on Early Notification of a Nuclear Accident, dealt only with the accidental phase of the activity and laid down rather detailed rules of notification. In the circumstances, it would be better, at the current stage, to formulate recommendations or a code of conduct on the topic of prevention rather than to formulate generally applicable rules of a legally binding character.

19. The list of dangerous substances should be mainly for preventive purposes and should therefore be in the nature of a recommendation. It might be useful to annex such a list to the instrument on prevention to provide an illustration of the kind of activity that should in future come under closer surveillance and be the subject of special and effective rules on prevention.

20. Lastly, he agreed with previous speakers that it was too soon to lay down general principles of international law relating to the "global commons".

21. Mr. SHI said he agreed with the Special Rapporteur that the discussion should concentrate on the main issues of the topic rather than on the texts of the articles. That was entirely in keeping with the decision taken by the Commission at its forty-second session.⁶

22. In his view, a decision on the nature of the instrument would be premature at the current stage. Since the early 1960s, the Commission's aim had always been for its articles on various topics ultimately to take the form of international conventions. Initially, its codification efforts had met with success, as exemplified by the first conventions on the law of the sea, the conventions on diplomatic and consular relations and the convention on the law of treaties, but, since the 1970s, the conventions concluded on the basis of articles drafted by the Commission had not always proved so successful, either because there had not been many ratifications or because the instruments in question had not come into force because of the scant number of States parties. Also, some of the draft articles recommended by the Commission had been shelved by the General Assembly: he was thinking, for instance, of the most-favoured-nation clause and of the status of the diplomatic courier. In his

view, the Commission should be more careful in future before making recommendations on the final form the draft articles should take, particularly when those articles were more concerned with the progressive development of international law than with its codification, as in the case of the topic under consideration. He therefore agreed with the Special Rapporteur that the question of the nature of the instrument should be left aside for the time being and that the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles. The Commission should expedite its work in that direction in order to meet the expectations of the General Assembly and should bear in mind that not even one draft article had been provisionally adopted since the topic had been placed on its agenda over 10 years earlier.

23. As to the title of the topic, he would refer members to paragraph 216 of the Commission's report on its thirty-eighth session,⁷ which seemed to settle the question, and he would therefore not reopen the debate on the matter. In order to facilitate work on the topic in the next quinquennium, however, it would be better for the Commission to request the General Assembly at its forty-sixth session to replace the word "acts", in the English version of the title, by the word "activities", with any consequential changes being made in the other languages.

24. With regard to the scope of the topic, he had consistently held the view that the draft articles should apply to activities involving risk as well as to activities with harmful effects or activities that caused harm. Like other members, he considered that the threshold concept was important in triggering liability for activities not prohibited by international law. States seemed to accept or to tolerate a certain degree of harm and it was only when harm exceeded a certain established limit, either because of an accident or for other reasons, that liability was triggered. The question, however, was whether the two types of activity—activities involving risk and activities with harmful effects—should be treated together. Although it was mainly a question of method, he considered that, since the two types of activities had much in common in terms both of general principles and of legal consequences, the two could indeed be treated together. On the other hand, he doubted whether the word "prevention", even if understood in the broad sense the Special Rapporteur gave to it in his sixth report,⁸ could also apply to measures taken after the occurrence of an accident to reduce the extent and degree of harm or to minimize the harmful effects of an activity. At any rate, he agreed with the Special Rapporteur that the Commission should review the possibility of the joint treatment of the two aspects of the matter at the end of the exercise.

25. A general definition could serve as a guide to States in delimiting the scope of the topic. It would be difficult, if not impossible, to draw up an exhaustive list of dangerous activities and an illustrative list would be virtually useless. As to a list of dangerous substances, he shared the view expressed in the Sixth Committee that

⁶ *Yearbook* . . . 1990, vol. II (Part Two), para. 472.

⁷ *Yearbook* . . . 1986, vol. II (Part Two), p. 58.

⁸ See 2221st meeting, footnote 7.

the fact that a substance appeared on the list might not mean that the activity related to the substance would necessarily create a risk of transboundary harm and that the risk might be created by activities unconnected with a dangerous substance.⁹

26. Prevention was no doubt an important element in the regime applicable to activities involving risk. The revised procedural rules proposed by the Special Rapporteur in his sixth report were an improvement over those presented in his fifth report.¹⁰ Despite views to the contrary voiced both in the Commission and in the Sixth Committee, however, the obligation of prevention should remain within the realm of "soft" law. In that connection, he endorsed the commentary to article 18 which appeared in the Special Rapporteur's sixth report: failure to comply with procedural obligations of prevention entailed no liability, for liability arose only when harm had occurred and could be imputed to an activity by a causal link.

27. With regard to the assignment of liability for appreciable or significant transboundary harm, he considered that the operator should bear the primary liability to make reparation, since that was in line with the current practice of States, as reflected in a number of conventions. The operator might be a private corporation, a State enterprise or the State itself, in accordance with the way that term was used in the draft articles on jurisdictional immunities of States and their property. Where the operator was the State itself, there was no doubt that the State should be liable. Since the amount of compensation might be quite large, an intergovernmental fund might be created, with statutes similar to those of the World Bank or the Common Fund for Commodities. The specific terms and conditions governing the use of the resources would be determined by the fund itself. Since primary liability lay with the operator, the draft articles ought to include provisions on civil liability. However, it was best not to make those provisions too detailed, since civil liability was provided for in domestic law and countries might have different legislation in that regard, so that uniformity would probably be hard to achieve in the near future. Provisions embodying general principles on local remedies and particularly on non-discrimination would suffice.

28. Harm to the "global commons", in particular the "greenhouse effect", was currently a matter of particular concern. The Commission could not ignore that problem and should contribute to the development of the law in the field. The question was whether it should do so in the context of the current topic, under which the Commission was considering liability for appreciable or significant transboundary harm to persons, property or the environment. Both the State of origin and the affected State could thus be easily identified and the harm caused could be assessed. That was not the case with harm to the "global commons", which differed from the current topic in a number of ways: the multiplicity of sources causing harm, the difficulty of identifying the State or

States of origin, the problem of assessing the threshold of harm, difficulty in determining the effects of harm to the environment of the "global commons" and the question of the definition of the concept of the "global commons". In those circumstances, he did not think that the issue should be dealt with under the current topic and suggested that the Commission might list it separately as a priority topic in its long-term programme of work.

29. In discussing the current topic, the Commission should take account of the conditions of developing countries and formulate the draft articles accordingly. Articles 3 and 7 proposed by the Special Rapporteur did in fact take account of their lack of technology. However, the situation needed to be considered more systematically because, whether they were upstream or downstream of the harm, developing countries were the main victims of modern industrial production. Activities involving risk or activities causing transboundary harm were very often carried out by transnational corporations, which developing countries were hardly in a position to regulate. Furthermore, many of those countries did not have the technological know-how and financial resources to control such activities. It was thus not only a matter of providing assistance to developing countries, but also of determining who was liable in the case of transboundary harm. Developing countries that were affected by transboundary harm faced the problem of the lack of means for monitoring and assessing the harm and the lack of the technology and financial resources to minimize and contain it.

30. Lastly, he hoped that the Commission could speed up its work on the topic, especially since it was already well advanced on jurisdictional immunities of States and their property, the law of the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. In his opinion, the topic of liability should be given high priority on the agenda of the renewed Commission.

31. Mr. Sreenivasa RAO said that, in attempting to recast the basic ideas of the topic in the light of comments by States, recent conventions and the conceptual problems involved, several of Mr. Barboza's reports, including the seventh, seemed to create some confusion about the focus and direction of the topic, but, on closer examination, they were in fact helping the Commission to grasp the essential elements of the possible legal regime.

32. He, too, was in favour of a flexible framework convention establishing general principles of liability, including the circumstances under which liability arose; the role of prevention and due diligence; exemptions from liability; the criteria for compensation or reparation; the role of equity; the peaceful settlement of disputes; the functions of international forums and organizations; and the establishment of effective standards and monitoring agencies through national legislation.

33. It was reasonable to assume that liability should be based on significant or appreciable harm, whether such harm had or had not occurred, and that the role of the risk factor should be limited to indicating the possibility or probability of harm and, more importantly, to imposing the obligations of prevention and due diligence. The

⁹ *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee, 28th meeting, para. 62.*

¹⁰ *Yearbook . . . 1989, vol. II (Part One), document A/CN.4/423.*

debate was also indicating—even though it had yet to be stated clearly—that liability for harm lay with the operator, subject to all the principles linked to the obligation of due diligence and the applicable exceptions. In that connection, the Special Rapporteur had rightly emphasized control of the activity in his seventh report.

34. It should also be recognized that a regime of liability placing the emphasis on the operator might never be applicable to harm to the environment, persons or property as a result of the gradual accumulation of the harmful transboundary effects of a more or less long-term activity, especially if that harm was the result not of the activity of one operator in one particular State, but of the activities of several operators in more than one State, as in the case of the depletion of the ozone layer. The principle of liability could be effectively applied only if it was adapted to the characteristics of each type of activity. A regime of liability could not be designed to be applicable to every situation, as shown, for example, by the current negotiations on liability for nuclear accidents or incidents. By highlighting the features of particular activities, such negotiations could provide guidelines for the Commission on the basic elements of the framework convention on which it was working and, once the convention had taken shape, could help give it final form.

35. International liability as a regime was closely linked to the lifestyle of peoples and it must be borne in mind that much of the world's population was simply trying to satisfy its basic needs or improve its standard of living. For the developing world, space research, communications, technology, atomic energy and so on were means of reducing economic disparities and compensating for having missed out on industrial and technical revolutions as a result of colonialism and the exploitation of their natural resources. Those efforts to modernize did not reflect a desire for power, as they might in other parts of the world, but would enable the developing countries to meet the challenges of population growth and poverty.

36. If, in order to obtain the technical, scientific and financial assistance of the most advanced countries, the developing countries, having little to offer in return, sometimes had to pay the price in terms of national sovereignty or political, economic or cultural freedom, was it moral and equitable to require the same standards of liability of them? To demand equality of treatment in that regard was to take no account of the lifestyles and standards of living which the developed world had achieved at the expense of the environment, planetary resources and, more serious still, a large majority of the world's population. A regime could not be considered equitable and based on a sense of justice if it ignored the disparities in standards of living between nations and was insensitive to the development needs of the majority of the world's population.

37. The responsibility of the over-industrialized world for the enormous amounts of waste generated by excessive consumption and its contribution to global warming, deforestation, and the like, had to be given due consideration. He feared that non-acceptance of State liability and the exclusive dependence on operator liability might create some gaps in the regime to be established. State

liability should be distinguished from the liability of multinational corporations.

38. There was a need to set up international organizations and reorient existing ones in order to provide the technical assistance needed to ensure the safety of operations. It was also necessary to set adequate standards, define thresholds of harm and, above all, establish international funds and contingency plans which would operate in cases of disaster.

39. It was clear that there were activities which gave rise to some limited harm, owing to operator negligence or irresponsibility, in which case a simple liability regime would be applicable, as in the common law. In such cases, claims would be based on the law of causality, the principle of the due diligence expected of a prudent and reasonable individual, the principle of compensation and other types of relief for damage, as well as insurance coverage, which could be made mandatory. However, in the absence of agreement on the threshold of appreciable harm, extending that regime to all forms of transboundary harm would be legally and politically unacceptable.

40. In view of the work that still had to be done, he would welcome the establishment of a small working group to consider the main issues: while an innocent victim should not have to bear the cost of the harm, should he not share the risk to the extent that he benefited from the activity? What approach should be taken on the issue of intergenerational equity? With regard to environmental law, the poor suffered most from the effects of pollution; they must be given a cleaner environment, which would then help guarantee their right to life. In India, the Supreme Court had interpreted the right to life in its widest sense in linking it to the right to development. In mentioning those specific aspects of liability, his aim was merely to stress that the issue for developing countries was less the right to life than the right to survival. Under such circumstances, how could the environment be protected and the basic needs of populations be met at the same time without an excessive drain on financial and other resources? How could liability be shared between those who caused harm and those who could remedy it by means of surplus resources?

41. In conclusion, he said he hoped that, while viewing the topic in a consistent manner, the Commission would bear in mind the situation of much of the world's population, whose development needs were urgent and whose very survival was in jeopardy.

42. Mr. THIAM thanked the Special Rapporteur for his report. He said that a great deal of thought had gone into it, but it created two contradictory impressions.

43. The first was that the report was a kind of introduction to consideration on second reading before the fact. All the issues referred to in the report had been discussed at length and had been incorporated into draft articles which had been sent to the Drafting Committee. Those issues were being brought up again even before the Drafting Committee had considered them and before States had commented on the Commission's work. However, there was also the impression that the consideration of certain issues had just begun. That was the case, for

example, of the scope of the draft articles, a matter which was usually dealt with at the start of the work. Those contradictory impressions might have been created because the subject was a difficult one, but also because the Commission had not given the Special Rapporteur clear enough guidelines. In any event, the item had been on the agenda for more than 10 years and the Commission continued to puzzle over the same issues without being able to come up with a precise and coherent focus; and, once again, the Special Rapporteur was asking the Commission to consider issues on which the members had already made their positions clear. He personally continued to entertain doubts about the topic itself, which, in his opinion, was not separate enough from the overall topic of State responsibility and should have been considered in that context. It was unfortunate that, in undertaking his study of the topic of State responsibility, Mr. Ago, Special Rapporteur on the topic from 1963 to 1978, had refused to consider the overall issue of responsibility and liability and had dealt only with responsibility for wrongful acts.

44. He would nevertheless try to give a few ideas on the questions raised by the Special Rapporteur.

45. With regard to the nature of the instrument, he thought that such a complex topic probably called for a framework convention embodying some very general rules rather than binding ones. States did not seem to be prepared to accept responsibility for the activities they carried out in their own territory, as was their sovereign right, without any wrongdoing on their part. That was the problem and it was the problem that had arisen some 10 or 12 years previously with regard to liability for risk, a principle for which it had been very difficult to gain acceptance. It was probably now generally agreed that liability for risk existed, but that was the result not of codification, but of legal decisions that had gradually given shape to the applicable rules. The Commission therefore had to be cautious and modest, ruling out any ambitious undertakings.

46. The title of the topic was not only very long, but also contained ambiguous terms. It referred to "international liability for injurious consequences", but was there such a thing as liability for non-injurious consequences? All liability involved injury. The Commission could thus improve the title by simplifying it and making it more precise. He also recalled that it had been agreed that the topic should cover *activités* and not *actes*. A term corresponding to the word *activités* therefore had to be found in English.

47. With regard to scope, he did not see any difference, from the viewpoint of liability, between activities involving risk and activities with harmful effects. Any activity which caused harm, whether an activity involving risk or an activity with harmful effects, would give rise to liability. He could also see no point in drawing up a list of substances. Whenever the use of a substance caused harm, the harm must be repaired. A list of prohibited substances would make sense only in connection with responsibility for wrongful acts. In any case, compiling a list of substances would not be easy and would call for technical knowledge that the Commission did not have.

48. Most of the principles proposed—freedom of action and the limits thereto (art. 6), cooperation (art. 7), prevention (art. 8) and reparation (art. 9)—derived from general international law. He saw no objection to including them in the draft articles, provided that responsibility for wrongful acts was not confused with the present topic. For instance, making prevention an obligation would be tantamount to saying that a breach of that obligation would give rise to responsibility for a wrongful act. That was also true of reparation.

49. With regard to procedural obligations, the Special Rapporteur was asking whether they should remain within the realm of "soft" law. He could not take a definite stand on that issue, since that was a common law concept. However, if a procedural obligation was laid down, States must comply with it, for otherwise, there would be a breach. It could not be said both that an obligation existed and that it was part of "soft" law, unless the concept had some meaning of which he was unaware.

50. He could also not take a stand on the choice to be made between the original civil liability of a State and its residual liability. He noted, however, that the Special Rapporteur had expressed his own preference in the draft articles which he had proposed and all of which—for instance, articles 1 and 3—were based on the liability of the State of origin. If the intention was now to base them on the principle of the operator's liability, he had no objection, but all the draft articles would then have to be revised accordingly. The same applied to the duty of diligence. The Special Rapporteur had stuck to his own approach in proposing that the State should be liable for any breach of the duty of diligence. But there must be a choice: either a State was liable for activities which were themselves necessary and which it carried out in a sovereign capacity, but which caused harm to someone else, or it was responsible for a breach of its obligation of diligence.

51. It must be recognized that the Commission was not much further ahead than it had been at the beginning of its discussion of the topic. It had to decide what to do now and it had two options: it could tell the General Assembly that the topic was not ripe for codification and recommend that it should invite States to sign bilateral or multilateral conventions in specific fields; or it could continue its study of the topic, but it then had to try to be consistent, logical, systematic, discerning and clear, naturally with the Special Rapporteur's assistance. Above all, however, it must avoid going over the same ground every year.

52. Mr. HAYES said that, in response to the suggestion made in the Sixth Committee of the General Assembly, which the Special Rapporteur had quoted in the introduction to his report, he would refer mainly to the overall assessment of the current state of the topic, dealing with the key issues rather than with the draft articles, even if that meant reopening the general debate to some extent.

53. Although it was true that the Commission's debates at the last four sessions had revealed some sharp differences of opinion both with regard to fundamental matters and to points of detail, there was a surprisingly

wide area of agreement, in some cases amounting to a consensus.

54. The schematic outline proposed by the former Special Rapporteur¹¹ had been approved by the Commission at its thirty-fourth session; the present Special Rapporteur had proposed that it should be retained, and that proposal had subsequently been endorsed by the Commission. The outline was based on the principle *sic utere tuo ut alienum non laedas*, the first principle which met with general agreement and which lay at the very heart of the subject: liability for transboundary harm, whether threatened or actual. That principle was supplemented by another, which was based on Principle 21 of the Stockholm Declaration¹² asserting that States had as much freedom of choice in their activities in their own territory as was compatible with the rights and interests of other States. On that point as well, there seemed to be general agreement in the Commission. The outline also contained the elements of risk and harm, even if it did not use those words, providing as it did for prevention and reparation. In addition, it proposed that the innocent victim should not be left to bear his loss or injury and it emphasized the balance of interests between the States concerned.

55. At the thirty-ninth session, the present Special Rapporteur had asked the members of the Commission to discuss the following points: (1) whether the draft articles should ensure for States as much freedom of action within their territory as was compatible with the rights and interests of other States; (2) whether the protection of rights and interests of other States required the adoption of measures of prevention of harm; (3) whether, if injury nevertheless occurred, there should be compensation; and (4) whether the view that an innocent victim should not be left to bear his loss, should have a firm place in the topic.¹³ At the end of that debate, the Special Rapporteur had drawn the following conclusions: (a) the Commission must endeavour to fulfil its mandate from the General Assembly on the topic by regulating activities which had or might have transboundary physical consequences adversely affecting persons or objects; (b) the draft articles on the topic should not discourage the development of science and technology, which were essential for the improvement of conditions of life in national communities; (c) as the topic dealt with both prevention and reparation, the regime of prevention must be linked to reparation in order to preserve the unity of the topic and enhance its usefulness; and (d) certain general principles should apply in that area, in particular: (i) every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States; (ii) States must respect the sovereignty and equality of other States; (iii) an innocent victim of transboundary injurious effects should not be left to bear his loss.¹⁴

56. Those elements which were contained in the schematic outline were therefore valid material and the debates at the thirty-ninth and subsequent sessions of the

Commission had shown that there was broad support for their inclusion in the future instrument, even if views differed on how that should be done.

57. He thus believed that, in the overall assessment it would submit to the General Assembly, the Commission should in the first instance draw attention to those areas of agreement and he hoped that they could be added to following the current debate.

58. Turning to the important issues raised by the Special Rapporteur, he said that with regard to the nature of the instrument, he accepted the Special Rapporteur's recommendation that the Commission should leave a final decision until a later stage and in the meantime work on the preparation of a framework convention. In any case, he personally favoured a framework agreement, which would encourage States to establish regimes applicable to specific activities and situations. It would then act both as a guideline and as a body of residual rules to be applied in the absence of a special regime.

59. With regard to the title of the topic, he thought a decision should be left until later, on the basis of the assumption that the English text of the title would refer to "activities" and thus conform with the other language versions. The Special Rapporteur's explanations on that point were fully convincing.

60. As to scope, he believed that there was agreement on including both activities involving risk and activities with harmful effects and on laying down the corresponding obligations of prevention and reparation. He was, moreover, not convinced that the two kinds of activities were mutually exclusive, since they could easily overlap.

61. He also did not think that there should be a further round of discussions on the choice of adjectives to qualify "risk" or "harm". He was nevertheless still firmly convinced that confining the draft to activities involving risk by describing them as "ultra-hazardous activities" or by referring to a list of activities or of dangerous substances would unnecessarily and unjustifiably restrict its scope. There did not seem to be much support for such an approach either in the Commission or in the Sixth Committee.

62. He agreed that the principles referred to in the draft articles were those applicable in the field. He thought, however, that the absence of any specific provision stating that the innocent victim should not be left to bear his loss was a significant gap which must be filled, perhaps by incorporating it in draft article 9 on reparation or in draft article 6 on freedom of action and the limits thereto.

63. Referring to procedural obligations, he said he agreed with the Special Rapporteur that there was basic agreement on having a procedure to trigger the obligations to make a transboundary impact assessment, to notify the potentially affected States and to consult with those States. Fortunately, the wording of the articles on procedural obligations in the sixth report was less detailed than in the earlier version, but it could be further simplified if the provision of detailed information, including technical data, was obligatory only where a request was made either by the State of origin or by the potentially affected State. There might well be cases

¹¹ See 2223rd meeting, footnote 5.

¹² See 2221st meeting, footnote 6.

¹³ *Yearbook . . . 1987*, vol. II (Part Two), p. 41, para. 132.

¹⁴ *Ibid.*, p. 49, para. 194.

when it would be unnecessary to provide such data to accompany the notification because the risk would be quite obvious. Although the Special Rapporteur was emphasizing that the proposed provisions reflected the wording of some specific agreements, he personally thought that less detailed rules were called for in a framework agreement. He also thought that article 17 could be simplified and placed in an annex, as the Special Rapporteur proposed in his report, and he supported the view that no sanctions should attach to the procedural obligations; compliance or non-compliance with them should instead be a factor to be taken into account in negotiations for compensation once harm had occurred. On the other hand, due diligence and the adoption of measures of prevention should be strict obligations.

64. With regard to the obligation of reparation, he would prefer the choice of regime to be left open instead of having a system of civil liability and residual State liability. If such a regime was to be developed, the draft articles would have to require States to make provision to that effect in their internal law. However, domestic legal systems differed as to grounds of action and he wondered how feasible, or even desirable, it would be to insist on that kind of harmonization. It would be better to leave it to States to make what provision they considered appropriate to impose liability on the operator for transboundary harm if it occurred, whether the operator compensated the injured party directly or contributed to the compensation paid by the State of origin.

65. As to the "global commons", he agreed that, if there were no applicable rules, some ought to be framed, but not without first studying the many aspects of the subject. The Commission should make clear that its task was to develop that area of law and should seek a mandate to do so.

66. In connection with the negotiations which the Special Rapporteur had said States would be starting on the topic at some stage, he understood that the Special Rapporteur had meant something other than the inter-State negotiations which always took place in the Sixth Committee when it considered drafts submitted by the Commission or in a diplomatic conference with a view to the adoption of an instrument. The Special Rapporteur had spoken of putting forward several alternative drafts for some articles. His own view was that that would be premature. The Commission should await the General Assembly's reaction to its report on the status of the topic before considering such an unusual procedure, even if the topic itself was an unusual one.

67. Lastly, he thought it would be useful for the Commission to inform UNCED that it was doing work which had a bearing on the environment. For that purpose, it could, as recommended by the Special Rapporteur, ask a working group to prepare a paper to be approved by the Commission and sent to the Conference. The paper should also report on the progress of the Commission's work on the law of the non-navigational uses of international watercourses.

The meeting rose at 1.10 p.m.

2226th MEETING

Wednesday, 19 June 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR² (continued)

1. Mr. PAWLAK thanked the Special Rapporteur for his seventh report and his useful and inspiring introduction. The opinions expressed by the Special Rapporteur and his request for the views of the members on the topic deserved careful consideration. Like many other members, he was deeply concerned that, despite 14 years of determined effort, the draft articles on the topic were not even ready to be sent to the Drafting Committee. One reason was that the Commission had allowed the topic to grow from a relatively limited one covering State liability for non-prohibited activities into a quasi-omnipotent and uncontrollable monster encompassing virtually the whole of international environmental law. Of course, that growth had been fuelled by long-standing concerns about the degradation of the global environment and environmental accidents.

2. In order to achieve what should be its basic objective, namely, fulfilling its obligation to the General Assembly, the Commission should be working not towards the elaboration in the distant future of an overall convention, but towards the drafting in the near future of a relatively narrow and practical legal instrument, which could meet the international community's basic concerns and be accepted by States as a useful tool to combat any abuses arising from the use of new technologies. In other words, the monster topic had to be controlled and contained.

3. The Commission would do best to limit itself to one basic objective: laying a firm and scientifically sound foundation for the topic. There were a number of exist-

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

ing legal principles which could contribute to the achievement of that objective. At the same time, the Commission could not begin its work by simply elaborating politically acceptable articles. No builder or architect would begin construction on a building without having some idea of its nature. He therefore did not agree with the Special Rapporteur that a decision on the nature of the instrument could be taken at a later stage. In that connection, he shared Mr. Ogiso's view (2225th meeting) that the Commission might prepare a short draft of a binding legal instrument that might take the form of a convention or a treaty and would set forth the principles under which reparation would be made for actual and appreciable transboundary injury or harm.

4. There were strong moral and legal grounds for establishing such principles, the main argument being that the victim should not be left without legal protection. The procedures for obtaining compensation should be practical: civil liability should be assigned to the operator; if that obligation could not be fulfilled, responsibility would then be assumed by the State. The State would also be liable when the authors of the harm could not be identified, when liability could not be assigned fairly among operators or when transboundary harm was the result of cumulative effects.

5. He had great sympathy for the particular problems which might arise in developing countries; that situation had been eloquently described by Mr. Sreenivasa Rao at the preceding meeting. Those problems might be solved through the assistance of existing or specially established international agencies or by setting up special funds.

6. The Commission also needed to consider some kind of arrangement for multinational corporations, which were playing an increasingly important role in almost all activities that gave rise to transboundary harm. States had to find a way of reconciling the commercial needs of multinational corporations with the need to assign liability for the injurious consequences of activities that were not prohibited by international law. In that context, it would be best to focus on easily definable consequences, such as the effects of nuclear disasters, oil contamination, deforestation, and the like.

7. As he had stated at earlier sessions, the main purpose of the Commission's work on the topic was to elaborate a binding system of rules governing compensation for transboundary harm arising out of activities not prohibited by international law. Such transboundary harm should be based not on the concept of risk, but on the concept of real, sustainable and appreciable harm. The Commission should not be concerned that some States were not yet prepared to accept obligations relating to such harm. In fact, there was growing awareness among States of their interdependence and of the collective responsibility to prevent further degradation of the environment. Most States, by sheer necessity and out of their own interests, would accept realistic rules. For example, Principle 21 of the Stockholm Declaration³ was almost universally accepted: it gave States freedom to do as they wished within their own territory and, at the same time, it ensured the inviolability of the territory of

States with respect to effects originating in other States. In addition to that principle, there were a number of other principles that provided grounds for the obligation to make reparation, *inter alia*, the duty to cooperate in preventing and minimizing transboundary harm or its consequences and the principle of non-discrimination. Those principles seemed to be acceptable to the Commission and had already been endorsed in part under other topics, including international watercourses.

8. The Commission should pay particular attention to the problem of prevention. The need to draft a set of provisions on that issue had been emphasized at the outset. Although the obligation to take all reasonable measures to prevent or minimize harm was firmly established in international practice, prevention was still considered to be a "soft" area of general international law. He agreed with the Special Rapporteur that article 8 should be modified in order to reflect the real obligations of States; the procedural measures contained in articles 11 to 15 and the unilateral measures provided for in article 16 should also be further refined. The issue of prevention could serve as the basis for a draft document of a general, non-binding character which would contain recommendations for States. The Commission could thus emphasize the concept of risk as a fundamental factor in all prevention activities. Accordingly, risk should be covered neither by the articles pertaining to scope nor by those concerning reparations; rather, risk should be limited to the articles relating to prevention.

9. In his opinion, there was no need to include the issue of the "global commons" under the topic of international liability. That matter could be treated as a separate topic by future members of the Commission.

10. He shared the views of the members who wanted the English title of the topic to be amended by replacing the word "acts" by the word "activities". The word "activities" would better reflect the type of endeavours with which the Commission was dealing.

11. He endorsed the proposal to create a working group to draft basic principles for the topic. That group should concentrate on principles to be included in the first draft of a binding instrument to be submitted to the General Assembly and, in outline form, to UNCED in 1992.

12. Mr. AL-KHASAWNEH expressed gratitude to the Special Rapporteur for his seventh report, which he had introduced in such an able fashion.

13. In the introduction, the Special Rapporteur reiterated his view that the Commission should not be concerned about the eventual form of the draft articles. Yet, later, in arguing against including a list of dangerous activities in the draft articles, he warned that such inclusion would change the nature of the draft articles, so that instead of being a framework agreement encompassing all activities they would become an instrument intended to regulate specific activities. The Special Rapporteur had used similar language in his introduction to his sixth report.⁴ In his seventh report, the Special Rapporteur, in discussing dangerous activities, made a distinction be-

³ See 2221st meeting, footnote 6.

⁴ *Ibid.*, footnote 7.

tween the Council of Europe draft rules and existing conventions. He then concluded that:

... [those] rules instead deal with any dangerous activity; they would constitute a general convention just as the Commission's draft articles are intended to be.

14. Those statements revealed two things. First, although the Special Rapporteur had asked the Commission not to prejudge the final outcome of the draft articles, he seemed to be referring to a framework convention as if it were the natural outcome of the Commission's work. He would appreciate clarification in that regard from the Special Rapporteur. Secondly, the terms "framework convention" and "general convention" were used interchangeably in the report. For the Special Rapporteur, a general convention was one in which the subject-matter was not confined to one activity, but which included general principles applicable to liability in all fields, or at least in those fields which had not been expressly excluded from the scope. In his own opinion, the two terms were not synonymous. A framework convention contained general residual rules that would encourage the negotiation of more specific regimes and would apply in the absence of those specific regimes. A general convention contained more detailed rules which would apply directly and not residually. He would appreciate clarification from the Special Rapporteur on that point as well. In particular, he wished to know whether the specific regimes varied according to the subject-matter of the activity in question or according to the negotiating States in each individual case.

15. Although he would not reiterate his criticism of the framework convention approach, he drew the Special Rapporteur's attention to the statement he had made on that issue in 1987.⁵ Such an approach might give rise to a mosaic of rules, which represented the very antithesis of codification and was dependent on such non-principled solutions as using the results of negotiations.

16. Mr. Shi had referred at the preceding meeting to the propensity for drafting conventions that had taken hold in the 1960s as a result of the successful codification efforts undertaken by the Commission. He had also spoken of the less than optimal results achieved in the succeeding decades. He was not sure whether those facts argued for abandoning the traditional form of a binding general convention. He believed that the Commission should prepare its draft articles on the assumption that they would constitute a universally applicable general yardstick against which acts could be measured with certainty and clarity.

17. With regard to the title of the topic, the issue was probably more complex than simply harmonizing the various language versions. He did not endorse the suggestion that the word "acts" should be replaced by the word "activities". In fact, he would argue the opposite, namely, that the Commission should confine its topic and scope to acts, not only because the word "activities" was a dangerous one for lawyers, but also because the failure to distinguish between acts and activities had been at the heart of the confusion regarding what consti-

tuted liability *sine delicto*. Writing in the *Netherlands Yearbook of International Law*, Mr. Akehurst had stated:

Because a certain activity, e.g., the operation of a smelting plant, is not prohibited by international law, the Commission has assumed that any liability incurred in the course of that activity must be liability *sine delicto*. This is a *non sequitur*. The fact that operating a smelting plant is permitted by international law does not necessarily mean that all acts committed in the course of that activity are permitted by international law.⁶

18. The Commission's focus on the environment during its discussions of the present topic was somewhat puzzling, since most rules on the environment were expressed in terms of prohibitions whose boundaries were shifting all the time as man's freedom to deal with nature as he chose was being regulated or curtailed in the interests of survival, civic responsibility or intergenerational equity. It was also puzzling in view of the historical development of the topic as an offshoot of the topic of State responsibility governed not by responsibility for wrongfulness, but by the only other active principle of obligation of which legal reasoning admitted, namely, causal responsibility. By widening the scope of the topic to include lawful activities and introducing duties of prevention, the topic had begun to encroach on the domain of State responsibility. It was time to consider going back to a limited, but manageable and focused scope of the topic, namely, the provision of compensation once harm had occurred. The topic was based on a fundamental principle of equity: the innocent victim should not be left to bear his loss alone. In following such logic, the Commission might end up with a rather short draft. Indeed, in one of his earlier reports, the Special Rapporteur had warned that the entire draft could consist of a single article requiring compensation when harm occurred. That was no doubt an exaggeration intended to show the absurdity of the course which he himself was now advocating. Nevertheless, the draft articles might well be limited to a number of articles defining harm; the definition of the threshold beyond which harm must be compensated; and principles governing that compensation and exonerations therefrom.

19. With regard to the question of risk, he agreed with Mr. Hayes (2225th meeting) that defining the activities that should be included in the topic either through the use of the term ultra-hazardous or through a list would unjustifiably narrow the scope of the draft articles. While an attempt to introduce the concept of the foreseeability of risk would not cause confusion, it would miss the point: the essence of the obligation under the current topic was a causal one based on the notion of equitable justice, which was triggered by the occurrence of harm. Even where risk was imperceptible, harm could occur and it would be unjust to leave the innocent victim to bear his loss alone. He was not at all convinced that such logic would give rise to an unrealistically wide scope under which the occurrence of harm automatically led to compensation.

⁶ M. B. Akehurst, "International liability for injurious consequences arising out of acts not prohibited by international law", *Netherlands Yearbook of International Law*, 1985 (The Hague), vol. XVI, p. 8.

⁵ *Yearbook* . . . 1987, vol. I, 2020th meeting, para. 12.

20. In the first place, compensation should be due only in respect of harm that crossed the threshold of what could be regarded as significant: in that sense, it was the weakest reflection of the maxim *sic utere tuo ut alienum non laedas*; secondly, such harm must be confined to physical activities; and, thirdly, the amount and form of compensation must be decided through a process of negotiation whose parameters should be laid down, in general terms, under the topic. In his view, such negotiation should be governed by a principle referred to by Mr. Riphagen, a former member of the Commission, according to which a delicate balance should be maintained between the need for permanent negotiations between States and respect for the normative content of international law. The question of the foreseeability of risk could have an effect on the amount and form of compensation—a term he preferred to reparation, which was to be avoided, as it evoked images of State responsibility. The remedies available should not be confined to pecuniary compensation: a decision to let a smelting plant continue to operate at a reduced level was a case in point.

21. He had no strong views on the primacy of civil liability or international liability; indeed, that part of the report caused him the least difficulty.

22. In short, the inherent complexity of the topic had been compounded by its intrusion into the realm of State responsibility. The fact that the topic was so broad in scope, because of the preventive aspects introduced by the reference to activities rather than to acts, made it difficult to manage. As if those difficulties were not enough, a stronger infusion of the progressive development of international law than the Commission and the Sixth Committee had been accustomed to had not made for consistency. The prospects of acceptability by States were therefore as difficult to evaluate as ever. The topic should not be seen as one primarily concerned with the environment, something that would be unfair both to the topic itself and to the concept of environmental protection. The latter was best achieved through prohibitions and positive obligations with respect to prevention, which were part of State responsibility. The aim of the topic should be to lay down the general principles governing the conditions for the existence of no-fault harm and the consequences of such harm.

23. Mr. DÍAZ GONZÁLEZ said that the Commission should be grateful to the Special Rapporteur for laying the foundations on which the scope of the topic could be developed. It was apparent from the many lengthy statements made over the years, however, that opinions among members regarding the fundamental principles were sharply divided.

24. In introducing his seventh report at the 2221st meeting, the Special Rapporteur had asked the Commission not to reopen a general debate on the topic. In paragraph 1 of the report, he had indicated that it might be worthwhile for the Commission to prepare an overall review of the current status of topic and also that there was no consensus on several aspects of the topic—including some of the basic premises—and that it was not his task to arbitrate the differences. While he himself agreed entirely with those statements, he would none the less be

grateful if the Special Rapporteur could shed some light on the reference he had made to negotiations. What kind of negotiations did the Special Rapporteur have in mind, for what purpose and among whom?

25. Although he was also grateful to the Special Rapporteur for the informal paper he had circulated seeking members' views on certain important issues,⁷ it was regrettable that the Special Rapporteur had not proposed solutions to the Commission or drawn conclusions from the discussion. True, it was not the Special Rapporteur's task to arbitrate, but he was well versed in the subject and it would be extremely helpful if he could make some specific proposals in the light of the debate.

26. Much had been said about the nature of the instrument, but the importance of that question would depend on the instrument that was ultimately prepared. If it was a draft convention, it would have to contain a number of obligations. If it was just a code of conduct, however, the method and procedure would differ; and a framework agreement, too, would differ in form.

27. From the outset, he had favoured the use of the word "activities" rather than the word "acts" in the title of the topic. Indeed, in Spanish, it had always been stressed that the word *actividades* should be used, not the word *actos*. Acts did not give rise to harm or consequences; harm and consequences arose out of activities conducted pursuant to acts that were lawful and permitted by international law.

28. The topic was almost exclusively concerned with the progressive development of international law and, in fact, involved the creation of new law, which explained the confusion that persisted. Mr. Pellet (2223rd meeting), for instance, had raised the question whether the topic was concerned with general activities not prohibited by international law or with activities that gave rise to environmental harm. It was true that, thus far, the topic—like the topic of international watercourses—had been more concerned with issues of environmental law than with other areas of law. The Commission would therefore have to decide exactly what the topic involved and should, if necessary change the title to read "Activities causing harm to the environment".

29. The doctrine of risk and of no-fault liability was known mainly to common law and those trained in that law. Consequently, most of the terminology used in the topic was borrowed from common law. An attempt should therefore be made to adopt certain norms which would preclude the need to reproduce the English terms exactly and to define the legal content of those terms. Many of the terms used in English had no exact equivalent in Spanish and, even when translated, did not have the same legal content. Great care was needed when dealing with topics involving the creation of new law and it was necessary to start by defining the terms used.

30. In considering the need for a list of substances, it was important first to decide what type of instrument was involved. If it was to be a framework agreement, such a list would merely complicate matters, for it would

⁷ See 2222nd meeting, footnote 5.

have to be drawn up on the basis of the particular circumstances of States which entered into special agreements on specific substances. On the whole, therefore, he considered that a list of substances was not really necessary and that the matter should be set aside.

31. The Commission would have to decide whether it wished to prevent harm or risk, which was but one component of harm. He did not know whether it was possible to prevent risk, since it was, after all, a part of any human activity. It was, however, possible to prevent harm and activities involving a certain degree of risk. The crux of the matter was the magnitude of the harm caused and the scale of the risk. A State which carried out an activity should know whether it was running a risk and how great that risk was. International law was not so much concerned with acts as with their consequences.

32. The Special Rapporteur had suggested that a working group should be appointed to assess the work carried out thus far. If there was to be such a group—and he was not opposed to the idea—it would have to have a special mandate, for it could not just arrogate to itself the functions of the Commission and establish principles in its name. If, however, the purpose of the working group was connected with the forthcoming UNCED, he did not think that the Commission could be very helpful at that Conference, since it would be concerned with highly technical—not legal—matters. The Commission should, however, pay due attention to the work carried out at the Conference and he would therefore have no objection if it decided to send an observer, in line with its usual practice, but he did not think that someone should be appointed to establish principles or take decisions in the Commission's name.

33. The topic of international liability had been tossed back and forth between the Commission and Sixth Committee for 10 years and the time had come for principles to be established on the basis of the conclusions arrived at during the debate. The Special Rapporteur had made an understandable request that he should receive guidance on how to proceed and he supported him in that request.

34. Mr. BARSEGOV paid a tribute to the flexibility, openness and resourcefulness of the Special Rapporteur, who had investigated a variety of different approaches in his seventh report in an attempt to find generally acceptable solutions. He said that in choosing to present an overall review of the current status of the topic, instead of an article-by-article analysis, the Special Rapporteur had broadened the base of the subject. In particular, he had raised the question of the possibility of bringing together liability and responsibility for transboundary harm and of introducing the notion of absolute State liability. Those ideas must be discussed, for they were crucial to the draft articles and, in a wider sense, to the development of international law.

35. Perhaps the Special Rapporteur ought not to have raised key questions, such as the very title of the topic, at such a late stage. No doubt he had done so because a majority of the members of the Commission had insisted on a link between liability and transboundary harm. However, the new issues could have been more appropriately

raised at the Commission's next session, when its new members would welcome an opportunity to express their views. Far from holding back progress on the topic, that would actually have advanced it.

36. While he agreed with the Special Rapporteur about the pace at which treaty norms on liability in specific fields of activities were being developed, he considered that the Commission should not compete with other international organizations and artificially speed up the work. However, there were sound reasons why the Commission was experiencing difficulty. The subject was a complex one and the process of the formulation of rules governing liability in specific areas of activities was in the process of development. However, the fundamental reason for the slow rate of progress was that the item within the Commission's mandate had been considerably extended. That was by no means the fault of the Special Rapporteur, who had reflected the view of the majority of the members in refusing to confine harm to inherently risky activities, which, according to their own words, would be an unduly narrow approach.

37. Inevitably, the Special Rapporteur had to link liability with transboundary harm which was the result of the breach of some obligation or norm of conduct. He personally did not object to tackling whatever legal issues might crop up, including the question of liability for transboundary harm occurring as a result of activities which were not inherently risky, but he could not endorse the confusion of different legal concepts or institutions. In particular, liability and responsibility differed as to their legal nature and had different legal sources and led to different consequences. Confusing them would merely delay the work and make it impossible to find a quick solution.

38. Furthermore, the Commission had agreed, in accordance with the General Assembly's decision, to consider liability and responsibility as separate concepts. If it now wished to treat them as indistinguishable, that was a new decision which would have to be approved by the Sixth Committee of the General Assembly.

39. The Special Rapporteur had broadened the Commission's mandate by treating liability and responsibility interchangeably. However, the term "acts" was used not only in English, but in the Russian and Chinese texts as well. That substitution was not an accidental one, for there was a genuine difference between the two terms. A person who travelled by car or lit a stove in his house was performing acts which did not entail liability; if the entire country did so, activities were being performed which might well entail liability, if the consequences of those activities extended across the border. It then had to be decided to whom such liability should be attributed and on what basis. In his previous reports, the Special Rapporteur had been considering strict or objective liability as a distinct legal concept, but, now, he was presenting liability as a manifestation or as a consequence of responsibility. In so doing, he was relying on the approach followed by Mr. Quentin-Baxter at an earlier stage of the work on the topic, when no true distinction had been drawn between liability and responsibility. The Special Rapporteur, in his second report, seemed to agree with the view that

responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required.⁸

Furthermore, he stated in his seventh report that:

Those undoubtedly were the meanings of the terms "responsibility" and "liability", at least in international practice and without venturing into the dangerous territory of the meanings of those terms in Anglo-Saxon law.

As now proposed by the Special Rapporteur, it became extremely difficult to decide on the nature and extent of the responsibility of States. What the Special Rapporteur appeared to be proposing was State responsibility for breach of the obligations of due diligence. In his own view, that would be to trespass on the topic of State responsibility, which had been entrusted to another Special Rapporteur.

40. Considering liability to be the result of State responsibility, the Special Rapporteur was actually introducing a concept of absolute State liability, which he regarded as the "middle way". He himself could, however, not help wondering whether States would really agree to assume financial responsibility *vis-à-vis* all non-nationals for all acts by private entities or individuals—not merely by large operators or factory owners, but also by owners of houses and cars. It was one thing to establish conditions under which harm was to be compensated by operators and quite another to pay for damage caused by operators who were themselves unable to pay or could not be traced. Nor could absolute liability be attributed by reference to the Convention on International Liability for Damage Caused by Space Objects. That instrument had been drafted and adopted on the assumption that all future space activities would be carried out by States, which must bear absolute liability for transboundary harm. The Special Rapporteur himself recognized that responsibility for damage caused by space objects was different, in principle, in legal terms, from the situations envisaged in the draft articles, which aimed to establish general principles of objective and strict liability. It was evident that absolute State liability could not be extended to all activities, in particular to private activities. The draft should be oriented towards the civil liability of operators, in accordance with the practice of States.

41. Turning to the concept of harm, he stressed that he in no way denied the role of harm in triggering liability. Liability derived not from risk itself, but only in case of actual harm resulting from activities involving risk. Harm could result both from innocent and from wrongful actions or activities. It might lead to different forms of responsibility, such as objective responsibility, namely, liability for harm resulting from lawful acts, responsibility for wrongful acts, namely, a result of the breach of an obligation, a violation of rules of conduct, including want of diligence, and so forth. The whole question was in the source and nature of the liability in question.

42. If harm was caused by an activity which was inherently risky, but which was in full compliance with the obligations of a State, it could be only the result of *force majeure*, such as an earthquake. In such cases, the State of origin of the transboundary harm and the State which suffered the transboundary harm were both victims and they must cooperate. Adequate principles must therefore be devised to compensate for transboundary damage taking into consideration the specifics of liability. Responsibility for transboundary harm caused by the breach of an obligation was a different matter and one which the Commission had not yet tackled properly. It must now remedy the omission, without confusing the different forms of responsibility. He hoped that, in the next quinquennium, both themes of liability and responsibility would be at the centre of the Commission's work. Its success in framing draft articles on those two subjects would depend on different conceptual approaches to the topics. The results of the work done so far could well be assessed in a working group, which would take account of all the views expressed. That would help to define what ground remained to be covered and would enable the Commission to complete its task. However, he could not go along with the proposal that the Commission should prepare a document for UNCED, since it had neither a clear concept on the matter nor a mandate from the General Assembly for that purpose.

43. Finally, with reference to the "global commons", he personally was wholly in favour of the international legal regulation of questions relating to the "global commons". However, the Commission must proceed with realism and caution. The subject of the "global commons" could not be included in the present topic and was more suitable for independent study, if the General Assembly so decided.

The meeting rose at 11.35 a.m.

2227th MEETING

Thursday, 20 June 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

⁸ *Yearbook... 1986*, vol. II (Part One), p. 146, document A/CN.4/402, para. 4.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR²
(continued)

1. Mr. McCAFFREY said that, although some members regretted that more headway had not been made in the consideration of the topic, that might well be the fault of the Commission, which seemed, rightly or wrongly, to have sacrificed the topic in order to be able to make progress on others.

2. In his view, the assessment made by the Special Rapporteur in his seventh report was quite useful because it gave a general idea not only of the positions of States and of the members of the Commission, but also, thanks to the 33 draft articles proposed in the sixth report,³ of the shape of the draft and its scope. Consequently, the consideration of the draft articles on first reading would probably make substantial progress during the next term of office of the Commission.

3. Turning to the list of important issues contained in the informal paper the Special Rapporteur had circulated to the members of the Commission,⁴ he said that it would be wiser to wait until further progress had been made in the work on the topic, both in plenary and in the Drafting Committee, before taking a decision on the nature of the instrument. As to the title, he reiterated that he was in favour of the replacement of the word "acts" by the word "activities", since the topic must deal with activities not prohibited by international law and the "act" of causing harm to another State was indisputably governed by international law. In addition, that change made it possible to solve a number of theoretical problems: the topic would, for example, cover activities such as those of chemical plants and nuclear power stations, which were not prohibited by international law, but whose operation involved a risk of appreciable harm for other States.

4. With regard to scope, he noted that, according to the Special Rapporteur, a majority seemed to be in favour of including both activities involving risk and activities with harmful effects and he urged the Commission to study the meaning of the obligation of due diligence in the case of activities involving the risk of transboundary harm. Could that obligation become stricter as the scope and gravity of potential harm increased? In other words, if a State set up a chemical plant or a nuclear power station in a border area, for example, and if, despite the vigilance it exercised, a breakdown occurred in the operation of those installations, causing serious harm to a neighbouring State, would the State of origin nevertheless incur liability under international law? By answering

that question, the Commission would be making an outstanding contribution to the development of international law, particularly at the present time, when technology was undoubtedly of benefit to mankind, but also involved some risks.

5. As to prevention and procedural obligations, the Commission should consider the establishment of a regime—which was, moreover, the underlying idea of the schematic outline submitted by the first Special Rapporteur⁵—in order to compensate for the lack of internationally agreed safety standards for the operation of chemical plants, nuclear power stations, and the like. It could happen that an activity which one State regarded as safe was not so regarded by another. Those two States should therefore hold consultations and negotiations in order to agree on a regime to be applied to the activities in question.

6. He agreed with the Special Rapporteur that the procedural obligations seemed to be established in general international law in conditions similar to those contemplated in the draft articles. As to whether they should stay in the realm of "soft" law, his opinion was that a procedural obligation was still an obligation under international law and that its breach gave rise to the consequences arising out of the breach of any international obligation, even, of course, in the absence of harm. As pointed out by the Special Rapporteur in his informal paper, it was obvious that the procedural obligations were complied with by merely putting the procedure in motion and that there was no obligation to reach an agreement before the activity had actually been started in the State of origin. However, should the draft articles go even further and specify that States must reach an agreement? He did not have any definite view on that point. He nevertheless noted that the Special Rapporteur was asking whether, in the event of actual transboundary harm and in the absence of agreement on a regime to make it acceptable to the affected State, there should be a system for the compulsory settlement of disputes. In such a case, there should be compulsory fact-finding into the seriousness of the harm and an obligation for the States concerned to hold consultations and negotiations, but not an obligation to use a particular type of settlement or to accept its outcome. The emphasis should, however, be on prevention. In his view, obligations of due diligence therefore had to be "hard".

7. Referring to responsibility and liability and the relationship between them, he supported the idea of stating the principle of civil liability and residual State liability for the reparation of harm. He nevertheless thought that the rules to be included in the draft articles should facilitate the setting in motion of private law remedies, including the exhaustion of local remedies, on a transnational basis in the case under consideration, and that only where a private individual could not obtain redress, for example, because there were so many sources of pollution that had caused the harm and they were difficult to determine, should the residual liability of the State come into play. That idea followed from the law of diplomatic protection.

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

³ See 2221st meeting, footnote 7.

⁴ See 2222nd meeting, footnote 5.

⁵ See 2223rd meeting, footnote 5.

8. With regard to the other aspects of the question, he endorsed the proposals formulated, at least implicitly, by the Special Rapporteur and, in particular, the idea that the draft articles should contain some provisions to ensure the application of the principle of non-discrimination (equal access to courts), with internal legislation providing for means of obtaining compensation in the event of transboundary harm.

9. The Special Rapporteur had suggested that the question of the "global commons" should be left open, but, in his own view, it raised different complex issues. There had to be organized action by the international community to deal with the damage being done to the "global commons", which had to be preserved for future generations. To whom should their protection be entrusted, however? To every State, to an organization or to an individual, such as the Secretary-General of the United Nations or the Executive Director of UNEP?

10. Actually, very interesting proposals in that regard had been formulated outside the Commission and, in his view, the Commission should consider them in depth, perhaps, for the sake of efficiency, as part of a separate topic. The Commission could very well formulate a set of articles on the protection of the "global commons" and even make proposals on the agencies that would be responsible for implementing them. Very interesting ideas had been put forward in that regard, including that of changing the Trusteeship Council's mandate and extending it to cover the protection of the resources of the "global commons". At the very least, the Commission should work out a more detailed definition of the meaning of an obligation *erga omnes* with regard, for example, to pollution of the high seas and determine current conditions for the exercise of an *actio popularis* with regard to the resources of the "global commons".

11. As to the Commission's contribution to UNCED, its work on the topic under consideration would probably be taken into account, whether or not it made any special submission to the Conference. The Preparatory Committee for the Conference had set up Working Group III on legal, institutional and all related matters and its mandate was to prepare an annotated list of existing international agreements and international legal instruments in the environmental field, describing their purpose and scope, evaluating their effectiveness and examining possible areas for the further development of international environmental law, and to examine the feasibility of elaborating principles on general rights and obligations of States in the field of environment and development, with a view to incorporating them in an appropriate instrument/charter/statement/declaration.⁶ It would, however, be helpful if the Commission were to make its own contribution to the Conference, if only in the form of a progress report on its work on the topic, along the lines of the relevant chapter of its report to the General Assembly. He noted that the Preparatory Committee for the Conference would have before it, at its request, a report from its secretariat on the progress of the work of the Commission on the non-navigational uses of international watercourses.

⁶ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 48 (A/46/48), vol. I, annex I, decision 2/3.

12. Mr. ARANGIO-RUIZ congratulated the Special Rapporteur on the tenacity and ingenuity he had displayed in his seventh report, as in the previous ones, on a topic which was so difficult not only from the legal, but also from the political, point of view. It was precisely that difficulty which, in 1969, had led the then Special Rapporteur on State responsibility, Mr. Ago, to recommend and the Commission itself to decide that it should be a separate topic.⁷ One of the chief merits of the seventh report was that the Special Rapporteur did not hesitate to encourage the Commission to reconsider the wisdom of that decision. He was, of course, not calling into question the idea of separating the topic under consideration from that of State responsibility for the purpose of dividing the work to be done into parts or that of appointing an ad hoc special rapporteur to examine it. That decision had, however, not been a very wise one because it had been based on over-emphasis on the differences between the two topics, which were very largely only differences of degree.

13. Indeed, in his opinion, within the framework of a national legal system, the various types of injurious facts could be placed along a *continuum* ranging between two extremes. At one end—say, the extreme left—were the facts sanctioned by law as criminal offences characterized by wilful intent (*dolus*). At the opposite end—say, the extreme right—were the injurious facts for which it was difficult if not impossible to trace precisely the author(s) or cause(s). Between the two extremes were to be found the great diversity of injurious facts characterized as "civil torts". Those ranged, as everybody knew, from the unlawful acts characterized by some degree of *culpa* (*lata, levis, levissima*) to wrongful acts, liability for which was predicated by the law on an objective, causal basis, regardless of any degree of fault. That latter type of wrongful act or fact occupied a place next to the injurious facts situated at the extreme right end of the *continuum*.

14. By way of illustration, he drew a distinction between three categories of harmful consequences: first, those provided for by the civil law of a number of countries and also, although perhaps less clearly, by other modern legislation relating to dangerous activities other than nuclear activities; secondly, those covered by the conventions and legislation relating to the civil liability of operators of nuclear plants and nuclear ships; and thirdly, injurious consequences or damage which were much more difficult, if not impossible, to trace within the context of modern societies—probably the most controversial category.

15. With regard first to national legislation, he cited as an example article 2050 of the Italian Civil Code entitled "Liability arising from the exercise of dangerous activities", which read:

Any person who causes damage to another in the exercise of an activity which is dangerous inherently or on account of the means used to carry it out shall be bound to make reparation unless he proves that he has taken all necessary measures to avoid it.

It was clear in that case that there was a reversal of the burden of proof, and also that the Italian legislator had

⁷ See 2223rd meeting, footnote 7.

not intended to provide for injurious consequences arising out of activities not prohibited by Italian law, but had attached liability, or the obligation to make compensation, to the fact—or act—of having caused damage. While one could philosophize about the question whether causing damage while carrying out a non-prohibited activity was wrongful, it was difficult to deny, in the case of the hypothesis in question, that wrongfulness was present in the negative fact or act which consisted of not having taken all necessary measures to avoid the damage. There was no doubt, therefore, that the provision in question dealt with responsibility for wrongful acts.

16. As to the second category he had mentioned, namely, harmful consequences arising out of nuclear activities, it was an acknowledged fact that the “legislator”, in other words, the conventions on the civil liability of operators of nuclear plants or nuclear ships and the national legislation deriving from them, went even further in that he provided for strict liability. In such cases, the operator had no escape: whatever measures he might have taken, he had to compensate for the damage. Everyone knew the other principles embodied in the relevant conventions: channelling of liability, limitation of the amount of compensation and additional compensation by the State. One might well wonder, of course, in what respect the situation of the operator of a nuclear plant or ship could be equated with that of a person carrying out a “conventional” dangerous activity of the kind he had referred to in his first example. The fact remained that such a situation also involved responsibility and the responsibility derived from the fact of having caused damage.

17. The third category of harmful consequences was represented *grosso modo* by the various kinds of injuries or damage caused to the environment for which it was difficult to find a causal link with given sources, installations, objects or persons. It was with a view to the compensation of such damage that an endeavour was being made by contemporary writers on civil law to work out theoretical and practical solutions based essentially on the notion that, failing prevention or mitigation, damage should be compensated—in whole or in part by the State or by a public institution—although, for the time being, his remarks applied solely to the national level.

18. As to the Commission’s historic decision to separate the topic under consideration from the topic of State responsibility, he believed that the motivation for that decision,⁸ as cited by Mr. Calero Rodrigues (2223rd meeting), rested on two highly questionable propositions.

19. The first drew a distinction between “responsibility for internationally illicit acts” and the “so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities”.

20. That jumped too abruptly, in his view, to space and nuclear activities, when consideration should first have been given to the “conventional” dangerous activities

which he had mentioned in connection with contemporary legislation and in particular with article 2050 of the Italian Civil Code. Clearly, as the Special Rapporteur had often rightly explained, responsibility did not derive from the activity, but from the fact of having caused damage. In the case of “conventional” dangerous activities, it also derived from fault, which qualified even more clearly the wrongful nature of the act.

21. The second ground for the Commission’s decision had been “to avoid any confusion between two such sharply different hypotheses, which might have an adverse effect on the understanding of the main subject”. First of all, State responsibility was not the main subject: both of the subjects in question were extremely important. It was surely unacceptable, however, to make such a drastic separation as that implicit in the words “two such sharply different hypotheses”. In fact, it was precisely because of such a drastic distinction that the Special Rapporteur and the Commission were confronted with what now seemed to be an impasse. It was not, of course, a question of attaching the topic under consideration to the topic of State responsibility, but of simply recognizing, on the one hand, that the separation was justified only for reasons of degree and of the special nature of the problems and, on the other, that, given the scope of the topic of State responsibility as a whole, the appointment of a separate Special Rapporteur was justified.

22. Turning to the important issues on which the Special Rapporteur invited the views of the members of the Commission, he said that, so far as the title of the topic was concerned, while it was true that the differences between the various language versions should be eliminated, he wondered whether the French title itself was satisfactory. In a sense, the word “acts”, which appeared in the English version, described the phenomenon more closely. At any rate, it would be difficult for him to accept the notion that acts which caused the injurious consequences covered by the draft articles were not prohibited. Under article 2050 of the Italian Civil Code, for instance, while the dangerous activity was not regarded as unlawful, the fact of causing damage because all the necessary measures had not been taken to avoid it could not reasonably be regarded as not unlawful, in other words, as being lawful. The topic under consideration dealt in large measure—at least so far as dangerous activities other than nuclear activities were concerned—with the regulation of the injurious consequences of acts that could not reasonably be qualified as lawful or “not prohibited”. It was only in the case of extremely hazardous activities that no wrongful act could be found, except for the damage, and that the limit of the general framework of State responsibility was reached—the third category of injurious consequences to which he had referred was an example—but not, however, exceeded. The title should therefore be changed, but neither of the proposed solutions—“acts” or “activities”—was satisfactory.

23. As to the substance of the topic, it was apparent from the Special Rapporteur’s seventh report that three problems of responsibility had to be considered.

⁸ Ibid.

24. The first problem concerned the responsibility States might incur in the event of "conventional" dangerous activities. In the case of such activities, States had an obligation of result similar to the obligation of result implicit in article 2050 of the Italian Civil Code. They were bound to ensure that activities which could be dangerous from the international standpoint, in other words, which could cause transboundary harm, should not be conducted without all the necessary precautions being taken to avoid such harm. In such a case, the burden of proof should be reversed, as it was under article 2050 of the Italian Civil Code and under the relevant provisions of other legal systems. The obligation of result, however, surely implied a certain conduct, which consisted in the exercise by the State of all the diligence necessary to avoid the damage. In that connection, one might ask whether, from the standpoint of theoretical analysis, the obligation in question, so far as "conventional" dangerous activities were concerned, remained a pure obligation of result or whether it became, by virtue of the "due diligence" element, a hybrid obligation falling halfway between an obligation of result and an obligation of conduct.

25. The second problem concerned particularly dangerous, or so-called ultra-hazardous activities, including space and nuclear activities. With regard specifically to nuclear activities, his current position differed from that he had taken earlier in various articles, according to which States could be held liable for nuclear damage only if there was fault. He now took the view that a rule similar to that adopted with respect to the operators of nuclear plants and nuclear ships should be adopted for States, but that, in that connection, the Commission should consider two possibilities, given the political difficulty of persuading States to accept causal liability of that kind. The first possibility would consist simply of reversing the burden of proof, in other words, of placing nuclear activities in the same category as "conventional" dangerous activities. The second possibility, and the one he would prefer, would be to extend to States the rule of strict liability adopted under the international conventions on the liability of nuclear operators. There would, of course, have to be some adjustments: first of all, the State should have unlimited liability, whereas, at the internal level, the liability of operators was limited, and some form of international solidarity should be instituted in order to meet the economic burden that compensation for damage caused by large-scale nuclear incidents might represent. Such solidarity would be essential to avoid the disastrous consequences a needy developing country would have to face in such cases in order to meet its liability in full.

26. A far more complicated problem arose in the case of the third category of injurious consequences which were more difficult to attribute, namely, essentially environmental damage in the broad sense of the term. That third category led him to the question of the nature of the instrument.

27. In that connection, the Commission should, bearing in mind the status of its work, adopt two different methods. So far as the first two categories of injurious consequences were concerned—those arising out of "conventional" dangerous activities, on the one hand,

and nuclear activities, on the other—a treaty should be the answer, as Mr. Shi and Mr. Al-Khasawneh had recommended (2225th and 2226th meetings respectively). As to the third category—damage that was not easily attributable—the object for the time being should merely be to indicate the aim to be pursued within the framework of an articulate and progressive development of international environmental law. In the short term, the instrument could take the form of a declaration of the General Assembly. Such a declaration should, however, be followed fairly swiftly by further steps and a mandate could, for instance, be given to the Commission to study the general problem of the environment, including the "global commons", with the care it deserved.

28. In all three cases, he agreed with the observations made by numerous speakers, in particular, Mr. Pellet (2223rd meeting), who had stressed the importance of rules on prevention and cooperation. He was, however, less attracted by the idea of mandatory negotiations in so far as reparation was concerned. Negotiation was nevertheless vital when preventive measures had to be agreed in the context of cooperation among States and the role of international organizations in devising and implementing preventive measures had to be determined.

29. Those measures should include the conclusion of an adequate agreement on nuclear security standards, which, as Mr. McCaffrey had pointed out, were lacking at the current stage.

30. With regard to the question of the relationship between civil liability and State liability, it was clear that, in practice, those two forms of responsibility combined to achieve adequate compensation. They were, however, quite distinct: one fell within the sphere of national law and came into operation under that law, while the other fell within the sphere of international law on State liability. Their relationship consisted in the fact that, once a portion of the damage had been compensated under national law, the State's liability would be reduced proportionally. Proposals to that effect had in fact already been made, in particular by Mr. Mahiou (2222nd meeting), Mr. Calero Rodrigues (2223rd meeting), and Mr. Al-Khasawneh (2226th meeting).

31. Finally, he supported the Special Rapporteur's proposal that a working group should be set up.

32. Mr. EIRIKSSON said that his position on the topic had not changed since he had first spoken on it at the Commission's fortieth session.⁹ He had then been of the view that the scope of the draft articles proposed by the Special Rapporteur in his fourth report, which centred on the concept of risk, should be expanded to cover all activities, whether risky or not, that caused harm to other States. The draft articles submitted by the Special Rapporteur in his fifth report¹⁰ had reflected the wider scope of the topic and he himself had considered at that time that activities involving risk were an important sub-topic, involving greater duties of notification and prevention and that the guidelines for the negotiation of

⁹ See *Yearbook . . . 1988*, vol. I, pp. 32-33, 2048th meeting, paras. 3-16.

¹⁰ *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/423.

reparation for harm would differ according to which of the two categories of activity was involved. In his sixth report,¹¹ the Special Rapporteur had then amplified the earlier articles on scope and general principles and had introduced all the articles he envisaged on the topic, dealing with prevention and liability and introducing a system of civil liability. He had been somewhat concerned at the time about the addition of a list of substances which were inherently dangerous, since he had felt that its inclusion would tend to narrow the scope of the articles once again by stressing the risk factor.

33. He regretted that the report before the Commission, which admittedly provided a very useful overview of the topic, did not propose articles that would enable the Drafting Committee to make progress in its work. In his view, there was a clear trend in the Commission in favour of preparing a concise set of articles, setting forth the basic principles, with some thresholds to provide, for instance, that the topic would not cover all harm and specifying the situations in which the rules of State responsibility would not apply.

34. He saw some merit in the proposal for the establishment of a working group, which would facilitate the Drafting Committee's work and also provide the basis for the Commission's contribution to UNCED.

35. Turning to the important issues raised by the Special Rapporteur, he said that, as far as the nature of the instrument was concerned, the Commission should work towards the drafting of a convention, but should be ready to change course if the progress of its work so warranted.

36. With regard to the title, he recalled that, at an earlier session, he had proposed a radical change. At present, he had no clear opinion on whether the word "acts" should be replaced by the word "activities" in the English version and considered that the Commission did not really have to deal with that question for the moment.

37. Concerning general principles, he shared the Special Rapporteur's view that there seemed to be basic agreement that the principles referred to in the articles did apply to the subject-matter. He recalled, however, that the proposal made by Mr. Hayes at the 2225th meeting regarding the draft article on reparation had been based on a principle which he found fundamental, namely, that the innocent victim of transboundary harm should not be left to bear the loss.

38. He would prefer the draft articles not to contain detailed rules on prevention or a civil liability regime, at least for the first reading. Otherwise, there might be dozens of articles of a very general nature and that would be quite inappropriate at the present stage.

39. He agreed with other members of the Commission that the submission of articles on the "global commons" should not be delayed.

40. In conclusion, he thought there were fewer problems than others believed. The Commission should con-

tinue its work on the subject and concentrate on the preparation of draft articles.

41. Mr. BEESLEY, recalling his statement at the 2222nd meeting, said that he now proposed to deal with the main points raised by the Special Rapporteur in his report, but perhaps more briefly than he had originally intended in view of the comments just made by Mr. Eiriksson, with which he fully agreed.

42. First, he thought that the Commission should be careful not to assume that it had reached an impasse. For instance, he saw no reason why the Drafting Committee should not be asked to concentrate at least on articles 6 to 10, which had been before it at the forty-first session and on which there seemed to be a broad measure of agreement. In that connection, it might be possible to follow the suggestion made by Mr. Hayes for article 10 and replace the word "reparation" by the word "compensation" in order to avoid encroaching on the topic of State responsibility. He did not underestimate the divergence of views, but did not believe that the disagreement was such as to prevent the Commission from achieving some concrete results at the current session. There was ample evidence of that in the concerns which many members had expressed about the environmental aspects of the subject. There was no reason not to set up an informal group of "friends" both to assist the Special Rapporteur and to advise the Drafting Committee.

43. In that light, he took a favourable view of the seventh report. He fully endorsed the methodology used by the Special Rapporteur, which had the great advantage of forcing the members of the Commission to rethink their basic approach.

44. Turning to the important issues raised by the Special Rapporteur in his informal paper and to that of the nature of the instrument, he said that he did not see why the Commission could not formulate draft articles in the field under consideration as it had done in others. If some specific principles, whether substantive or procedural, did not seem to warrant inclusion in the draft articles, they could instead be incorporated in a code, although he did not think that was necessary. He remembered being particularly interested by Mr. Ogiso's comments (2225th meeting) on the ideas which should be included in a set of articles or in a code, depending on whether the intention was the codification or progressive development of the law or the use of precedents found in "soft" law or in "hard" law. On the latter point, he was of the opinion that, in many cases, the distinction between the two was unjustified. For example, a declaration on outer space had been followed by a treaty on the same subject and the Universal Declaration of Human Rights had been followed by the adoption of the Conventions. Of course, the status of the two types of instrument was not the same, but they overlapped to such an extent that it might well be asked whether it could always be said that a declaration was by definition part of "soft" law, a treaty part of "hard" law.

45. To take another example, should Principle 21 of the Stockholm Declaration on the Human Environment¹²

¹¹ See 2221st meeting, footnote 7.

¹² *Ibid.*, footnote 6.

or the provisions of articles 192 and 193 of the United Nations Convention on the Law of the Sea be regarded as "soft" law or as "hard" law? The distinction was not relevant. Those were two different ways of expressing the same basic principles. The idea of embodying certain principles in a code if they could not be included in draft articles should nevertheless not be ruled out.

46. He was surprised that some members of the Commission seemed to believe that there were no precedents in that regard and he quoted an example which was probably less well known than the *Trail Smelter* case,¹³ namely the statements made by the Canadian and United States Governments in explanation of their positions on the Stockholm Declaration on the Human Environment. The representative of Canada had stated on behalf of his Government that:

The Canadian Government considers that Principle 21 (formerly 18) reflects customary international law, ... that the secondary consequential Principle 22 (formerly 19) reflects an existing duty of States ...

and that:

... the duty of States to inform one another considering the environmental impact of their actions upon areas beyond their jurisdiction also reflected a duty under existing customary international law.¹⁴

47. The Government of the United States had later stated in a diplomatic note on the Cherry Point oil spill that it:

... continues to give full support to Principle 21 of the Declaration on the Human Environment as well as to the principle enunciated in the *Trail Smelter* arbitration ... in so far as Principle 21 is consistent with customary international law and widely accepted treaty obligations, the U.S.A regards it as declaratory of international law.

and that it:

... believes that the action called for in Principle 22 is necessary to render Principle 21 an effective and usable deterrent to transnational environmental damage.¹⁵

Those statements should be regarded at least as minor precedents in the progressive development of the law. There were other points of reference, for instance, in the United Nations Convention on the Law of the Sea, where the ideas of "responsibility" and "liability" were both used in several places. He referred the members of the Commission to articles 31, 42, paragraph 5, and 235 of the Convention. In that light, the subject could hardly be regarded as new. There was no doubt that, if they so wished, the members of the Drafting Committee could develop the law in that area, even in the time available to them, and draw some concrete elements from the general debate to submit to the Commission.

48. As to the scope of the topic, he agreed with Mr. Eiriksson that it would be unduly restrictive to decide that liability must be based on risk. The basis of liability should, in his view, be appreciable harm, but he still thought that liability for appreciable harm and the concept of risk should be covered in the same articles, especially from the viewpoint of prevention.

¹³ See 2222nd meeting, footnote 7.

¹⁴ Quotation from the speaker's own statement in his capacity as legal adviser and chief negotiator to the Canadian delegation to the Stockholm Conference. Cited in W. Rowland, *The Plot to Save the World* (Vancouver, Clarke, Irwin & Company Limited, 1973), p. 99.

¹⁵ Quotation from diplomatic note. *Ibid.*, p. 112.

49. With regard to the issue of responsibility and liability, the members of the Commission might find it useful to refer to an article by N. L. J. T. Horbach, which was a good summary of the question.¹⁶ The author drew a distinction between "objective" or "no-fault" liability and "subjective" responsibility, in which fault on the part of a State was considered to be the essential element of an internationally wrongful act. She explained why she thought that the Commission had decided to make a separate study of State responsibility and international liability:

First, according to the Commission, State responsibility derives from prohibited acts, whereas, in contrast, international liability can stem from permissible (i.e. not prohibited) acts. Besides responsibility of a State for its wrongful acts, that is, for breaches of an obligation attributable to the State, the Commission also recognizes the responsibility for lawful activities which, due to their nature, give rise to damage. This "source of responsibility" does not presuppose wrongful conduct or a breach of any obligation.

50. The article went on to discuss the duty of reparation arising from objective liability.

51. He did not, however, agree with the author's conclusion that the separation of the two concepts, which had seemed logical at the beginning, no longer applied. On the contrary, he believed the distinction must be maintained.

52. On the other hand, he was not convinced of the need to draw a distinction between primary and secondary rules. He would have preferred the Commission not to venture into that area. It was absurd to describe responsibility for a wrongful act as a secondary rule. In the light of the Commission's discussions, he thought that it was a basic and primary rule and he saw no point in describing the principle that the innocent victim must be compensated as either primary or secondary.

53. With regard to the issue of the "global commons", he was of the opinion that the Commission should at least have established principles which could have been referred to the Drafting Committee. In that connection, he had taken note with interest of Mr. McCaffrey's comments earlier in the meeting on the Preparatory Committee for UNCED and hoped that the Preparatory Committee's work was linked in some way to the Commission's work. Mr. McCaffrey was certainly aware that an intergovernmental meeting on the negotiation of a framework convention on climate change was taking place in the Palais des Nations at the present time. In that case as well, he did not know whether any connection was being made with the Commission's work, but such a link would certainly be highly desirable. Whatever legal regime was to be developed on liability, he hoped that it would take the form of an "umbrella" treaty, modelled on those which had been established in the areas of outer space, human rights and the law of the sea. Part XII of the United Nations Convention on the Law of the Sea was generally considered to be an "umbrella" treaty, since those articles had not only taken note of existing conventions but had subsequently provided the basis for many other subsidiary instruments.

¹⁶ N. L. J. T. Horbach, "The confusion about State responsibility and international liability", *Leiden Journal of International Law*, vol. 4, No. 1, April 1991, p. 48.

54. That did not imply that the framework convention to be prepared by the Commission should not be focused, but the provisions did not have to be too detailed.

55. He did not have a strong view on whether purely “procedural” rules should be established. In fact, however, no aspect of the topic under consideration was strictly procedural. He was referring in particular to the obligations of States to notify, consult or cooperate and even to negotiate.

56. Lastly, he urged the members of the Commission to take a more constructive attitude towards the topic: they should not give up, but should give priority in the Drafting Committee to articles 6 to 9 of the Special Rapporteur’s draft.

57. Mr. SOLARI TUDELA said that, like the Special Rapporteur, he believed that the draft articles relating to principles should be sent back to the Drafting Committee because it could help give shape to the progress achieved thus far, especially since the principles in question were certain to be well received.

58. With regard to the nature of the instrument, he believed that, as they stood, the draft articles could serve as a framework agreement, although the nature of the instrument might change as the work proceeded. There was thus no need for the Commission to take a definite decision on the matter at the present time.

59. He would have no objection if the word *actos* was replaced by *actividades* in the Spanish version and “acts” by “activities” in the English version of the title of the topic and he agreed with Mr. Thiam (2225th meeting) that the words “injurious consequences” created some confusion. Their inclusion in the title implied that liability would exist even in the absence of injurious consequences. By keeping the title as it stood, the Commission would be agreeing with a particular school of thought, according to which liability could exist without harm. According to another school of thought, to which he belonged, liability could not exist without harm. If the Commission were to endorse that point of view, the words “injurious consequences” would no longer be necessary.

60. In his view, activities involving risk and activities with harmful effects should both be included within the scope of the articles. He recalled that a list of dangerous substances had been adopted at the European level and failed to see why the same could not be done at the international level. All countries should have access through a framework convention to a list of substances which involved a risk; that type of information was of particular interest to the developing countries, which were more vulnerable because they, more than the other countries, were hosts to the industries which used such substances.

61. Referring to the issue of prevention, he said that it was difficult for someone from a country whose legal system did not distinguish between “soft” law and “hard” law fully to understand what those two ideas covered. If the Commission did not want a particular rule to be an obligation, it could simply make it a recommendation. That would not be at all unusual from the legal point of view, since there were many instruments,

such as the resolutions of the General Assembly, which were only recommendations. Other rules that should be obligations would then be dealt with under the topic of State responsibility rather than under the current topic.

62. Lastly, reparation should be compulsory. Any harm caused by an activity involving risk or an activity with harmful effects must bring reparation into play.

63. Mr. FRANCIS said that, in discussing the topic, the Commission should not forget that situations might occur that were not a direct result of a particular activity. Recalling that Mr. Sreenivasa Rao (2225th meeting) had urged that special treatment should be accorded to third world countries in the draft convention, he again stressed that developing countries had to establish a regime of prevention which provided for penalties both for the government agencies and for the private enterprises that were responsible for harm.

64. In invoking obligations of conduct and of result, Mr. Arangio-Ruiz had referred, by interpretation, to part 1 of the draft articles on State responsibility. In his own statement at the 2223rd meeting, he had said that, in his view, State responsibility would be engaged if a State, in carrying out a lawful act, wilfully caused harm to another State. He therefore saw no problem with invoking the obligation of result if part One of the draft so allowed, but he did not think that it did, since, in the first case, what were involved were wrongful acts and, in the second, acts not prohibited by international law. It was thus important to keep an open, critical mind on obligation of result.

65. Referring to the issue of prevention, he noted that Mr. Al-Khasawneh had said (2226th meeting) that the Special Rapporteur was dealing with the issue in such a way as to bring it under the topic of State responsibility. In fact, with regard to procedural obligations, the Special Rapporteur had raised the question whether they should stay in the realm of “soft” law, i.e. if they were breached, no sanction would follow. If the Special Rapporteur meant sanctions to be imposed at the international level, the Commission would be crossing over into State responsibility. He did not object to the fact that, in the draft articles, the Commission was putting pressure on States to take preventive measures because, in that case, the injured State could invoke the relevant rule of the internal law of the State of origin. He would, however, be concerned about the idea of sanctions at the international level, in other words, in the area of State responsibility. Another question was whether, in invoking the responsibility of the State of origin in respect of procedural matters, the Commission was not contaminating the atmosphere within which negotiations on compensation would take place.

66. Mr. PELLET said that he wished to add two points to the statement that he had made at the 2223rd meeting. The first, which seemed to have been overlooked during the entire debate, was the basic distinction that had to be made according to the type of operator responsible for activities involving risk. International liability could not be approached in the same way in the case of State and non-State operators. The Commission was currently trying to codify the rules of the international liability and responsibility of States. Where the State was the direct

operator, he believed there was less difficulty in accepting the principle of the responsibility of the State and its consequence, which was the obligation to provide compensation, than in the other case. He seriously doubted whether, in contemporary positive international law, the State had an obligation to provide compensation for the harmful consequences of activities not prohibited by international law, when those activities were carried out by private operators or other entities whose activities were not attributable to the State; that obligation would be in addition to the obligation of due diligence rightly expected of all States and he was referring in that connection to the classic *Trail Smelter* case.¹⁷ That basic distinction was practically absent from the Special Rapporteur's approach and, in fact, had hardly been referred to by the members of the Commission. Yet, if it failed to make that distinction, the Commission would encounter difficulties in arriving at an agreement.

67. His second point involved the issue of the foundation of the topic. Mr. Solari Tudela's arguments in favour of the deletion of the words "injurious consequences" from the title were highly debatable. Recalling the basic philosophy underlying the draft articles on State responsibility, at least according to the approach which the former Special Rapporteur, Mr. Ago, had taken to it and which the Commission seemed to endorse, he pointed out that, in that draft, the Commission made a careful distinction between responsibility and reparation, which was only a consequence of responsibility. It was the internationally wrongful act which gave rise to responsibility. If, in addition, the internationally wrongful act resulted in individualisable harm, reparation was called for. While the internationally wrongful act formed the basis for the international responsibility of States in its general form, the factor which gave rise to reparation was harm. Unlike Mr. Solari Tudela, he believed that Mr. Ago's approach could be transposed, *mutatis mutandis*, to the topic under consideration: it could be considered that risk gave rise to certain mechanisms, particularly the obligation of prevention, which was essential, and that harm gave or could give rise to reparation.

68. Mr. ARANGIO-RUIZ, referring to Mr. Pellet's first comment on the conditions under which a State might be held liable for harm when it was not carrying out the activity which had injurious consequences, said he believed that the State was still acting as a governing institution in respect of the operator. To the extent that a State could be held liable, it would be liable not only because of the operator, but also by virtue of not having fulfilled the obligation of due diligence. However, a question remained in the case where a State was liable at the international level for transboundary harm resulting from a nuclear accident that had occurred in a territory under its jurisdiction or on board a ship flying its flag. There would then be two possibilities. The first was to apply the rule which he had drafted for dangerous activities, by analogy with the Civil Code of his country: the State was liable for a nuclear accident only if it was at fault and that would be the case only if the State was unable to prove that it was not at fault and that it had used

all due diligence. He had also suggested another solution: in the case of nuclear activities, it would be no more necessary for the State than for the operator to be at fault in order to be held liable; in that situation, the strict liability of the State would be the criterion. When the time came to adopt the rules on the causal liability of the State, the Commission should use a modified form of the rules provided in conventions relating to operators. While a regime of unlimited liability should be established, there should also be provisions relating to international solidarity in the event of a nuclear disaster, particularly for developing countries.

The meeting rose at 1 p.m.

2228th MEETING

Friday, 21 June 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPporteur² (*continued*)

1. Mr. BARBOZA (Special Rapporteur), summing up the discussion, said some members had described his seventh report as proposing a repetition of the general debate and had said that the Commission had already dealt with such general concepts as were now brought to its attention. However, one member had recalled that the Commission's report on its forty-second session had stated:

The sixth report raised some complex policy and technical issues and contained 33 articles. Many members of the Commission felt that they needed more time to reflect on the issues raised in the report and

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

¹⁷ See 2222nd meeting, footnote 7.

were able to make only tentative remarks. The Commission therefore decided to revert to the issues raised in the sixth report at its next session.³

2. Accordingly, it was perplexing to find that some of the same members who had prompted the Commission to revert to those issues at the present session were now complaining because that decision had been followed.

3. One member had made the important comment that the Drafting Committee had not so far considered any one of the articles proposed, not even the first 10, which had been referred to the Committee at the Commission's fortieth session, in 1988. It had been urged that the Commission should start consideration of those first 10 articles at the next session, a view with which he could not but agree. Failure to consider those 10 articles had deprived him of the kind of guidance that was essential for moving ahead in any topic.

4. The Drafting Committee was the Commission's forum where dialogue was more lively and where comparison of ideas helped to dispel misunderstandings and made it possible to arrive at common formulations on difficult points. A good example in that connection was the topic of the non-navigational uses of international watercourses, which had at first been considered as totally intractable. However, the patient search for areas of agreement in the Drafting Committee had made it possible to arrive at formulations for some articles already adopted on first reading. Without the guidelines emerging from discussions in the Committee, particularly in a topic where progressive development of the law played such an important role, drafting new articles or correcting existing ones was rather like working in a vacuum.

5. The purpose of his seventh report was to make an overall review of the status of the work done so far, to identify trends on important issues and to try to give the General Assembly an indication of the direction in which the Commission intended to proceed. He had chosen to follow that course, suggested during the Sixth Committee's debate, rather than to continue drafting articles—a task which appeared rather useless.

6. The fact that a large number of texts, covering practically the whole of the topic, had already been presented and discussed implied that, if agreement could be reached on the basic issues, the task of completing the consideration of the articles would be done quite quickly. Such an approach to the seventh report would also serve to verify whether it was true to say that the Commission had developed its study in directions scarcely imaginable in 1978 and had considerably broadened the scope of the topic, a question that had been raised in the Sixth Committee. Of course, it was not easy to say what had been in the minds of those who had first thought of the topic in 1978, but one member had demonstrated that the Commission had not gone much further than the schematic outline, which had been accepted in principle some years ago, both by the Commission and by the General Assembly.⁴ Actually, the idea that the scope had been extended was a fantasy. The draft ar-

ticles were intended to cover liability for transboundary harm, something that was badly needed. In so far as the environment was affected by transboundary harm, the articles had to do with environmental law and, in that sense, they simply complied with the recommendation contained in Principle 22 of the Stockholm Declaration⁵ to develop the law of liability in the field of the environment. That notion had been reiterated in the 1991 European draft convention on the transboundary effects of industrial accidents.⁶

7. Two members had referred to the role of the Special Rapporteur. In his report, he had stated that the Special Rapporteur was neutral, meaning that he did not intend to impose his views on the Commission, either directly or indirectly. Of course, a special rapporteur made proposals and every one of his 33 draft articles constituted a proposal. If, however, his opinions were not accepted or encountered obstacles, he tried to discern the real trends in the Commission and in the Sixth Committee in order to find acceptable formulas. The process of codification was a dialogue between the Special Rapporteur and the Commission, and then between the Commission and the Governments represented in the Sixth Committee. Neutrality meant that a special rapporteur should not join any one faction, or try to head his own faction.

8. One member had pointed out that there were a number of conventions on specific activities and had suggested that the Commission should identify fields which stood in need of new rules. Personally, he took the view that, in a general exercise like the present one, the Commission was not called upon to identify particular fields where new rules were needed; that task should be left to other specific conventions. There did exist, however, some gaps in contemporary international law that the Commission's articles should fill, such as the lack of general principles.

9. No principles on the subject had been stated or expressly accepted by the international community. Many conventions on specific activities implied the existence of certain principles: reparation for damage caused without breach of an obligation, or the principle of prevention, or that of cooperation. Nevertheless, there had not been any declaration or any formal acceptance of those principles by the international community. During the discussion in the Commission, it had been said that a State had no obligation under international law to make reparation for the injurious consequences of an activity which was not prohibited by international law. One member, however, had rightly emphasized that in 20 years of environmental law rules had emerged for specific activities but very little in general terms. Also, very little had been done in the realm of liability, apart from an exhortation to States to develop the law on liability, that was to say, a repetition of Principle 22 of the Stockholm Declaration. He felt strongly that principles should be formulated, because no civilized legal system could afford to leave a gap that would reveal such a lack of solidarity as to cast doubt on the very existence of an international community. Principles like the ones proposed

³ *Ibid.*, para. 472.

⁴ See 2223rd meeting, footnote 5.

⁵ See 2221st meeting, footnote 6.

⁶ See 2224th meeting, footnote 11.

in the draft were unimpeachable; they stood to reason; they were logical, and the Commission had no need to come back to them. If, as it was said in the Commission, what was logical was not yet law, then it was the task of the Commission to propose those principles as law. Again, it had been stressed that the special situation of the developing countries should be taken into account. He heartily agreed with that position, and urged that the situation of developing countries should be borne in mind throughout the development of the topic.

10. As emphasized by one member, the Commission had arrived at several important areas of agreement. They included (a) the principle of *sic utere tuo ut alienum non laedas*; (b) recognition that the central theme was transboundary harm, whether threatened or actual; (c) acceptance of Stockholm Principle 21; (d) the principle that the innocent victim should not be left to bear the loss; and (e) the role of the balance-of-interest test. He fully concurred with that member and with his conviction that those (and other) areas of agreement formed a suitable basis for continuing with the topic.

11. On the question of the separation between the present topic and that of State responsibility, he would draw attention to paragraph 146 of the Commission's report on its thirty-ninth session, which pointed out that:

Contrary to State responsibility, international liability rules were primary rules, for they established an obligation and came into play not when the obligation had been violated, but when the condition that triggered that same obligation had arisen. . . .⁷

12. There were thus some general differences between liability and responsibility that related to the nature of the rules: secondary rules in State responsibility and primary rules in liability. That difference implied that, in responsibility for wrongfulness, there had to be a violation of an obligation. In the case of liability, the opposite situation prevailed: payment of the damages was the fulfilment of a primary obligation. Responsibility for wrongfulness would be discharged in certain cases, for example in obligations of result if the imputed State proved that it had employed all reasonable means to prevent the event from occurring. If, however, the event did occur, in the field of liability the State generally had to compensate without entering into the question of the means employed.

13. As to reparation, there were also different patterns in the two fields. The *Chorzów Factory* rule⁸ or the restoration of the *status quo ante* were two possibilities. In the field of responsibility for wrongfulness he understood that the Commission had chosen the *Chorzów Factory* rule. In addition, there were important differences in terms of the incidence of a number of different factors, like the restoration of the balance of interest or the imposition of a ceiling on liability and also in the matter of reparation and compensation. The same was true of attribution. In State responsibility an act of an organ of the State was needed. In the case of liability, the Commission considered that the mere fact that an activity was being conducted in the territory of a State under its jurisdiction or control was sufficient.

14. It had been suggested during the discussion that the responsibility of the State for transboundary harm should differ depending on whether the State acted as an operator or not. In the former instance, one member of the Commission was ready to accept the principle of the responsibility of the State, but not in the case where the State was not the operator. That issue was tied in with the old debate about whether a State was liable for acts performed in its territory, namely, under its jurisdiction and control, by private persons.

15. The discussion had been a fruitful one and several areas of agreement had emerged. A clear majority agreed with him that the decision on the nature of the instrument should be postponed, although a few members would prefer the matter to be settled now and suggested that there should be two drafts, one of a binding character and the other purely recommendatory. The proponents of the latter approach none the less differed among themselves. Accordingly, it had to be inferred that the question of the nature of the instrument should be taken up later and that the Commission should continue to submit articles that were coherent, logical and politically acceptable.

16. With regard to the Commission's future work, there was a consensus that the topic should have very high priority in the next quinquennium and also that the Drafting Committee should start at the next session with the first 10 articles submitted to it in 1988, a conclusion he endorsed.

17. He had proposed at the beginning of the session the establishment of a working group to examine the principles of the topic so as to transmit the results of its work to UNCED. No group of "friends of the Special Rapporteur" had been suggested by him, a procedure which had not been accepted by the Planning Group. It had been rightly pointed out that the session was too advanced to permit a working group to produce anything of real importance. Other members suggested that the results of the working group's deliberations should not be sent to the Conference in Brazil. Actually, Working Group III of the Preparatory Committee for the Conference could reach its own conclusions by reading the Commission's proceedings. Consequently, and since the Drafting Committee would in 1992 take up the first 10 articles, which included the principles, he was grateful for the support received from many members but preferred to withdraw his proposal for a working group.

18. It was generally agreed that the title of the topic should be changed so as to replace the term "acts" by "activities". The change did not relate to the English text alone, and the conclusion to be drawn on that point was that the Commission had to submit the question of the title to the Drafting Committee with a view to asking the General Assembly to make the change.

19. With regard to scope, some members considered that activities should not be categorized because, after all, it was the transboundary harm that triggered liability, while other members wanted to broaden the scope so as to include the damage caused by isolated acts. Yet others insisted that the topic should relate only to the physical consequences of activities. However, it was plain that the majority were in favour of including both activities

⁷ *Yearbook* . . . 1987, vol. II (Part Two), p. 43, para. 146.

⁸ *P.C.I.J., Series A, No. 17*, judgment of 13 September 1928, p. 47.

involving risk and activities with harmful effects. One member proposed a different categorization of activities according to the risk involved: on the one hand, abnormally and particularly dangerous activities, and on the other, activities which caused damage that was not easily attributable to the sources. Perhaps when the time came, that categorization could be made compatible with the one in the draft.

20. Most members did not favour a list of dangerous substances. One member urged including it in the draft as a protection for developing countries, which would thus be able to claim the same standards of protection against activities using those substances as those embodied in the 1991 European draft convention on transboundary effects of industrial accidents. A majority accepted the principles already proposed in the draft, but one member wanted the articles on reparation to be no more than recommendatory and did not accept reparation as a principle. Other members took a similar view regarding prevention, although one of them expressly accepted the principle of reparation, exhaustion of local remedies and non-discrimination.

21. Again, many members urged that the idea that the innocent victim must not be left to bear his loss should find its way back into the formulation of the principle of reparation, and no objection was raised against that opinion. Reparation was then accepted as a general principle.

22. Many references had been made to the concept of threshold as a necessary element in applying those principles. It was obvious that the Commission must go on considering the subject of principles, including the concept of threshold, which needed to be refined somewhat.

23. In the matter of prevention, differences had emerged between those who believed that obligations of prevention should be binding, and those who preferred to relegate prevention as a whole to a separate, non-binding, instrument.

24. There was a considerable body of opinion that procedural obligations regarding prevention should be recommendatory only, and that view reinforced the preference for two separate instruments of a different legal character. It was generally felt that procedural obligations could be further simplified and that, if binding, they should be permissive, in other words prior international consent would not be required before the activity could be carried out. More members favoured unilateral measures of prevention than procedural obligations. Some believed that unilateral measures should be obligatory whereas others thought that general international law would cover the consequences of a breach of such measures. The latter view, of course, implied acceptance of State responsibility for the breach. One member argued that the measures should constitute obligations of conduct, which would give rise to legal consequences if breached; others insisted that such consequences should arise only where transboundary harm occurred. The subject of prevention was one on which there were widely-diverging views, with a strong trend in favour of non-obligatory measures of prevention. A separate instrument on prevention might well simplify matters. Including prevention in the topic tended to raise problems of duplication with the topic of State responsibility.

25. As to responsibility and liability, the Commission was virtually in agreement that civil liability should take priority, and State liability should be residual. One or two members had argued for a choice in favour of the victim. It had been contended that the draft should establish a minimum amount of regulation because of the differences in domestic legal systems. One member had emphasized that the draft should not require States to establish causal liability in their domestic law. Clearly, it was to be inferred from the debate that civil liability should be regulated in the draft, and should include the interrelationship between civil and State liability, on the basis of primary civil liability and residual State liability. The principle of non-discrimination was essential: without it civil liability could not operate equitably.

26. Lastly, some members considered that the question of the "global commons" should be excluded from the draft altogether. Others felt that the bilateral or State-to-State approach which prevailed in the draft was outdated, and that the "global commons" should be included. Some members would prefer to ask the General Assembly to assign the subject to the Commission as a separate topic. His conclusion was that the question should be left open at least for one more year, to enable him to complete his preliminary study of the subject.

27. Mr. FRANCIS said that he must disagree with the Special Rapporteur's conclusions about the "global commons". The subject was very urgent and the Commission should at least indicate its preliminary views to the General Assembly. Certainly, it was much too urgent to be deferred for a year. He did not think it should be grafted on to the present topic, since that would delay its examination even longer.

28. Mr. NJENGA asked what the Special Rapporteur had meant by concluding that the question should be left open. He fully agreed with Mr. Francis that the "global commons" was an urgent subject. It should be brought to the attention of the General Assembly, which could give the Commission its guidance on how to tackle it.

29. Mr. HAYES thanked the Special Rapporteur for a comprehensive but succinct summing-up of the debate. He was very disappointed, however, that the Special Rapporteur had withdrawn his proposal that a working group should be set up to consider the principles involved and attempt to draft a document which, after approval by the Commission, could be presented to UNCED. During the remaining period of the session, a working group should be able to prepare a coherent report in the light of the discussion so far. Indeed, failure to do so would reflect badly on the Commission. He appealed to the Special Rapporteur to reconsider his withdrawal of the proposal.

30. Mr. BEESLEY said he, too, shared the reservations expressed by Mr. Francis and Mr. Njenga about the Special Rapporteur's conclusions on the "global commons". He would welcome further comment on such an important issue. There was a strongly held view that the Commission ought to produce some material on the subject, and Mr. Hayes was right to say there was still time to do so.

31. He was also disturbed by the implicit assumption that the Drafting Committee had no time to deal with liability. Liability ought to go hand in hand with State responsibility although the two were different in nature. It would not be difficult for the Committee to tackle article 6, for example, since it already commanded general acceptance and the only change needed was to alter the one word "risk". Furthermore, the Commission had itself decided to give the Drafting Committee time to deal with liability. There had been no decision to give priority to State responsibility.
32. Mr. EIRIKSSON said that a working group could be helpful to the Drafting Committee, and it would also facilitate the preparation of the Commission's report on the topic. An informal group of that kind had been set up at the Commission's previous session to consider the question of an international criminal court.
33. Mr. ARANGIO-RUIZ said he disagreed. The Drafting Committee was working to a programme adopted by the Commission itself. Moreover, it had successfully advanced its work on five substantive articles. He himself was willing to serve on the Drafting Committee every morning from then on until the end of the session, and he was equally effective working at night.
34. Mr. PAWLAK supported the proposal to establish a small working group to assist both the Special Rapporteur and the Commission itself in their work on the principles involved in the topic. The important subject of liability should not be left out.
35. Mr. ROUCOUNAS said that the Special Rapporteur had produced an excellent summary. After ten years' work on the topic, a report should be submitted, at least on the principles on which agreement had been reached. Work could continue either in the Drafting Committee or in a small working group. However, the future treatment of the draft articles should not be tied in with UNCED. The question of the "global commons" had been discussed only superficially.
36. Mr. NJENGA pointed out that the Special Rapporteur had himself made the original proposal to set up a working group, but only in connection with the 1992 Conference. The establishment of such a group was essentially a matter for the Special Rapporteur, with the consent of the Commission. It was more important for the Drafting Committee to proceed with the 10 draft articles, which mostly related to general principles. The General Assembly should be asked to advise on the treatment to be given to the question of the "global commons".
37. Mr. BARSEGOV noted that six or seven members were in favour of presenting to the 1992 Conference a document on the "global commons", prepared by a special working group. Others objected to the proposal on various grounds: the Commission was not yet ready to make such a report, there was no real consensus on the subject, and the Commission, as an organ of the General Assembly, had no mandate for such a procedure. He wondered if the Commission had now reverted to its earlier view.
38. Mr. BEESLEY said the prevailing view seemed to be that the topic should not be considered closed. Consequently, procedural problems should not prevent it being reopened, perhaps through an informal group which could submit its views to the Drafting Committee.
39. Mr. EIRIKSSON said that two views appeared to have emerged: first, the Commission had no mandate to make a submission to the 1992 Conference, through a working group or otherwise; and second, there were procedural obstacles to setting up an informal working group.
40. Mr. ARANGIO-RUIZ said he deferred to the superior judgement of the Special Rapporteur, on the question of establishing a working group.
41. Mr. DÍAZ GONZÁLEZ said that the Special Rapporteur had expressly withdrawn his proposal for a working group to prepare a document for the 1992 Conference. Moreover, no document could be submitted without the prior approval of the Commission, and in the short time that remained no statement could be completed on principles on which no agreement had yet been reached in the Commission. An informal group was equally out of the question; all the Commission's work had official standing. If the Special Rapporteur required the assistance of experts, they could be appointed under the terms of the Statute of the Commission. The question of establishing a working group should be left for a more opportune moment.
42. Mr. CALERO RODRIGUES said the Special Rapporteur might well agree to the formation of a working group to prepare a summary of areas of agreement and disagreement within the Commission, thereby enabling the Commission to submit a report to the General Assembly based on some degree of consensus. As to UNCED, a report on the status of the Commission's work could be brought to its attention by the General Assembly.
43. Mr. BARBOZA (Special Rapporteur) said that, in his summing-up, he had described the "global commons" as an open, not a closed, question. So far, the Commission had given only perfunctory consideration to the subject, which was a relatively new field, and the discussion had been inconclusive. He had simply proposed that the Commission should wait one more year to consider the subject properly. As yet, there was little to report to the General Assembly. It was not even clear whether the "global commons" was a distinct topic or not. So far as the division of opinion on establishing a working group was concerned, there would be no need for a group to prepare a report on principles if the Drafting Committee took up the first 10 draft articles at the Commission's next session. Agreement had been reached on the scope of the draft articles, and there had been an important debate on prevention. The question of civil liability had also been partly resolved. The Commission would therefore be able to report some real progress to the General Assembly.
44. Mr. FRANCIS said that he did not agree with the Special Rapporteur's remarks concerning the "global commons", which could never be accommodated within the topic under consideration and should form the sub-

ject of a special study. The Commission should make that quite clear to the General Assembly.

45. Mr. EIRIKSSON said he did not think it was the Commission's intention to impose a working group on the Special Rapporteur. With regard to the remark that the agreement on matters such as scope and liability would be reflected in the Commission's report, the problem was that such agreement would be reflected in the parts of the draft report circulated to the Commission fairly early on, and possibly in only two languages, but it might well collapse at the end of the session. If that could be avoided by setting up some mechanism whereby advance agreement could be secured, it would be helpful for the work of the Commission.

46. Mr. BEESLEY said that he understood the Special Rapporteur's position on the question of the "global commons", but would point out that the question was not new to all members and that some of them had in fact spoken at some length on the matter.

47. The CHAIRMAN suggested that further discussion on the matter should be suspended.

The meeting was suspended at 11.50 a.m. and resumed at 12.15 p.m.

48. The CHAIRMAN said that, following consultations, it had been agreed that a working group would be set up to assist the Special Rapporteur in drawing up the conclusions of the debate.

49. Mr. BARSEGOV said that he would like to know who had agreed to the establishment of a working group and what the group's mandate would be. During the discussion, various kinds of working group had been suggested, but the Special Rapporteur himself had rejected the idea of any group. Regrettably, therefore, he could not agree to such an idea.

50. The CHAIRMAN explained that the working group would take as the basis for its work the summary of the situation made earlier in the meeting by the Special Rapporteur. There was no question of any Commission document containing a statement of principles being referred to the Conference in Rio de Janeiro. His suggestion had been made simply to find a way out of what appeared to be an impasse. Nothing would be referred to the Sixth Committee without the Commission's approval.

51. Mr. DÍAZ GONZÁLEZ said that matters were not at all clear. Before the meeting had been suspended there had been no question of a working group, and the Special Rapporteur had even withdrawn his proposal in that connection.

52. Mr. FRANCIS said that a working group would be a good idea in principle. However, as it was still not certain precisely what form the Commission's report on the topic to the General Assembly would take, a decision in the matter was perhaps a little premature.

53. The CHAIRMAN suggested, in the light of comments made, that further consideration of the matter should be deferred.

It was so agreed.

Closure of the International Law Seminar

54. The CHAIRMAN said the participation, albeit indirect, of those attending the twenty-seventh session of the International Law Seminar in the work of the Commission was seen by members of the Commission as a guarantee for the future. The serious approach of participants was a measure of their commitment both to the Commission and to the rule of law, something that was particularly relevant at a time when there was much talk of a new international order. As jurists, the participants would have an important role to play in working together to ensure that the new international order was based on the rule of law. Their attendance at the lectures organized within the framework of the Seminar had enabled them to familiarize themselves with the United Nations system.

55. He trusted that participants in the Seminar had found their stay in Geneva useful and that they would be able to build on the friendships they had undoubtedly made for the future. He also trusted that they would take back to their countries many favourable impressions: they would perhaps return to Geneva one day as members of the Commission.

56. Mr. BOTA (Chef de Cabinet, Office of the Director-General), speaking on behalf of the Director-General of the United Nations Office at Geneva, said that it was his pleasure to address the participants in the twenty-seventh session of the International Law Seminar, which had been dedicated to the memory of Professor Paul Reuter, an eminent jurist who had devoted his entire adult life to international law. The work of the Commission, of which Professor Reuter had been a member for many years, would long bear the mark of his influence.

57. The Seminar had been attended by 25 jurists from widely differing parts of the world, all of whom had had the opportunity to familiarize themselves with the work of the Commission, to further their knowledge, and to exchange views in a constructive manner on recent developments in public international law. It was a source of satisfaction to him that the United Nations Office at Geneva continued to provide the venue for the Seminar. Now more than ever, the United Nations symbolized that global perspective of world affairs which alone was conceivable at the end of the current turbulent century.

58. As the Secretary-General of the United Nations had said in his most recent report on the work of the Organization:

Resolution of conflicts, observance of human rights and the promotion of development together weave the fabric of peace; if one of these strands is removed, the tissue will unravel.⁹

That was the underlying idea on which the whole approach of the United Nations had always been based—an approach which was designed to promote the well-being of the individual and which encompassed all aspects of the lives of States and peoples. It was that same approach which dictated the basis for the work of the

⁹ Official Records of the General Assembly, Forty-fifth Session, Supplement No. 1 (A/45/1), p. 10.

Commission, concerned, as it was, with the topics of State responsibility, the jurisdictional immunities of States and their property, a draft Code of Crimes against the Peace and Security of Mankind, the law of the non-navigational uses of international watercourses, and relations between States and international organizations. All of them were topics that reflected the vast and dynamic nature of international law and the evolution of modern international life.

59. It was his hope that the Seminar would continue to be held in the future and that the United Nations would be able to provide the necessary facilities.

60. Miss FERIA, speaking on behalf of the participants at the twenty-seventh International Law Seminar, expressed appreciation for the opportunity afforded to them to attend the Seminar, dedicated to the memory of Professor Paul Reuter. Although none of the participants had had the honour of knowing Professor Reuter, they were acquainted with many of his writings. The lectures held during the Seminar had shed fresh light on the Commission's work on the progressive development and codification of international law and on the profound influence that Professor Reuter had exercised on many aspects of that work.

61. She thanked members for giving generously of their time to lecture on the topics currently before the Commission and on areas in which Professor Reuter had taken a particularly keen interest. The participants in the Seminar had derived much benefit from being taught by some of the foremost legal authorities of the day; they would return to their countries all the wiser, and eager to put their new knowledge into practice. Though they came from many regions of the world, they shared a common bond in their desire for a better understanding of international law, and, as international lawyers and civil servants, they looked forward to contributing to the progressive development of that law.

Mr. Bota, on behalf of the Director-General, presented participants with a certificate attesting to their participation in the twenty-seventh session of the International Law Seminar.

The law of the non-navigational uses of international watercourses (continued)* (A/CN.4/436,¹⁰ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE

62. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.458 and Corr.1 and Add.1) containing the titles and texts of the draft articles proposed by the Committee.

* Resumed from the 2218th meeting.

¹⁰ Reproduced in *Yearbook* . . . 1991, vol. II (Part One).

63. Mr. PAWLAK (Chairman of the Drafting Committee), expressed his gratitude to all those who had contributed to the Committee's work during the 17 meetings it had held on the topic. He thanked in particular Mr. Hayes, who had replaced him during the three days he had been absent owing to other obligations, and paid a tribute to the Special Rapporteur, Mr. McCaffrey, whose constructive spirit and diligence had enabled the Committee to complete the first reading of the draft articles on the law of the non-navigational uses of international watercourses. Thanks to the Special Rapporteur and to the hard work of all those who had participated in the deliberations of the Drafting Committee, the Commission would, he trusted, have a second complete draft—after the draft on jurisdictional immunities of States and their property—to submit to the General Assembly at its forthcoming session. He also expressed appreciation to all members of the secretariat who had helped in finishing the work on time in an efficient and organized manner.

64. The Drafting Committee's report consisted of two parts, the first part (A/CN.4/L.458) covering in the main the articles the Drafting Committee had adopted at the current session. He had said "in the main" because two articles, namely articles 30 and 31, were in fact amended versions of two articles adopted at previous sessions, as articles 21 and 20 respectively. As indicated in the footnote to those two articles, it had been felt preferable to include them in document A/CN.4/L.458 so that the Commission would have before it the complete text of part VI.

65. The second part of the report (A/CN.4/L.458/Add.1) reproduced the articles adopted at earlier sessions except, for the reason he had just explained, for former articles 21 and 20. The Committee, having completed the consideration of all of the articles, had had a complete view of the draft and had deemed it appropriate to review the order of articles previously adopted. It suggested that the articles should be re-arranged as indicated in document A/CN.4/L.458/Add.1. Furthermore, in view of the recommendation which the Drafting Committee had reached after a long discussion on the use of the term "international watercourse", the word "[system]" had been eliminated throughout the draft. The Drafting Committee had also made a few adjustments, mostly of an editorial nature, to which he would refer at a later stage.

66. He suggested that the Commission should begin with document A/CN.4/L.458.

ARTICLE 2 (Use of terms)

67. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 2, which read:

Article 2. Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

68. Mr. PAWLAK (Chairman of the Drafting Committee) said that, following the usual practice, the Drafting Committee had felt that the article entitled "Scope of the present articles" should appear as the first article. The article on use of terms therefore appeared as article 2.

69. Article 2 consisted of three subparagraphs, of which subparagraph (a) contained the definition of the term "international watercourse". Although some members had felt that the definition should logically be presented after that of a "watercourse", the Committee had decided to define an international watercourse first, in view of the fact that the actual subject-matter of the draft was international watercourses and that the word "watercourse" was generally used throughout the draft in conjunction with the adjective "international". The definition in subparagraph (a) followed the text proposed by the Special Rapporteur in his report. The commentary would recall that some members objected to the expression "international watercourse", which in their opinion connoted common management, and favoured the term "multinational" or "plurinational".

70. Subparagraph (b) was based on subparagraph (a) of alternative B proposed by the Special Rapporteur in his report and took into account the preference that had been expressed in plenary for the term "watercourse" over the term "watercourse system". The main change the Committee had made to the definition of a "watercourse", as proposed by the Special Rapporteur, was to add the phrase "and flowing into a common terminus" at the end. In plenary, several members had observed that under the proposed definition, different drainage basins connected by canals would constitute a single watercourse system, a result which, in their view, had been undesirable. The requirement that the components of the watercourse should flow into a common terminus had been added in order to keep the scope of the articles within reasonable bounds.

71. The Drafting Committee had also substituted the phrase "surface and underground waters" for the one originally proposed by the Special Rapporteur, namely, "hydrographic components, including rivers, lakes, groundwaters and canals". It had noted that, according to experts, the term "hydrographic" referred to a drainage pattern rather than to the components of a watercourse system and that the term "hydrological", which the Special Rapporteur had suggested as a possible substitute, might be interpreted as encompassing atmospheric waters and would therefore cover much more than the components dealt with in the draft articles. It therefore had been agreed to omit the term "hydrographic". The Drafting Committee had felt that the reference to "rivers, lakes, groundwaters and canals", merely provided examples and could therefore be deleted, on the understanding that the commentary would explain that a system of surface and underground waters included rivers, lakes, aquifers, glaciers, reservoirs and canals.

72. Some members of the Committee had expressed doubts about including "canals" as one of the components of a watercourse. In their view, the term "watercourse" connoted a natural phenomenon and the draft

had been elaborated on that assumption. A territorial scope larger than what had been envisaged in elaborating the draft would emerge if, for example, canals connecting natural watercourses were included. For those members, such a result would be undesirable. With respect to the phrase "surface and underground waters", the prevailing view in plenary was that groundwater should be included in the concept of a watercourse at least in so far as it was related to surface water. The notion that groundwater should be connected with the watercourse in order for it to be considered as forming part of the watercourse was implicitly conveyed by the references to "physical relationship" and to "a unitary whole". That would be made explicit in the commentary.

73. Subparagraph (c) reproduced the definition of a "watercourse State", which had thus far been contained in article 3. Article 3 had been eliminated and articles 4 to 10 had accordingly been renumbered 3 to 9.

74. Mr. DÍAZ GONZÁLEZ said that, since 1980 the Commission had been considering the topic on the basis of a provisional working hypothesis, which had included the concept of an "international watercourse system". Thus, even though it had decided, at its thirty-ninth session, to leave aside the issue of the use of terms, the Commission had in fact been operating all along on the assumption that what was being talked about was a watercourse system. As indicated by the Special Rapporteur in his seventh report, the concept of a "watercourse system" was not a new one and had found expression in various international agreements, both old and new. The Special Rapporteur had therefore recommended that the draft articles should include a definition of the term "watercourse", submitting that the rights and obligations of watercourse States under the draft would be made most clear and cooperative planning and management of international watercourses most effective by defining that term as "a system of hydrographic components which, by virtue of their physical interrelationship, constitute a unitary whole".

75. The Special Rapporteur had proposed two alternative versions for the article on the use of terms, expressing his own preference for alternative A. In the course of the discussion, the majority of members had endorsed alternative A. It was therefore surprising that the Drafting Committee had chosen to ignore what was almost a consensus on the use of the word "system" and had virtually eliminated the use of that term from the draft articles. Accordingly, he wished to enter a general reservation regarding all of the draft articles so far as the use of terms was concerned. Furthermore, an explanation of the Drafting Committee's decision should be given in the commentary.

76. Mr. NJENGA said that he endorsed the Drafting Committee's changes to subparagraph (b), namely, the replacement of the enumeration of the various hydrographic components, as proposed by the Special Rapporteur, by the phrase "surface and underground waters". In addition, the phrase "and flowing into a common terminus", added to subparagraph (b), was an appropriate way of responding to concerns that had been expressed by some members and of defining the scope of the articles. On the other hand, the Committee seemed not to

have addressed the issue of underground waters that straddled two or more States and did not flow into a common terminus. In his view, that element should have been included in the definition.

77. Mr. BARSEGOV said that he had participated in the drafting of the text of article 2, which represented a compromise. The article involved the crucial issue of which of two alternative approaches to the wording should be adopted. He would not oppose adoption of the article as it stood. However, he wished to point out that the final nature of the document had not yet been determined. His assumption was that, on the basis of specific agreements they might conclude, the watercourse States would themselves determine whether the articles applied to specific watercourses.

78. Mr. ROUCOUNAS said that, throughout the debate on the topic, it had generally been agreed that the Commission should define the term "watercourse" in a manner that was acceptable to scientific experts and to jurists alike. He still believed that the term "international watercourse system" was the best choice in view of the Commission's objectives. Thus, he did not favour the wording currently used in subparagraph (b). He wondered, moreover, whether there was a difficulty from a drafting standpoint because the word "system" did not appear in other draft articles. In general, it would have been better to use the expression "international watercourse system" throughout the Commission's work on the topic.

79. Mr. Sreenivasa RAO said that he had strong reservations about article 2, which had made it very clear that the definition of a watercourse would not be linked to the third "limb" or element of the working hypothesis, namely, the concept of the relative, international character of a watercourse. The working hypothesis had, since 1980, provided the basis for the Commission's work on the topic, and the third limb had been a fundamental element on which Member States had expressed their views on the topic at the General Assembly over the years. It was not appropriate for the Commission to remove such an element, something that changed the thrust of the definition and cast the draft articles in an entirely different light. Any change of that nature should come from the General Assembly itself. Article 2, as it stood, was therefore unacceptable. He could agree to it only if it included the third limb of the working hypothesis, even if that part were to appear in brackets.

80. Mr. AL-KHASAWNEH said that article 2 was a good compromise text. However, he wondered what was the relationship between article 2 and article 3, on watercourse agreements, which stated in paragraph 2, that:

Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. . . .

A definition was relatively easy to elaborate in the case of surface waters. However, according to the definition of a watercourse established in article 2 (b), three elements were involved: surface and underground waters; their relationship as a unit; and the flow of those waters into a common terminus. He wondered, then, to what extent should States, in determining the waters to which their agreements applied, take cognizance of those three elements.

81. Mr. McCAFFREY (Special Rapporteur) referring to Mr. Njenga's question about groundwater straddling two States, said that, if the groundwater was related to surface water, it would be included in the scope of the draft article; if it was unrelated, it would then fall under the category of confined groundwater. In the draft commentary, distributed to members for their use in connection with the review of the draft articles, he had noted that some members believed that confined groundwater should be included within the term "watercourse", provided the aquifer in which it was contained was intersected by a boundary. Perhaps the Commission might wish to reconsider that matter on second reading.

82. As to Mr. Sreenivasa Rao's comment on the third limb of the working hypothesis, namely, the notion of relative internationality, it had been the view of the Drafting Committee, and of a clear majority of members who had spoken on the issue in plenary, that it had not been necessary to include that notion in the definition because the requirement had been built into the articles themselves.

83. In regard to the question raised by Mr. Al-Khasawneh, his own understanding had always been that watercourse States were free to define the waters to which their agreements applied in any way they wished. The Commission was elaborating a framework agreement. Accordingly, in concluding agreements States were free to take account of the Commission's definitions or to ignore them. The value of the definition as it appeared in article 2 (b) was that it could help States to recognize that, if they excluded terrestrial elements of the hydrologic cycle, they did so at their risk because of the interrelationship among the various components.

84. Mr. ROUCOUNAS said that he had not heard any explanation for the deletion of the word "system" from the draft articles or any response to his observation about the use of that same word in article 2 (b). Members should bear in mind that they were adopting the articles on first reading; therefore, there was nothing wrong with placing some terms in brackets, rather than conveying the impression of a consensus that did not exist.

85. Mr. McCAFFREY (Special Rapporteur) said that, in defining the term "watercourse" as a "system of . . . waters", the Drafting Committee had assumed that whenever the term "watercourse" appeared in the draft articles, it would be taken to mean watercourse as defined in article 2. An additional factor was that the term "watercourse", rather than "watercourse system", appeared in the title of the topic. Furthermore, some members of the Committee had thought that it would be rather strange to define the term "watercourse system", since the topic was really concerned with watercourses.

86. He believed that the definition contained in article 2 represented a good compromise. He did not think it was essential to use the term "system" throughout the draft, nor did he think there was any legal difficulty arising from the absence of the word "system" throughout the draft articles and defining watercourse as a system of waters. In view of the fact that watercourse was defined in article 2 as a system of waters, the Commission

should leave the matter as it stood and not start using brackets throughout the text.

87. Mr. PAWLAK (Chairman of the Drafting Committee) said that the decision in defining the word “watercourse” had been reached after lengthy debate. Clearly, the text of article 2 (b) was the result of a compromise. The Commission’s task was, as the title of the topic indicated, to elaborate the law of the non-navigational uses of international watercourses, not “systems”. The Drafting Committee had tried to reflect that idea. There had also been very strong opposition to retaining the word “system”, the argument being that, in so doing, the Commission would be taking a general approach to all watercourse systems, when in fact each system had different characteristics.

88. In his opinion, it was not necessary to incorporate the word “system” in brackets. The Commission had to decide either to retain the word or to eliminate it. The issue was secondary when viewed from the standpoint of the results that had already been accomplished, something members could perhaps bear in mind as they considered the draft articles.

The meeting rose at 1.05 p.m.

2229th MEETING

Tuesday, 25 June 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE (continued)

¹ Reproduced in *Yearbook... 1991*, vol. II (Part One).

ARTICLE 2 (Use of terms) (concluded)

1. The CHAIRMAN welcomed Mr. Fleischhauer, the Legal Counsel, and invited the Commission to resume its consideration of article 2.

2. Mr. DÍAZ GONZÁLEZ said that, during the discussion at the preceding meeting, the present text of article 2 had been described as the outcome of a compromise in the Drafting Committee. The Commission must now either endorse that compromise or reject it. Since the Commission had often had occasion to send the General Assembly draft articles which included terms in square brackets, especially in the case of texts adopted on first reading, he saw no reason why, in the present case, it should not reintroduce the term “watercourse system” and place it in square brackets. If the Commission decided to endorse the Drafting Committee’s compromise, he would have to reserve his position on article 2.

3. The CHAIRMAN said that article 2 did not rule out the possibility that two riparian States might agree to retain the term “watercourse system” as between themselves, but several members of the Commission had not considered it possible to keep it in the draft. The compromise would then be to agree to the text as it stood, to reflect possible reservations by any members of the Commission in the summary records and to deal with the question in a detailed report to the General Assembly.

4. Mr. SEPÚLVEDA GUTIÉRREZ said that he shared the views of Mr. Díaz González and Mr. Roucouas (2228th meeting). The term “system” enabled States to understand what the components of a watercourse were. However, since the instrument which was being drafted would ultimately be a framework agreement, it should not impose any obligations on States, which thus had no reason, at the present stage, to formulate reservations on the use of terms. They could do so when they took elements from the framework agreement to be used in bilateral or regional treaties.

5. He was nevertheless concerned by the fact that he had still not found a satisfactory definition of the term “framework agreement”. If the draft was to constitute a framework agreement to serve as a model for treaties which States A and B, on the one hand, and States M and N, on the other, decided to conclude on questions of an entirely different nature, why should any specific obligations be incorporated in it? He therefore had reservations about the elimination of the term “system” from article 2 and about the nature and scope of the framework agreement.

6. Mr. CALERO RODRIGUES said that the problem was only one of terminology because, unlike the previous speaker, he did not think that the term “system” had been eliminated: what the Drafting Committee had done was to abandon the expression “watercourse system”. Article 2 (b) clearly and unambiguously used the “system” concept. He was still not sure whether the Commission should go so far, but he accepted the idea that, for the majority of the members of the Commission, the term “watercourse” meant a system or a complex of waters comprising rivers, tributaries, canals, lakes, glaciers and groundwater related to surface waters. If, in-

stead of referring to a "watercourse", the Commission used the expression "watercourse system" throughout the draft articles, it would make the text cumbersome and it would have to change the title of the topic, which referred only to "watercourses". As it stood, the text of article 2 clearly expressed the "system" concept that had obviously been accepted.

7. In submitting two alternatives for article 2 in his seventh report, the Special Rapporteur recognized that:

The advantage of alternative B is that it begins with the term that is contained in the title of the topic—"watercourse"—and defines it as a "system of waters".

One argument which had been used by the Special Rapporteur and which supported the view expressed by Mr. Díaz González and Mr. Sepúlveda Gutiérrez was that the virtue of alternative B was to:

... [keep] before the reader of the draft articles the fact that the waters of an international watercourse form a system. This will help to reinforce appreciation of the fact that all components of watercourses are interrelated; and thus, by implication, that it is important to take into account the impact of actions of one watercourse State upon the system-wide condition of the watercourse.

In his own opinion, there was no need to remind the reader constantly of the expression "watercourse system", which was incorporated in the definition of a "watercourse" which the reader would bear in mind. It would also be better for the Commission to avoid submitting to the General Assembly a complete set of articles in which square brackets would be used simply because of a drafting problem. He therefore appealed to the members of the Commission to look at the draft articles objectively, taking a legal, not a theoretical, approach or one based on the position of States.

8. Mr. BEESLEY said that, as a matter of principle, he had always been in favour of the expression "watercourse system". If that term could not be used, he would have liked it to be kept in square brackets in the text. Lastly, since that solution was also not feasible, he would have preferred the order of subparagraphs (a) and (b) to be reversed, but the Drafting Committee had not accepted his suggestion. In the light of the discussion in the Drafting Committee and in the Commission, he simply wished to stress that the watercourse system concept had to be reflected in the draft and that he could agree to the subtle compromise which had been proposed.

9. Mr. NJENGA said that the compromise was quite acceptable because the text proposed by the Drafting Committee referred to the "system" concept in subparagraphs (a) and (b). However, if the Commission placed the expression "watercourse system" in square brackets, it might give the impression that it had not been able to find any area of agreement on a question which had been controversial for many years. He therefore appealed to the members of the Commission who were members of the Drafting Committee not to reopen the discussion of a question which the Committee had already discussed in depth.

10. The CHAIRMAN, speaking as a member of the Commission, said that he shared Mr. Sepúlveda Gutiérrez' doubts about the binding nature of the rules enunciated in a framework agreement.

11. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt article 2 as proposed by the Drafting Committee.

Article 2 was adopted.

ARTICLE 10 (Relationship between uses)

12. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 10, which read:

Article 10. Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

13. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 10 was based on article 24 proposed by the Special Rapporteur in his fifth report² under the title "Relationship between navigational and non-navigational uses: absence of priority among uses". The Drafting Committee was of the view that article 10 set forth a general principle and therefore belonged in part II of the draft.

14. The Drafting Committee had noted that the basic thrust of article 24, as proposed by the Special Rapporteur, had met with general approval in the Commission. Doubts had, however, been expressed on the advisability of singling out navigational uses among the various possible uses of an international watercourse, not only because the draft as a whole was confined, under what was now article 1, to non-navigational uses, but also because the question of the priority of navigation was now generally recognized as outmoded.

15. The Drafting Committee had felt that the simplest way of disposing of the problem was to eliminate the reference to navigation and to place all uses on an equal footing. The title of the article had been simplified accordingly. As a result, paragraph 1 now merely provided that no use enjoyed inherent priority over other uses. The words "of an international watercourse" had been inserted after the words "no use" in order to link the article more closely to the subject-matter of the draft as a whole.

16. A second question had been raised in relation to paragraph 1. There had been general agreement in the Drafting Committee that, in practice, watercourse States often agreed to give priority to a specific use depending on their needs and that the Special Rapporteur had therefore rightly couched the rule in paragraph 1 in flexible terms, first, by making it a residual rule and, secondly, by making it clear, through the use of the adjective "inherent", that although inherently and in the abstract no use was superior to another, a particular use could, in concrete situations and in relation to a particular water-

² *Yearbook* ... 1989, vol. II (Part One), document A/CN.4/421 and Add.1 and 2, para. 127.

course, be determined by watercourse States to be a priority one. Concern had, however, been expressed that the phrase "In the absence of agreement to the contrary" could be restrictively interpreted as requiring a formal agreement between the States concerned, even though in practice it was often on the basis of usage and traditions that a specific use was given priority. In order to clarify the intent of the text on that point, the words "or custom" had been inserted after the word "agreement" and before the words "to the contrary".

17. Paragraph 2 dealt with the case where two uses, neither of which enjoyed priority under paragraph 1, happened to conflict. It sought to provide guidance to watercourse States for the solution of such a conflict. The paragraph envisaged a conflict between uses and therefore referred to a stage where no dispute in the formal sense had as yet arisen between the watercourse States concerned.

18. The Drafting Committee had considered that the wording proposed by the Special Rapporteur did not bring out clearly enough the purpose of the paragraph, which was not to ensure the equitable weighing of the conflicting uses, but to facilitate the solution of the conflict. The words "it (the conflict) shall be resolved" had therefore been substituted for the words "they (the uses) shall be weighed".

19. The construction of the opening phrase had been slightly modified in order immediately to identify the situation addressed in the paragraph, namely, the case of a conflict between uses.

20. As to that part of the paragraph dealing with the elements to be taken into consideration in solving possible conflicts, the Drafting Committee had noted that, in the Commission, there had been general support for the inclusion of a reference both to the principle of equitable use as contained in what was now article 5 (previously 6) and to the factors on the basis of which equitable use was to be assessed according to what was now article 6 (previously 7). Some members had, however, also favoured the inclusion of a reference to the obligation not to cause appreciable harm as set forth in article 7 (previously 8). The Drafting Committee had accordingly included in the text the phrase "with reference to the principles and factors contained in articles 5 to 7".

21. With regard to the concluding part of paragraph 2, which referred to "vital human needs", the Drafting Committee had considered that, among the factors to be taken into account in solving a conflict between uses, special attention should be given to the supply of water needed to sustain human life, including drinking water or water required for the production of food. While there had been general agreement on the addition of the phrase in question, some members of the Committee had said that, in order to ensure the internal cohesion of the draft, care should be taken to clarify the link between vital human needs and the criterion mentioned in article 6, paragraph 1 (b), namely, "the social and economic needs of the watercourse States concerned". The commentary

would therefore indicate that the criterion of vital human needs was not a new criterion, but an accentuated form of the criterion set forth in article 6, paragraph 1 (b).

22. The relationship between article 6 and the criterion of vital human needs had prompted some queries concerning the factors listed in paragraph 1 of that article. He would deal with that aspect when he introduced document A/CN.4/L.458/Add.1, where article 6 was to be found.

23. One final word on article 10, paragraph 2, was that some members had noted that, in reformulating the article, the Drafting Committee had left aside an important element of the original text, namely, the concept that the factors to be taken into account were those which were relevant to the international watercourse. That concern had been met indirectly through the reference to article 6, which required that "all relevant factors and circumstances" should be taken into account. It had, however, been agreed that, in order to dispel any possible doubt, the point would be explicitly covered in the commentary.

24. Mr. NJENGA said that, in his view, the reference in paragraph 2 to the requirements of vital human needs was a useful qualification, since it would show that, in the event of a conflict, priority—or preference—would be given to one use rather than to another. The Commission would certainly come back to that point when it took up articles 5 to 7, to which the paragraph also made reference.

25. Mr. BEESLEY said that no one would oppose the concept of the requirements of vital human needs. During the discussion in the Drafting Committee, however, he had been troubled by the development of that concept at a fairly late stage in the work and its interrelationship with the factors set forth in particular in article 6, paragraph 1 (b), since difficulties of interpretation must not arise on the question of criteria and factors. He was nevertheless satisfied by the cross-reference to articles 5 to 7 and had no doubt that the Commission would reconsider the need to harmonize the articles and to avoid any contradiction. He therefore had no objection to article 10 and could even support it.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10.

Article 10 was adopted.

ARTICLE 26 (Management)

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the title and text proposed by the Drafting Committee for part VI, starting with article 26, which read:

PART VI

MISCELLANEOUS PROVISIONS

Article 26. Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

³ See *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/427 and Add.1.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 26 was based on the text proposed by the Special Rapporteur in his sixth report.³

29. The Drafting Committee had noted that many members of the Commission had viewed that provision as one of vital importance for the protection of international watercourses. It had agreed that, in providing for an obligation to enter into consultations rather than an obligation to negotiate and in leaving the outcome of the consultations entirely to the discretion of the States concerned, the proposed text struck an appropriate balance between the various existing positions. It had, however, felt that the emphasis in paragraph 1 should be placed on the management of the watercourse rather than on the establishment of a joint organization, in other words, that the consultations envisaged in the article should deal primarily with the issue of management and only secondarily with the question of the establishment of joint machinery. It had also been pointed out that institutional management could take place in a less formal framework, for example, through regular meetings between representatives of the States concerned. The Drafting Committee had therefore decided to reformulate paragraph 1 on the basis of those considerations. In the new version, management was no longer linked, as in the original draft, to the establishment of an organization. The Drafting Committee had felt that, as a result, paragraph 3 had lost its *raison d'être* and could be deleted, particularly as it might be interpreted as limiting the freedom of action of States when defining the functions of any joint mechanism they might agree to establish. It was, however, understood that the differing functions performed by river commissions and other bodies and also State practice in the matter would be referred to in the commentary to the article.

30. The Drafting Committee, having noted that, in the view of the Commission, the text of paragraph 2 proposed by the Special Rapporteur was too elaborate, had tried to encapsulate the essential components of management in a shorter text. The Drafting Committee was aware that the various concepts reflected in subparagraphs (a) and (b) might appear to be somewhat abstract and vague, but each of those concepts would be fully explained in the commentary, account being taken of the wealth of information contained in the Special Rapporteur's sixth report. In particular, the commentary would indicate that the general formulation used in subparagraphs (a) and (b) covered the functions described in subparagraphs (b), (c) and (d) of the original text. In the *chapeau* of paragraph 2, the Drafting Committee had replaced the words "includes, but is not limited to" by the words "refers, in particular, to". That change was consequential upon its decision to describe the content of

the concept of management in a synthetic rather than an analytical way. The title was self-explanatory.

31. The CHAIRMAN, speaking as a member of the Commission, noted that some of the articles submitted were cast in such a way that they immediately imposed mandatory obligations on States: that, in his view, was not compatible with a framework agreement or convention. He could have accepted article 26 if it had not been cast in mandatory terms, but, despite his reservations, he would not object to its adoption.

32. Mr. NJENGA said that the Chairman had brought up an important question which might arise throughout the consideration of the draft articles, namely, the question of the meaning that should be given to a framework convention. As he saw it, a framework agreement did not have totally binding force; it was an instrument that States could use either to formulate specific agreements in a particular area or in the absence of specific agreement. In the instant case, article 26 did not impose any major obligation on States, but simply indicated what they should do if there was no agreement on the subject. It would, however, be interesting if the Drafting Committee or the Special Rapporteur could provide an explanation on the nature of a framework agreement and on the question whether it could impose actual obligations or whether it should merely contain recommendations. It was an important issue that could crop up again in other cases such as, for instance, the framework convention on climate change.

33. Mr. Sreenivasa RAO said that article 26 caused him no problem. The question of what the content of a framework convention should be depended on its subject-matter. Of course, even a framework convention or agreement could have consequences from the standpoint of the obligations it imposed, but the main function of such an instrument was generally to assist States parties in adapting the principles it set forth to specific needs and, in the present case, to those of the watercourse concerned. It should therefore be general in character, but couched in very clear terms. At the current stage of its work, however, the Commission should take a decision on the articles before it and should not enter into a discussion of what the nature and scope of a framework convention might be.

34. Mr. McCAFFREY (Special Rapporteur), agreeing with Mr. Sreenivasa Rao, pointed out that the Commission had already referred to the question in paragraph 5 of the commentary to article 4, which had since become article 3, on watercourse agreements.⁴ The draft articles under consideration certainly did contain rules and obligations, but they were residual rules. They were not norms that would prevail over any contrary agreement. States were always free to enter into agreements on specific watercourses. Moreover, most framework agreements contained certain specific, and sometimes detailed, obligations, such as the Vienna Convention on the Protection of the Ozone Layer, which had led to the conclusion of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The same was true of certain bilateral framework agreements such as the 1983

³ See *Yearbook* ... 1990, vol. II (Part One), document A/CN.4/427 and Add.1.

⁴ *Yearbook* ... 1987, vol. II (Part Two), pp. 27-30.

agreement between the United States of America and Mexico on cooperation for the protection and improvement of the environment in the border area,⁵ which had provided the basis for the conclusion of specific agreements on the protection of boundary waters against pollution. A framework agreement could therefore be a document that contained specific obligations.

35. Article 26, for its part, merely dealt with the obligation incumbent on watercourse States to consult one another at the request of one of them and the commentary to the article would provide further information in that connection.

36. Mr. PAWLAK (Chairman of the Drafting Committee) said it was his impression that the discussion was going beyond the context of article 26. In his view, the obligations set forth in the article applied only to States that accepted them. The purpose of the rule was to help States solve their problems and to establish their own systems of cooperation with respect to watercourses.

37. The aim was merely to provide a State wishing to consult other States with the possibility of obtaining a response to its request. There were about 200 watercourses that were not subject to any regulation. It was therefore for the Drafting Committee and the Commission to work out principles and rules which would be acceptable to States and with which they would have to comply once they had accepted them.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 26 as proposed by the Drafting Committee.

Article 26 was adopted.

ARTICLE 27 (Regulation)

39. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 27, which read:

Article 27. Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

40. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the article had been proposed by the Special Rapporteur as article 25⁶ and that it had received general support during the discussion in plenary. It dealt with regulation of the flow of water, namely, with works and measures that affected the flow or speed of water or that stabilized the river channel. Normally, measures were taken to prevent any change in the course of rivers.

41. The Drafting Committee had borne in mind that many members wanted the term "regulation" to be defined in the article and that a number had felt that States should share in the costs of regulation only if they also shared in the benefits of such regulation. The Drafting Committee had further noted that paragraph 1, as originally proposed by the Special Rapporteur, according to which States would be required to "cooperate in identifying needs and opportunities for regulation of international watercourses", could have been interpreted so as to impose an obligation on States to seek out needs and opportunities even when they had not been identified. That, of course, was not the intent, which was to encourage States to cooperate where there was a need to prevent harm and an opportunity to increase the benefits to be derived from the watercourse. The Drafting Committee had therefore reworded paragraph 1 accordingly.

42. Paragraph 2 had also been partly revised in response to points raised in plenary or during consideration by the Drafting Committee. With regard to the defrayal of the costs of regulation works, the watercourse States must, first, have agreed to undertake such measures and must, secondly, share in the benefits deriving therefrom. The words "participate on an equitable basis" were also designed to deal with the latter point. It had been agreed that the commentary to the article would make it clear that participation in the defrayal of costs would be proportional to the benefits that each State derived from the regulation. The words "In the absence of agreement to the contrary", which appeared at the beginning of paragraph 2 as proposed by the Special Rapporteur, had been replaced by the words "Unless they have otherwise agreed", since the original wording might suggest that States could not agree on arrangements other than those proposed in the paragraph, and that was obviously not the intent.

43. In accordance with the wishes expressed by some members of the Commission, the term "regulation" was defined in a new paragraph 3. It was a general definition designed to highlight two aspects of regulation: on the one hand, the means of regulation, which included hydraulic works or any other continuing measure and, on the other, the objective of regulation, which was to alter, vary or otherwise control the flow of the waters. That objective should be understood in good faith, within the context of the article as a whole, the object of which was to prevent harm and to increase benefits for watercourse States. Since the definition was more in the nature of a clarification of a term used solely in that article, the Drafting Committee had felt it would be preferable not to include it in the article on the use of terms. Lastly, the title had been shortened.

44. Mr. CALERO RODRIGUES said that he did not understand why the obligations laid down in article 27 were not the same as those in article 26. Where management was concerned, watercourse States had an obligation to enter into consultations at the request of any one of them, whereas, in the case of regulation, their only obligation was to cooperate where appropriate. He saw no reason at all for that distinction and would have preferred management and regulation to be dealt with together, since the two were linked. He did not intend to propose any amendment at that stage, however, but

⁵ Signed at La Paz, Mexico, 14 August 1983. *International Legal Materials*, Washington, D.C., vol. 22, 1983, p. 1025.

⁶ *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/421 and Add. 1 and 2, para. 140.

would like his views to be reflected in the summary record.

45. Mr. Sreenivasa RAO said that the question whether the articles should be dealt with together or separately had been considered by the Drafting Committee. It had, however, decided that it would be better for regulation to form the subject of a separate article that represented a compromise and was not of a strictly binding nature.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 27 as proposed by the Drafting Committee.

Article 27 was adopted.

ARTICLE 28 (Installations)

47. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 28, which read:

Article 28. Installations

1. Watercourse States shall employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

48. Mr. PAWLAK (Chairman of the Drafting Committee) said that the article originally proposed by the Special Rapporteur as article 27 had dealt with the protection of water resources and their installations.⁷ The considerable discussion to which it had given rise in plenary and the close examination in the Drafting Committee had highlighted several problems which the Committee now had to solve.

49. First, the article had been found to be too complex, in terms of both content and structure. The Committee had considered that a number of articles in the draft already provided adequate protection for watercourses and that the article in question should concentrate only on the protection of installations. Accordingly, all reference to watercourses and water resources had been deleted from the draft. However, some members of the Drafting Committee had noted that one aspect of the protection of water resources did not appear to have been explicitly referred to in the draft, namely, the protection of water resources from poisoning. Perhaps the Commission could consider that question on second reading, especially in the context of articles 21, 24 or 25.

50. Secondly, it had been necessary to define the nature of the obligation to consult mentioned in the *chapeau* of paragraph 2 as originally proposed. Even though consultations normally resulted in an agreement or understanding, that was not a required outcome. The Com-

mittee had therefore decided to delete the phrase "with a view to concluding agreements or arrangements".

51. Thirdly, again with reference to the *chapeau* of paragraph 2, the Committee had considered that it was better to limit the obligation to enter into consultations to situations where one of the watercourse States was concerned that some installations or facilities might have appreciable adverse effects on it. That was the purpose of the words "has serious reasons to believe that", which were the words used in article 18. The Committee had also used the words "appreciable adverse effects" because they were used elsewhere in the draft in respect of planned measures.

52. Fourthly, because the Committee had decided, for the reasons already explained, that any reference to water resources should be deleted, it was necessary to delete paragraph 3 of the article proposed by the Special Rapporteur, which dealt entirely with water resources.

53. Against that background, the Drafting Committee had drafted a new article 28 dealing entirely with installations related to watercourses.

54. Paragraph 1 enunciated the general obligation of watercourse States to employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse. The expression "best efforts" indicated the "soft" nature of the obligation of States. The question whether a State had or had not employed its "best efforts" was a matter of fact and should of course be determined in the light of the capabilities of each watercourse State. That "soft" obligation normally related to works situated in the respective territories of States, but that did not rule out the possibility that all watercourse States might occasionally have to protect works not situated in their territory, for instance, where the installations in question were jointly managed by several States.

55. Paragraph 2 enunciated the specific obligation of watercourse States to enter into consultations at the request of any one of them that was concerned about suffering appreciable adverse effects, which might be caused by the operation or maintenance of the installations. The new version of subparagraph (a), which dealt with that question, contained no reference to the "establishment" of installations, as the original draft had. In the view of the Drafting Committee, the establishment or construction of an installation or even its modification were among the planned measures covered by part III of the draft. Subparagraph (a) dealt only with the normal operation and maintenance of installations.

56. However, subparagraph (b) dealt with exceptional situations in which installations were placed in danger as a result either of natural events, such as flooding, or of wilful or negligent acts. Those situations differed from the emergency situations which were dealt with in article 25 and in which the threat or danger was imminent. It should also be noted that the Drafting Committee had deleted the reference in that subparagraph to safety standards and security measures. Information concerning such measures might sometimes be considered data vital to national defence or security and might have brought that paragraph into conflict with article 31 of the draft,

⁷ See footnote 3 above.

which dealt with such matters. In addition, since the re-drafted version of the subparagraph required watercourse States to consult each other concerning the protection of installations, it was not necessary to state explicitly what kind of information might be exchanged during such consultations. The reference to wilful or negligent acts should also be understood in the context of cooperation among States to protect the installations from any danger to which they might be exposed as a result of such acts.

57. Finally, the title of the article had been changed to reflect the fact that the article dealt only with installations.

58. Mr. NJENGA said that article 28 was linked to article 27: the consultations referred to in article 28, paragraph 2, could lead to a decision to improve the security of installations situated in a given State for the benefit of other States and that would raise the question of the financing of the works to be undertaken, which was dealt with in article 27, paragraph 2.

59. If article 28, paragraph 1, was to be wholly acceptable, the words "within their respective territories" should be added after the word "employ". As the Chairman of the Drafting Committee had explained, the wording of the paragraph did not rule out the possibility that, occasionally, all watercourse States might have to employ their best efforts to protect installations, regardless of the State in whose territory the installations were situated. He thought that that situation was covered by article 28, paragraph 2, when, after consultations, States had decided that they should act jointly. He was therefore proposing the additional wording in order to prevent any infringement of the territorial sovereignty of States on the pretext of the protection of installations.

60. Mr. PAWLAK (Chairman of the Drafting Committee) said that, even though there might be situations in which all watercourse States had to act jointly, it was obvious that the words which Mr. Njenga was proposing to add to article 28, paragraph 1, were already implied. He therefore did not object to the proposal.

61. The CHAIRMAN, speaking as a member of the Commission, said that he also supported Mr. Njenga's proposal. Any ambiguity must be removed.

62. In introducing the draft article, the Chairman of the Drafting Committee had stated that the words "employ their best efforts" referred to the "soft" obligation of States. On such an important issue, however, there was no room for "soft" law. The obligation in question was a duty of diligence, since States were bound to do everything they could to meet the required standards. He therefore wondered whether the words "employ their best efforts" meant that States must display all due diligence.

63. Mr. McCAFFREY (Special Rapporteur) said he believed that what the Chairman of the Drafting Committee had meant by a "soft" obligation was a "flexible" one. The provision meant that watercourse States were bound to do everything they materially could. That was certainly a duty of diligence, as he himself had explained in his report.

64. The proposal for the addition of the words "within their respective territories" had been raised in the Drafting Committee by the Chairman of the Committee. Moreover, in a draft commentary which he himself had circulated, he had explained that those words were implied. He therefore supported Mr. Njenga's proposal.

65. Mr. PAWLAK (Chairman of the Drafting Committee) said that he had described the obligation of States as a "soft" obligation in order to take account of the situation of poorer States, which did not have the resources to make the same efforts as richer States. That was an obligation of diligence.

66. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 28 with the addition of the words "within their respective territories" after the word "employ" in paragraph 1.

Article 28, as amended, was adopted.

ARTICLE 29 (International watercourses and installations in time of armed conflict)

67. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 29, which read:

Article 29. International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall not be used in violation of the principles and rules of international law applicable in international and internal armed conflict and shall enjoy the protection accorded by those principles and rules.

68. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 29 was based on the text proposed by the Special Rapporteur in his sixth report as article 28.⁸ During the discussion in plenary, some members had taken the view that a provision along the lines proposed by the Special Rapporteur was beyond the scope of the draft articles. Others were very reluctant to venture into that area for fear of the possibility of affecting the existing rules of international law governing that field. However, the prevailing view, both in the Drafting Committee and in plenary, had been that the subject was of vital importance and should be addressed, if only in the form of a reference to the relevant principles and rules of international law.

69. He stressed that the article was not confined to watercourse States, since international watercourses and related installations could be attacked by States other than watercourse States.

70. The Drafting Committee had noted that the text proposed by the Special Rapporteur provided that international watercourses and installations, facilities and other related works were to be used "exclusively for peaceful purposes". That phrase had the two-fold drawback that it did not really fit in the present context and was too broad, since it would, for instance, rule out the use of a watercourse for the transport of troops or mili-

⁸ Ibid.

tary equipment. The Drafting Committee had considered that the best way to circumvent the difficulty was to draft the text in terms of the impermissible rather than the permissible uses of the watercourse. The first part of the text therefore took the form of a prohibition, as indicated by the phrase "shall not be used in violation of". The Drafting Committee had deleted the reference to the principles enshrined in the Charter of the United Nations, which it regarded as too loosely related to the subject-matter of the article.

71. The Drafting Committee had also noted that, in plenary, as well as in the Sixth Committee, it had been suggested that, in order to ensure consistency with existing international law, the article should include a reference to the principles and rules of international law applicable to armed conflict. In the text before the Commission, it was therefore by reference to those principles and rules that the permissible and impermissible uses of international watercourses were to be determined.

72. As to the second part of the article, he recalled that the concept of the "inviolability" of a watercourse had given rise to many objections, both in plenary and in the Sixth Committee. The Drafting Committee had therefore replaced it by the concept of protection, the extent of that protection also being defined by the principles and rules applicable to international and internal armed conflict.

73. Mr. NJENGA said that he would not object to the adoption of article 29, but did not think the text prepared by the Drafting Committee was an improvement on the one proposed by the Special Rapporteur, which was actually clearer. He did not see how a watercourse could be used in violation of the principles and rules of international law applicable in armed conflict, except perhaps in the case where a State used hydraulic works to flood a neighbouring country. What the Commission had originally been thinking of was the protection of watercourses and related installations.

74. Mr. TOMUSCHAT said Mr. Njenga had rightly pointed out that the Commission had originally placed the emphasis on the protection of watercourses. In that light, the last two phrases might be inverted so that the article would read: "shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules".

75. Mr. PAWLAK (Chairman of the Drafting Committee) said that the text prepared by the Drafting Committee was the product of a lengthy and laborious discussion. In his own view, it was a well-balanced article, but he would not object to the inversion proposed by Mr. Njenga and Mr. Tomuschat if the Commission decided in favour of it.

76. Mr. GRAEFRATH said that the text was not very satisfactory, but the proposed inversion might not be enough; it might be necessary to postpone the adoption of the article and come back to it after a solution had been found.

77. Mr. CALERO RODRIGUES said that he would not object to the proposed change, but he shared

Mr. Graefrath's opinion that a mere inversion might not be enough. He would be quite satisfied with the existing text because, in view of the title of the topic, it would be justified to refer first to the uses of watercourses.

78. Mr. BARSEGOV said that he supported the proposal by Mr. Njenga and Mr. Tomuschat.

79. Mr. McCAFFREY (Special Rapporteur) said it would be easy to invert the order of the two statements if the Commission so agreed. As Mr. Pawlak had pointed out, however, there had been a lengthy debate on the article in the Drafting Committee and it did serve its purpose, which was to indicate that the principles and rules of international law applicable in international and internal armed conflict also applied to watercourses. He was not sure that it would be wise to try to redraft it completely and he doubted whether it would be possible to produce a text that was acceptable to everyone.

80. Mr. ARANGIO-RUIZ said that he shared Mr. Calero Rodrigues' view. He wondered whether the best solution would not be simply to state that the present articles were without prejudice to the application to international watercourses of the principles and rules of international law applicable in international and internal armed conflict. That was basically the point that was being made.

81. Mr. PAWLAK (Chairman of the Drafting Committee) said he hoped that Mr. Njenga and Mr. Tomuschat would not insist that the Commission should accept their proposal. The text in question did not impose any new obligations and it related only to those deriving from international law applicable in times of armed conflict.

82. Mr. FRANCIS said that he endorsed Mr. Graefrath's view because he found that the latest proposals, in particular that of Mr. Arangio-Ruiz, went much further than the purely drafting proposal by Mr. Njenga and Mr. Tomuschat.

83. Mr. HAYES said that, as the Chairman of the Drafting Committee had recalled, the text was the result of a great deal of work. It was simple and well balanced and the Commission should adopt it as it stood.

84. Mr. BARSEGOV said that the amendment proposed by Mr. Njenga and Mr. Tomuschat would make the text much more logical without changing the substance in any way.

85. The CHAIRMAN suggested that, in view of the differences of opinion which had emerged, the Commission should defer the adoption of article 29 until the next meeting in order to allow time for a solution to be found.

It was so agreed.

ARTICLE 30 (Indirect procedures)

ARTICLE 31 (Data or information vital to national defence or security)

86. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 30 and 31, which read:

Article 30. Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations through any indirect procedure accepted by them.

Article 31. Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

87. Mr. PAWLAK (Chairman of the Drafting Committee) said that he would not speak at length about those two articles because they simply represented slightly modified versions of two articles adopted previously, namely, articles 21 and 20, respectively.

88. With regard to article 30, the Drafting Committee had observed that the indirect procedures to which the article referred could be used not only in relation to the "planned measures" dealt with in part III, where the article had originally appeared, but also in relation to the measures envisaged in parts II, V and VI. It had therefore transferred the article to the last part of the draft. The Drafting Committee considered it important to provide States with indirect means of fulfilling the entire range of the obligations set forth in the draft, including the obligation to cooperate enunciated, for example, in articles 8 and 27. It had accordingly replaced the reference to articles 10 to 20, contained in former article 21, by a general reference to the obligations of cooperation between the States concerned provided for in the draft and including exchange of data and information, notification, communication, consultations and negotiations.

89. As to article 31, which was practically identical to the previously adopted article 20, the Drafting Committee had felt that that saving clause should apply to the entire draft. It had accordingly transferred it from part III to part VI, replacing the reference to "articles 10 to 19" by a reference to "the present articles".

90. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt articles 30 and 31.

Articles 30 and 31 were adopted.

ARTICLE 32 (Recourse under domestic law)

91. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 32, which read:

[Article 32. Recourse under domestic law

A watercourse State shall ensure that recourse is available in accordance with its legal system for compensation or other relief in respect of appreciable harm caused in other States by activities related to an international watercourse carried on by natural or juridical persons under its jurisdiction.]

92. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that, at the preceding session, the Special Rapporteur had introduced in his sixth report a set of

draft articles in an annex entitled "Implementation of the draft articles". After discussing the report, the Commission had decided to refer to the Drafting Committee only paragraph 1 of article 3 on "Recourse under domestic law" and article 4 on "Equal right of access". Those two provisions currently appeared as articles 32 and 33, the last two articles of part VI on "Miscellaneous provisions". In the view of the Drafting Committee, it was not necessary to have a part entitled "Implementation", since many aspects of implementation had already been dealt with in several of the articles, in particular those at the beginning of part III on "Planned measures".

93. The text of article 32, which corresponded to the original article 3 referred to the Drafting Committee by the Commission, was very similar to the language of paragraph 2 of article 235 of the 1982 United Nations Convention on the Law of the Sea. The purpose of article 32 was to oblige watercourse States to provide remedies for persons who had suffered appreciable harm as a result of watercourse activities carried out by natural or juridical persons under their jurisdiction, thus enabling those victims to obtain compensation or other relief, which could take the form, for example, of injunctive relief.

94. The Drafting Committee had deleted the adjectives "prompt and adequate", which had preceded the word "compensation" in the original draft, since the Committee had not reached agreement on whether "prompt and adequate compensation" currently formed part of general international law. It had decided to retain only the word "compensation". The Committee had also felt that the "appreciable harm" giving rise to the right to compensation should refer to actual harm and had deleted the reference to the threat of harm contained in the original draft, considering that such a reference would make the range of obligations of watercourse States too wide.

95. Under the present formulation of the article, a watercourse State had to ensure that its domestic law provided for remedies in respect of harm resulting from its watercourse activities to natural or juridical persons of another watercourse State or non-watercourse State, for example, a coastal State.

96. There had been no change in the title of the article.

97. Lastly, as the members of the Commission would observe, the article had been placed in square brackets, indicating that the Drafting Committee had been unable to agree on the intention of the article, which was to oblige watercourse States to provide remedies for transboundary harm arising from watercourse activities carried out in their territory. That obligation implied that the State had to amend its domestic law if it did not provide for those remedies. That was one of the interpretations offered in the Drafting Committee. That interpretation had been considered unacceptable by some members of the Committee; in their view, a watercourse State could not be obligated to change its domestic law in order to provide remedies for foreigners when such remedies were not even available to their own citizens. They had considered that a watercourse State could only reasonably be expected to provide foreigners with the same remedies that were available to its own citizens. Thus,

what they had been able to accept was a non-discrimination clause in respect of remedies.

98. Since that difficult issue could not be resolved, the Drafting Committee had preferred to leave the decision to the plenary.

99. Mr. McCAFFREY (Special Rapporteur) said that the square brackets needed to be added to the French text of document A/CN.4/L.458.

100. Mr. CALERO RODRIGUES said that, in his view, the article had what was a major flaw for a legal text: it was ambiguous. As the Chairman of the Drafting Committee had pointed out in his introduction, there were two possible interpretations of the article. It was either based on the premise that States were under an obligation to provide remedies to all victims in the case of transboundary harm resulting from watercourse activities, in accordance with the principle that adequate compensation was already an established rule of general international law, or it was based on the principle of non-discrimination between victims residing in the watercourse State and victims residing in other States. It seemed that it was the latter interpretation that the Special Rapporteur had originally had in mind in the draft of article 3 annexed to his sixth report, as indicated by paragraph 2 of his commentary relating to the obligation to provide compensation or other relief ("Persons threatened with harm in the second State should be entitled, to the same extent as persons in the first State . . ."). Moreover, in the draft commentary that he had had circulated informally⁹ the Special Rapporteur indicated that the article was:

. . . addressed to the situation in which there is a remedy under the domestic law of the forum State for harm that originates and is sustained in that State, but in which there may be no remedy for harm that originates within its borders but is sustained extraterritorially.

101. Before adopting article 32, the Commission had to decide how it would be interpreted in order to remove any ambiguity. The Commission could not adopt a text on which it did not have a clear position. Since he did not have a specific proposal to offer at the current stage, he suggested that the article should be given further consideration. It might also be possible to combine articles 32 and 33, which enunciated substantive and procedural provisions in respect of remedies.

102. Mr. Sreenivasa RAO said that articles 32 and 33 had initially been included in the section on implementation (articles 3 and 2, respectively), which the members of the Commission had considered unacceptable on many counts. At the time the two articles had been sent to the Drafting Committee, there had been not only the problem of ambiguity, as stressed by Mr. Calero Rodrigues, but also other problems. He personally feared that, if the Commission discussed the issue of remedies available to private parties, it would soon find itself in the realm of private international law, with all the resulting dangers of conflicts of laws. The question of remedies available to private parties was already dealt with in other texts and it might be asked whether it really belonged in a draft convention which would be basically a

framework agreement designed to govern relations between States. He also did not think it reasonable to imagine that individuals or groups of individuals might, on the basis of that framework agreement, hamper bilateral or multilateral negotiations held by States with a view, for example, to regulating the management of natural resources. That was his main reservation with regard to articles 32 and 33.

103. Mr. BARSEGOV said that, as a member of the Drafting Committee, he had also expressed his disagreement with regard to article 32. In his opinion, the Commission could not adopt, as an integral part of the text, articles which had formerly been contained in an annex, did not belong in a framework agreement and were, in addition, unacceptable to watercourse States.

104. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee had given lengthy consideration to article 32, which had originally been adopted and then called into question in the light of article 33. Those considerations had finally led the Drafting Committee to place the text of article 32 in square brackets. In view of the reservations that had been expressed and of the possible need to place greater emphasis on non-discrimination than on domestic remedies, he suggested that the Commission should come back to articles 32 and 33 at its next meeting.

105. Mr. McCAFFREY (Special Rapporteur) said that, although he had the impression that the substantive issues that arose in connection with watercourses were not very different from those dealt with in the United Nations Convention on the Law of the Sea, article 235, paragraph 2, of which was very similar to article 32, he agreed that it might be necessary to make the wording of article 32 clearer.

106. The CHAIRMAN, speaking as a member of the Commission, said that, although he had not been present when the Drafting Committee had adopted the text of draft articles 32 and 33, he too believed that those articles overlapped on various points and could be combined.

107. Speaking as Chairman, he suggested that the Commission should continue its consideration of the two articles at its next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

2230th MEETING

Wednesday, 26 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues,

⁹ This informal paper was never issued as an official document of the Commission.

Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE (continued)

ARTICLE 29 (International watercourses and installations in time of armed conflict) (concluded)

1. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that, at the previous meeting, discussion on the article had been deferred as some members had felt that greater emphasis should be placed on the protection of watercourses in times of armed conflict. Of the many proposals made to meet that point, the simplest would be to reverse the two phrases in the original text of the article so as to refer first to the protection, and then to the use, of watercourses during armed conflict. The article, as reworded, would read:

“International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.”

2. Mr. McCAFFREY (Special Rapporteur) said that the text read out by the Chairman of the Drafting Committee was, in his view, a definite improvement and probably stood the best chance of commanding general support. He would add that, although some members found it difficult to understand how a watercourse could be used in contravention of the rules and principles governing armed conflict, it was certainly a possibility.

3. Mr. NJENGA said that the new text made sense and safeguarded what had been achieved in the Drafting Committee. He trusted that the Commission would accept it.

4. Mr. BEESLEY said that he was among those who considered that the draft articles being prepared by the Commission should ultimately take the form of a framework convention and he very much hoped that any such convention would lay down residual rules. For that reason, he assumed that any residual rules which might eventually evolve out of the convention would provide broader protection, particularly for the environment, than the protection available under the principles and rules of

international law applicable in international and internal armed conflict. On that basis, he could accept the proposed text.

5. The CHAIRMAN said that, in the absence of further comment, he would take it that the Commission agreed to adopt the amended text for article 29 read out by the Chairman of the Drafting Committee.

It was so agreed.

Article 29, as amended, was adopted.

ARTICLE 33 (Non-discrimination)

6. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 33, which read:

Article 33. Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

7. Mr. PAWLAK (Chairman of the Drafting Committee) said that the article had been referred to the Drafting Committee as article 4 (Equal right of access), annexed to the Special Rapporteur's sixth report.² The basic purpose of the article was to impose an obligation on watercourse States not to discriminate between their citizens and foreigners when granting access to their courts and tribunals with respect to harm or threat of harm arising out of watercourse activities conducted on their territories. The wording of the original draft had, however, given rise to problems. It would imply, for example, that watercourse States were obliged to allow their citizens and foreigners to have access to their courts and tribunals even in cases where such access was not allowed under their domestic law. The effect of such an interpretation would be that States would have to change their domestic law, which was not the intent of the article. All that was intended was that, where the citizens of a watercourse State had access under the domestic law of that State, foreigners should also have access. The Committee, which had considered cases in which foreigners might be required under some systems of domestic law to post a bond in order to be allowed access to the courts, had not felt that that practice was discriminatory. The article prohibited discrimination on the basis of nationality and residence. The term “judicial and other procedures” included judicial courts and administrative tribunals. Non-discriminatory access, it would be noted, was permitted in the case of appreciable harm and also of a threat thereof.

8. The present formulation, in one rather than two paragraphs, was much simpler and also made it unnecessary to maintain the reference to “watercourse State of origin” in the original text. The title had been changed because the article dealt basically with a non-discrimination requirement and that concept was now more clearly reflected in the wording.

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² See 2229th meeting, footnote 3.

9. Lastly, the article had been adopted with the reservation of one, and later a second, member of the Drafting Committee.

10. The CHAIRMAN suggested that a decision on article 33 should be deferred pending a decision on article 32.

It was so agreed.

ARTICLE 32 (Recourse under domestic law) (*continued*)

11. Mr. McCAFFREY (Special Rapporteur) said that, in the light of the discussion held at the previous meeting, he had prepared a revised version of the title and text of the article, which read:

“Article 32. Remedies under domestic law

“A watercourse State shall ensure that compensation or other relief is available for appreciable harm caused in other States by activities within its territory related to an international watercourse to the same extent as for harm caused within its territory by such activities.”

The Commission might also wish to consider the addition of the words “in accordance with its legal system” after the word “shall”.

12. In the original article, he had endeavoured to follow as closely as possible article 235 of the United Nations Convention on the Law of the Sea, which seemed to have been generally acceptable. The wording of the article had none the less given rise to considerable difficulty. For instance, some members, noting that the article itself dealt with a substantive matter, had felt that the word “recourse” was more procedural in essence than substantive, while other members had not been sure about the effect of the article under existing systems of domestic law. He had therefore departed altogether from the wording of the Convention on the Law of the Sea in an attempt to make the intent of the article clearer. The intent, of course, was that, if a source of harm arose within the borders of a watercourse State but the effect occurred outside those borders, the State in question would be able to ensure that there was no gap in the relief available under its domestic law. In other words, if a person had access under article 33, a remedy would be available: it would be pointless in the event of extraterritorial harm to provide for access but not for a remedy.

13. Mr. BARSEGOV said it had been stated that, if the source of the harm arose on the territory of a watercourse State, that State would give compensation for any harm caused in another country. The crucial question was, however, what precisely the source of the harm was. Was it caused by the activities of the watercourse State itself, which might, for instance, have been negligent in the construction of some building? Or was it caused by a drought that occurred on its territory or by the breaking up of ice with resultant flooding? It was essential to be quite clear about the sources of harm that were contemplated.

14. Mr. BEESLEY said the problem, as he saw it, could be divided into three parts: the first concerned the question of access or recourse, which was seemingly one

of process; the second concerned the question of remedy, which was a matter of law for individual States; and the third concerned the question of reparation or compensation, which could be monetary compensation but might also be some form of remedial action. It would be better to follow the precedent of the Convention on the Law of the Sea, which struck the necessary balance; in his view, it was directed at the first point to which he had referred—the process—and could possibly be interpreted as including the second—the remedy—but did not go so far as the third—compensation. For those reasons, he supported the intent of the proposed new version but thought that it might be a little over-ambitious. He would not object to it, however.

15. Mr. NJENGA said that the article in its new formulation was much easier to understand than the original. Its purpose, of course, was to provide that civil remedies would to some extent be available for harm caused to people outside the country that was the source of the harm. For instance, if the source of harm was State A but the effect extended to State B, nationals of State B could, under the terms of the article, have recourse in State A for any resultant harm. To that extent the article was a good one, but it could be improved further by adding the words “in accordance with its legal system”, as mentioned by the Special Rapporteur. They would facilitate acceptance of the article by all States since the phrase would enable them to implement the article in accordance with their own civil procedure. Should a State’s code of civil procedure not provide for remedies for damage occurring outside its jurisdiction, however, that did not mean that none would be available, for recourse could still be had via the machinery of State responsibility.

16. Mr. GRAEFRATH, endorsing Mr. Beesley’s remarks, said that he could not agree to the new provision as drafted. He would, however, be prepared to accept it if the words “in accordance with its legal system” were added after the word “shall” along with the words “recourse for” before “compensation”, since it was important to keep the provision at a procedural level. The inclusion of a substantive rule on compensation in a framework agreement would not be acceptable to many States, and it would perhaps be better therefore to stick to the formula of the United Nations Convention on the Law of the Sea.

17. Mr. BARSEGOV said that Mr. Graefrath had made a reasonable proposal and the new provision should be discussed only if the phrase “in accordance with its legal system” was included. The question he had raised earlier should also be clarified, since it was evident that the provision was concerned with activities which could, of course, have various consequences involving liability or responsibility. A further point was what would happen if, say, the ice melted in an Arctic country and flooded a country farther south? Could other States then contend that the Arctic country had failed to do everything possible to prevent flooding in a lower riparian State? Would that situation be covered, bearing in mind that it had been said that both an act and an omission should be taken into account? It was essential to be clear about exactly what was meant by the word “activities”.

18. Mr. TOMUSCHAT said that, while he essentially agreed with the new version proposed for article 32, he had reservations about the use of the word "remedy". First, how would that word be translated into French: did it correspond to *un droit* or to *un recours*? Furthermore, it was not clear whether the word "remedy" related to the procedural or substantive aspects of the law. According to the new version, a watercourse State "shall ensure that compensation or other relief is available", wording that involved a claim for compensation and, accordingly, was presumably related to the substantive aspect of the law. Mr. Graefrath had suggested that the words "recourse for" should be inserted in the first line. With the addition of those words, the article would then include both the claim and the procedure for making that claim.

19. Under private international law, the place where the harm occurred was not relevant to any claim for reparation. In article 32, the Commission was confirming that legal principle. However, it was broadening the scope of the principle so that it applied to activities carried out by States. In consequence, caution was in order. In affirming that compensation or other relief must be ensured, the article was leaving the way open for preventive injunctions and other legal actions. In his opinion, the article should be limited to ensuring that compensation was available, rather than compensation or other relief.

20. Mr. BEESLEY said that the issues under discussion had a direct bearing on the topics of international liability and of State responsibility. That interrelationship among the topics should be brought to the attention of the Special Rapporteurs concerned, and should be noted in the commentary.

21. Mr. CALERO RODRIGUES said that the new version of the article clarified the issues involved. He endorsed the idea of adding the words "in accordance with its legal system"; although not absolutely necessary, the phrase could allay fears certain States might have about article 32. He was also in favour of adding the words "recourse for", although doing so might make translation into the other languages more difficult. Article 33 might then become irrelevant because, with the proposed additions, article 32 would encompass both the procedural and substantive aspects of the matter.

22. In his opinion, the issue of ensuring compensation as opposed to compensation or other relief was not an essential one. The main concern of article 32 was that any remedies which applied to harm caused within the territory of a State should apply equally to harm caused outside that territory. Any such remedies would be based on the national legislation of the State concerned.

23. Mr. MAHIU said that, in elaborating the article, the Commission was simply drawing the logical inferences from article 7 which provided that "Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States". The exact scope of article 32 still had to be determined. In that connection, he fully endorsed the comments by Mr. Beesley and Mr. Graefrath, who had pointed out the merits of basing that article on the United Nations Convention on the Law of the Sea, which, in referring to procedural consequences, established that the

States concerned must ensure that recourse was available in accordance with their legal systems. That idea was in fact embodied in article 32, as originally proposed by the Special Rapporteur, and should also be expressed in the new version which, by and large, met with his approval.

24. The Commission should be flexible on the question of providing for compensation alone or for compensation as well as other relief. Compensation was one possibility; however, that did not mean that other possibilities should be excluded. He therefore saw no reason to delete the words "or other relief".

25. Mr. Sreenivasa RAO said that, as a result of the discussion on the new text of article 32, he was more able, in contrast to his earlier position, to accept whatever compromise text the Commission might agree on. At the same time, he believed that the issues raised under article 32 fell within the realm of liability and should be developed under that topic. As it stood, the article did no more than emphasize the obligation to use existing domestic remedies. Actually, it had no real meaning unless it established that, in so far as existing remedies were inadequate, States should provide remedies, either by amending existing legislation or enacting new laws. Yet that would cause difficulties for States which did not envisage such possibilities.

26. Of more concern was the fact that the article might be taken to mean that private individuals had the right to interfere in matters which primarily concerned inter-State relations. For example, in the case of a negotiated agreement between two States concerning management of a watercourse system, private individuals might use legal means to block implementation, even though the agreement had been concluded between States in the interests of large sections of the population. He was certainly not opposed to the basic principle that every individual, whether a national or a foreigner, should have the same rights in regard to a State's legal system. The idea was one to which all democratic countries subscribed. He was merely pointing out that the article seemed not to be addressing other more important aspects, such as cooperation between States.

27. Mr. TOMUSCHAT said that articles 33 and 32 were both concerned with non-discrimination. Article 33 prohibited States from discriminating on the basis of nationality or residence in granting access to judicial or other procedures. The new version of article 32 specified that States, in granting access to judicial and other procedures, should not discriminate on the basis of the place where the harm had occurred. As it was currently being interpreted, the article cast the issue of non-discrimination in a slightly different light, implying that appropriate remedies should be provided if they were not already available under existing legislation. That aspect of the article should be made more explicit.

28. Mr. EIRIKSSON said that he agreed with the observations of Mr. Tomuschat on the link between articles 32 and 33. Furthermore, he personally thought that the article of the United Nations Convention on the Law of the Sea on which article 32 was based had sought to establish the requirement that States, if they had not already done so, should provide for the possibility of suing for environmental damage. Accordingly, the wide scope

of article 32 as originally proposed had never been a matter of concern. At the present stage in the debate, article 32 seemed to deal essentially with equality of treatment as between harm caused inside and outside the territory of a State, while article 33 dealt with equality of treatment as between nationals and non-nationals. He could accept those two articles as they were currently being interpreted, but a more narrow interpretation would be unacceptable.

29. Mr. NJENGA said that there was really no need for two articles on non-discrimination. With the addition of the words "in accordance with its legal system", the new version of article 32 would adequately cover the entire issue, thus making article 33 irrelevant.

30. Mr. DÍAZ GONZÁLEZ pointed out that he had entered a general reservation in regard to the draft articles. As far as article 32 was concerned, he wished to draw attention in the first place to the need to correct the Spanish version. In particular, the term *remedio* was never used in Spanish legal terminology; the proper term was *recurso*.

31. He could not agree with the formula in the new version of article 32 to the effect that a watercourse State had an obligation to ensure that compensation was available for appreciable harm, a form of words which appeared to suggest that the watercourse State would have to set up a fund from which compensation would be paid in such cases. That could not be the intention of article 32, the purpose of which was to ensure that there should be no denial of justice and that a judicial remedy should exist for the benefit of the victim of appreciable extraterritorial harm.

32. The CHAIRMAN, speaking as a member of the Commission, said he was opposed to the new version of the article, which represented a step backwards. The Commission had formulated a set of draft articles to reflect the rules of international law on the subject. Article 32 bypassed that body of international law and entered into the realm of domestic law. The present draft was concerned with the relations between States, not with the relations between a State and private individuals under domestic law.

33. The intention of the Special Rapporteur had been to frame a rule based on the result of the *Trail Smelter*³ arbitration. The text now proposed went beyond that particular precedent. In that instance, the two countries concerned, the United States of America and Canada, had had to enter into a special agreement to deal with claims by United States citizens who had no appropriate remedies under Canadian law. The United States had had to take up the claim against Canada. The case was one of State responsibility.

34. In the case envisaged under article 32, remedies under domestic law had to be available for the victim of appreciable extraterritorial harm and he could not accept that approach, since a body of international law was being framed on the subject. It would be going too far to suggest, as article 32 appeared to indicate, that the State

was responsible for ensuring compensation was available to the victim of appreciable harm, something which would seem to imply a subsidiary responsibility on the part of the State in the event, for example, of the operator responsible for the harm being unable to pay compensation because of bankruptcy. In the *Trail Smelter* case, more than compensation had been at stake. The company responsible for the harm had also been asked to put an end to the pollution.

35. As he saw it, the victim of the appreciable harm should be able to have recourse to judicial process for compensation or relief in accordance with the legal system of the State concerned. The wording of article 32 should make that position clear.

36. Mr. FRANCIS said that he would have found it difficult to accept the version proposed for article 32, in particular the very rigid notion of compensation it embodied, but that defect was largely remedied by introducing the words "in accordance with its legal system". The watercourse State should be required to make a recourse available to the victim of appreciable harm, so that the victim could institute legal proceedings. With the changes proposed by Mr. Njenga and Mr. Graefrath, article 32 should be acceptable and there was no need to defer a decision on it.

37. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that a small informal group should be set up to prepare a combined text for articles 32 and 33 during a recess.

38. Mr. McCAFFREY (Special Rapporteur) said he believed that both article 32 and article 33 were necessary, one being substantive and the other procedural. The question had been raised of omissions, in connection with such events as floods. His own intention had been to cover only human activities that caused harm in another State.

39. With reference to a point raised by Mr. Tomuschat, if the domestic legislation of the State concerned provided remedies for the victims of appreciable harm within the State, the provisions of article 32 would require it to make the same remedies available to victims of appreciable harm outside the country. Its laws would have to be changed to arrive at that result. If, on the other hand, no such remedies were available to victims of appreciable harm within the country, the State would not be under any obligation to make them available for extraterritorial harm.

40. In the *Trail Smelter* case, the position had been that the victims in the United States had had no recourse or remedy in Canadian law because of a rule in English common law—valid in Canada—to the effect that an action for damage to land could only be brought in the courts of the place where the land was located. Consequently, the victims had had to ask the United States Government to take up their claim since they had exhausted local remedies, which was of course a requirement under the law of diplomatic protection. Article 32 did not mean that the State concerned had to set up a special fund to ensure compensation. The State was only required to make the possibility of compensation available, i.e. ensure the existence of legal recourse.

³ See 2222nd meeting, footnote 7.

41. The article was not intended to bypass the rules set out in the other articles but to try to keep disputes from escalating into inter-State conflicts when they could be easily solved through judicial proceedings.

42. The debate had revealed differences in views regarding article 32 and the Commission needed more time to thrash out those differences. In the circumstances, he suggested that the article should not be included in the draft adopted on first reading, but kept for the second reading. A short paragraph on the subject could also be included in the report. In that way, the Commission might perhaps arrive at an article which all the members could understand.

43. Lastly, article 33 should have a place in the draft, since it laid down the non-controversial rule that the State should not discriminate.

44. Mr. EIRIKSSON said that, further to the clear explanations by the Special Rapporteur, he was more comfortable with article 32. As to the wording, he agreed that the proper term to use was "recourse". He would suggest that articles 32 and 33 should be included in the draft between square brackets in order to invite the views of Governments.

45. Mr. ARANGIO-RUIZ said that, following the suggestion to merge articles 32 and 33, it should be possible to devise wording to specify that the rule of non-discrimination applied not only to judicial proceedings but also to substance, namely to compensation, which was the subject-matter of both articles.

46. Mr. TOMUSCHAT said he was opposed to the suggestion to merge articles 32 and 33, for a merger would only combine all of the difficulties which were inherent in those two provisions. Special care should be taken with the French version of article 33, which should be prepared at the same time as the English version.

47. The CHAIRMAN, speaking as a member of the Commission, said that the question of access was particularly important for the plaintiff.

48. Speaking as Chairman, he invited the Commission to go into recess to enable a small informal group to work out a new text for articles 32 and 33.

The meeting was suspended at 11.40 a.m. and resumed at 12.35 p.m.

49. Mr. PAWLAK (Chairman of the Drafting Committee) said that the small informal group had examined the possibility of revising article 32 but had decided to prepare a new text which combined articles 32 and 33 and which read:

"Article 32. Non-discrimination"

"Watercourse States shall not discriminate on the basis of nationality or residence:

"(a) in ensuring that compensation or other relief is available for appreciable harm caused to other States by activities within their territories related to an international watercourse to the same extent as for harm caused within their territories by such activities;

"(b) granting access to judicial or other procedures to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof."

50. In the proposed new text, subparagraph (a) dealt with non-discrimination with regard to access to compensation and reflected the contents of the former article 32. Subparagraph (b) dealt with non-discrimination with regard to access to judicial and other procedures and embodied the contents of the former article 33.

51. Mr. CALERO RODRIGUES said that, despite their efforts, for which he was grateful, the members of the informal group had not succeeded in producing a satisfactory text. The wording of the new article contained many of the earlier ambiguities, and was not at all clear. He would have been prepared to accept article 32 as revised and as further amended during the discussion, but he could not accept the new text, which merged articles 32 and 33. He suggested that article 32 should be approved in its amended form and that both article 32 and article 33 should be placed in square brackets.

52. Mr. RAZAFINDRALAMBO said he agreed with the suggestion by Mr. Calero Rodrigues, although he was not, *a priori*, opposed to the new article 32. There was a difference between the article's two provisions in that subparagraph (a) referred to the right to compensation in the event of appreciable harm being caused, while subparagraph (b) dealt with the principle of access to judicial procedures. That difference explained why the last words "or is exposed to a threat thereof" appeared in subparagraph (b) and not in subparagraph (a). As a matter of drafting, he suggested that the last part of subparagraph (b) "as a result . . . threat thereof" should be deleted.

53. Mr. SOLARI TUDELA said he had misgivings about the new formulation. The reference in subparagraph (a) to compensation being made available for appreciable harm would appear to impose on the watercourse State an international obligation to set up a fund to guarantee payment of the compensation. The new text obviously went much beyond the framework agreement under consideration.

54. The phrase "in accordance with their legal systems", which formed part of the original text of article 33, was no longer found in subparagraph (b). It was fundamental and he could not accept its elimination. He proposed that article 32 should be left aside for the time being, as had indeed been suggested by the Special Rapporteur, and article 33 should be retained in the draft.

55. Mr. HAYES said he understood that, in the new version of article 32, subparagraph (a) replaced article 32 itself and subparagraph (b) replaced article 33. The effect of the two articles, as they had stood previously, was to remove the obstacle to non-nationals obtaining access to the courts to present their claims on an equal footing with nationals. The same remedies were, moreover, to be provided for harm caused both outside and inside the State where the activity took place. The new text was likewise based on the principle of non-discrimination. However, subparagraph (a) of the new

text did not convey the same meaning as article 32 in the version presented by the Special Rapporteur. In combination with the *chapeau*, its effect was to prohibit discrimination on the basis of nationality or residence in respect of harm occurring outside the watercourse State. However, a State could comply with the new article 32 by providing no remedy at all for harm occurring outside it, if none was available to its own nationals. Certainly, that would be non-discrimination in the literal sense, but it would not be very helpful to non-nationals, who were more likely to be affected. If the Commission now decided to abandon the original article 32, he did not consider that subparagraph (a) of the new draft would be a satisfactory substitute.

56. Mr. Sreenivasa RAO said he agreed with Mr. Calero Rodrigues that, instead of adopting the new draft article 32, the two previous drafts should be adopted together with the amendments proposed, and placed in square brackets. There was no disagreement on the principle of compensation, although the harm itself was not defined: it could consist of environmental or industrial damage, personal injury, loss of property, forfeiture of a private right, among other things, and as yet there was no agreement on a common threshold. The real problems of compensation began only at the stage of implementation. Those difficulties were the stuff of inter-State relations, and there was no need for private remedies to be included. In some cases, the State concerned would be unable to provide compensation, even if it was willing to do so. The draft ignored all the difficulties associated with compensation, including the issue of liability. Those problems could not be resolved in a single text.

57. Mr. ARANGIO-RUIZ supported the solution proposed by Mr. Calero Rodrigues.

58. Mr. NJENGA suggested that the Commission, instead of placing the two articles in square brackets, should insert a footnote in its report stating that they had not received the full endorsement of the Commission, and that further discussion was needed in the Sixth Committee.

59. Mr. SHI said the new text offered no real improvement and might even make matters worse. At the Commission's forty-second session, he had commended the efforts of the Special Rapporteur to avoid politicizing disputes concerning harm caused to individuals or juridical persons; but he had also warned that the two draft articles would be very difficult for some States to accept, and it would be best to present them in the form of an optional protocol.⁴ He now felt that the best solution would be to delete them altogether. However, he could agree to the proposal of Mr. Calero Rodrigues, if it commanded general support.

60. Mr. EIRIKSSON said he had no objection to either of the two articles, or to the proposed merger. As a solution to the present impasse, however, he could willingly agree to both articles being placed in square brackets.

61. Mr. BEESLEY urged that the two articles should be kept separate. The new text would lead to a kind of internal discrimination, since it gave access to the courts in cases of appreciable harm, or risk of harm, but provided compensation only for the former. Certain situations might fall between the two stools. The Commission should perhaps allow itself some time for reflection before making a decision.

62. Mr. TOMUSCHAT said it would be best to place the earlier versions of article 32, as amended, and of article 33, in square brackets. It was the only practicable solution, short of abandoning both articles, which would be regrettable. He was not satisfied with the new draft, which had given rise to misunderstandings; it was not correct, as Mr. Solari Tudela had implied, that States would have a subsidiary duty to compensate for harm caused.

63. Mr. BARSEGOV said that the draft produced by the informal group illustrated the complexity of the subject. However, it also ran counter to the thrust of the draft articles, and tended to undermine the Commission's previous work on the topic. States should themselves be invited to consider the problems associated with articles 32 and 33, which should therefore be placed in square brackets in the Commission's report.

64. Mr. SEPÚLVEDA GUTIÉRREZ said he could not accept the informal group's text. Moreover, article 32 had already led to serious reservations in its previous form. He agreed with the solution proposed by Mr. Calero Rodrigues.

65. Mr. MAHIOU said he shared that view. No satisfactory compromise text had yet emerged; indeed, it was not yet clear whether it was possible to combine articles 32 and 33.

66. Mr. CALERO RODRIGUES suggested another solution: to refer the two articles back to the Drafting Committee.

67. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the two articles could be taken up by the Drafting Committee when the rest of the Committee's work was completed. If the Commission was unable to accept it, article 32 should be abandoned and a paragraph should be included in the report reflecting the discussion on the article and the differences of view that had emerged. He noted that no fundamental objections had been voiced in connection with article 33.

68. Mr. Sreenivasa RAO said that, in view of the limited time available, the only realistic solution was to put both texts in square brackets, incorporating in the report the suggestions made about courses of action under domestic law.

69. Mr. CALERO RODRIGUES, speaking on a point of order, withdrew his suggestion to refer the texts back to the Drafting Committee.

70. Mr. BARSEGOV said that it would be useful to refer the texts, in square brackets, to the Sixth Committee, with a full explanation of the difficulties. Governments could then assist in solving the complex problems involved.

⁴ See *Yearbook* . . . 1990, vol. I, 2164th meeting, para. 45.

71. Mr. TOMUSCHAT said that, since the Special Rapporteur would have to reply fully to the points raised, the debate should be adjourned until the next meeting.

72. Mr. BARSEGOV supported that proposal, adding that the Commission could continue its discussion later in the day.

73. The CHAIRMAN suggested that the discussion should be held over until the next meeting.

It was so agreed.

The meeting rose at 1.20 p.m.

2231st MEETING

Thursday, 27 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE (continued)

1. The CHAIRMAN, recalling that, at the previous meeting, article 32 had been left pending, since no agreement had been reached despite an extensive debate, suggested that the Commission should deal first with article 33, which had already been introduced by the Chairman of the Drafting Committee.²

ARTICLE 33 (Non-discrimination) (concluded)

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that the basic purpose of the article was to oblige watercourse States not to discriminate between

their own citizens and foreigners in granting access to their courts in respect of harm or threat of harm arising from watercourse activities carried out in their territories. In that connection, the Drafting Committee did not consider that the practice in the domestic law of some countries of requiring foreigners to post a bond in order to be given access to the courts was discriminatory. The article merely prohibited discrimination on the basis of nationality or residence. The wording adopted by the Committee was much simpler than that of article 4 (Equal right of access) which had been proposed by the Special Rapporteur in the annex to his sixth report.³ Article 33 now consisted of only one paragraph and the reference to "the watercourse State of origin" had been omitted.

3. Article 33 had been adopted by the Drafting Committee with a reservation by one of its members, but it had not been placed in square brackets.

4. Mr. McCAFFREY (Special Rapporteur) said it was clearly understood that watercourse States were required to grant nationals or residents of other States access to judicial procedures only where such access was provided for their own nationals. There was no question of requiring them to amend their internal law to enable individuals from other countries to obtain easier access to their courts.

5. The principle of non-discrimination, which was already part of State practice, had been formally enshrined in almost all modern-day instruments adopted in the environmental field. For instance, article 2, paragraph 6, of the Convention on Environmental Impact Assessment in a Transboundary Context, adopted in 1991 by ECE, stipulated that:

The Party of origin shall provide ... an opportunity to the public ... to participate in relevant environmental impact assessment procedures ... and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin.

Another example was to be found in the Guidelines on responsibility and liability regarding transboundary water pollution, which had also been prepared by ECE and which provided that victims of pollution had the right to institute proceedings in the competent courts of the place where the harm had occurred.⁴ The Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, which was currently under consideration and would be annexed to the Basel Convention on the same subject, also provided for equal access to the courts of the State of origin.

6. The basic idea contained in article 33 should not prove too controversial.

7. Mr. SHI said that it would certainly be a valuable achievement if the Commission could adopt article 33 on first reading. In a spirit of cooperation, he would therefore withdraw the proposal he had made at the 2230th meeting that the article should be deleted altogether. He was willing to accept it as it was.

¹ Reproduced in *Yearbook ... 1991*, vol. II (Part One).

² For text, see 2230th meeting, para. 6.

³ See 2229th meeting, footnote 3.

⁴ See document ENVWA/R.45, annex.

8. Mr. CALERO RODRIGUES said that he had no substantive objection to article 33, but wished to comment on its wording. As it stood, it seemed to go too far in that it did not specify that the appreciable harm in question was harm suffered in a State other than the State of origin. The article seemed to be stating a general obligation of non-discrimination, including for harm suffered within the State of origin. He did not think that a provision along those lines should be included in a draft article on international watercourses dealing specifically with the impact of harm or risk of harm extraterritorially. Perhaps an explanation should be added to the text.

9. Mr. McCAFFREY (Special Rapporteur) said that the Drafting Committee had taken account of the point raised by Mr. Calero Rodrigues, but had finally decided not to include any such specification in the article. He agreed, however, that, as matters stood, the Commission might be accused of legislating for entirely domestic circumstances and of going beyond what was required in draft articles on international watercourses. If the Chairman of the Drafting Committee had no objection, he would therefore not oppose making such a change, which was, after all, a minor one.

10. Mr. GRAEFRATH said that, if the Commission was prepared to agree to the suggestion made by Mr. Calero Rodrigues, he would accept it as well, but he did not think that the Commission should agree to it. He saw no reason to limit the scope of article 33 to transboundary harm. The draft article dealt with international watercourses in general, not only with the harm in question. He therefore thought that the present wording should be retained.

11. Mr. PAWLAK (Chairman of the Drafting Committee) said that he shared Mr. Graefrath's view. The Drafting Committee had already discussed whether the restriction suggested by Mr. Calero Rodrigues should be included in the draft article. The fact was, however, that the article enunciated a general rule. Its subject-matter was not transboundary harm—since it was not a liability clause—but access to the courts. If the Commission wished to endorse Mr. Calero Rodrigues' proposal he would not object, but, if it did so, it would be limiting the scope of the article.

12. Mr. CALERO RODRIGUES said he would not insist on his proposal, but he thought that the Commission would be going too far by granting access to the courts to any natural or juridical person who had suffered appreciable harm when the harm was confined to the State of origin. The fact that watercourses were international did not mean that they had been internationalized. Only uses which produced effects in other States were of concern to the Commission. If the internal law of a State contained a discriminatory clause relating to harm which had occurred in its own territory, that would of course be regrettable and might be contrary to a rule of human rights law, but it would certainly not be a violation of any rule of the law relating to international watercourses. As now worded, the provision was generous, but its scope was too wide.

13. Mr. Sreenivasa RAO said he agreed that the scope of article 33 was too broad. Harm to States and harm to individuals could not be placed on the same footing,

even if it was appreciable harm. The right of individuals to institute proceedings should be limited, since they were already protected in other ways, especially by the remedies available under the internal law of their own countries and, frequently, under the internal law of foreign countries. The emphasis on the rights of individuals shifted the balance of the article and distorted its meaning. He could not therefore accept the article in its present form.

14. Mr. McCAFFREY (Special Rapporteur) said that he did not object to the proposal made by Mr. Calero Rodrigues, but there did not seem to be much support for it. Since the article had been proposed by the Drafting Committee, he was of the opinion that it should be adopted as it was on first reading and that the view stated by Mr. Calero Rodrigues should be reflected in the commentary.

15. Mr. BARSEGOV said that it would be wiser to accept the Special Rapporteur's proposal. In legal terms, the argument advanced by Mr. Calero Rodrigues was convincing, but it might not be reasonable to reopen the debate on article 33 at the present stage; it would be better to wait until the second reading to come back to that point. As to the procedure to be followed, he thought that, in view of the relationship between article 32 and article 33, the Commission should take a decision on article 32 before adopting article 33.

16. Mr. TOMUSCHAT said he agreed with the Special Rapporteur that article 33 should be adopted in its present form, even though the main problems that arose in the field in question were problems of transboundary harm. There was the example of the 1976 OECD Recommendation on the equal right of access in relation to transfrontier pollution,⁵ which sought to solve the problems which had arisen in the past when persons living in States other than the State of origin of the harm they had suffered had wanted to obtain compensation in the courts of the State of origin. However, it was now a well-established principle of human rights law that there should be no discrimination in respect of access to judicial procedures. That principle was enunciated, in particular, in article 14 of the International Covenant on Civil and Political Rights and it must be regarded as a customary rule of international law. In those circumstances, he thought that there was no real objection to expanding the scope of the article.

17. Mr. EIRIKSSON said that he did not share Mr. Calero Rodrigues' view and would prefer in general to keep the article as it stood.

18. The CHAIRMAN, speaking as a member of the Commission, said that it would have been better not to base the principle of non-discrimination solely on nationality or residence. In his view, that unduly restricted the scope of the principle; it should have been emphasized that all victims must be granted access to the courts.

⁵ Adopted on 11 May 1976. Text reproduced in OECD, *OECD and the Environment* (Paris, 1979).

19. Speaking as Chairman, he suggested that the Commission should adopt article 33, on the understanding that Mr. Sreenivasa Rao's objection and Mr. Calero Rodrigues' suggestion would be reflected in the summary record of the meeting and that the Commission could come back to them during its consideration of the article on second reading.

20. Mr. Sreenivasa RAO said that, since his objection was fundamental and was likely to change the entire structure of the article, it should also be reflected in the commentary.

It was so agreed.

Article 33 was adopted.

ARTICLE 32 (Recourse under domestic law) (*concluded*)

21. Mr. PAWLAK (Chairman of the Drafting Committee) said that the question dealt with in article 32 was so complex that it had not really been possible to work out a generally acceptable text. However, the Special Rapporteur had a new version to propose to the Commission but, if it turned out to be unacceptable, the Commission would have to act accordingly.

22. Mr. BARSEGOV said that the Commission was proceeding in a very odd manner. He recalled that he had accepted article 33 on the condition that article 32 would not be called into question. If the Commission was going to agree to an amended version of article 32, why had it adopted article 33 first? He was one of the members of the Commission who considered that articles 32 and 33 should either be placed in square brackets or deleted.

23. The CHAIRMAN said that the Commission could listen to the Special Rapporteur's new proposal without necessarily having to take a decision on it.

24. Mr. McCAFFREY (Special Rapporteur) assured the members of the Commission that his new proposal was not a Trojan horse designed to sneak article 32 in with article 33. The procedure currently being followed was the result of the fact that the Commission had had to decide on article 33, which had been recommended by the Drafting Committee for adoption without square brackets, and then come back to article 32, on which some reservations had been formulated in the Drafting Committee. He had made minor changes in the revised text that he had read out at the preceding meeting⁶ in response to the comments of several members of the Commission who had feared that article 32 might give rise to interpretations going well beyond its intentions. He was aware that those changes would not magically transform the article into a text certain to be widely accepted by the Commission, but he did think that they might clarify the intent of the article. If the Commission decided to bring the matter to the attention of the General Assembly, either by placing the article in square brackets or by referring to the issue in the commentary, it should try to describe the situation clearly so that the General Assembly would have a precise idea of the question.

25. The new version that he was proposing read:

"Article 32. Right to relief under domestic law

"A watercourse State shall ensure that a right to compensation or other relief is available under its legal system for appreciable harm caused in other States by activities within its territory related to an international watercourse to the same extent as for harm caused within its territory by such activities."

26. He pointed out that the article dealt with the substantive right to relief and not with procedural issues, which were the subject of article 33.

27. Mr. NJENGA recalled that, at the preceding meeting, he had noted that, if the Commission were to adopt article 32, then article 33 would no longer be relevant, since both articles dealt with the same problem. Discrimination was not prohibited only in respect of procedure. If a person was granted the right to apply to the courts of a country, it was obvious that he expected to obtain relief and would also benefit from the remedies available in that country. Thus, article 33 also dealt with the "relief" aspect of the issue. Article 32 should be withdrawn.

28. Mr. SEPÚLVEDA GUTIÉRREZ, supported by Mr. THIAM, said that he did not see how the Commission could consider a text which had not yet been made available in his working language.

29. Mr. CALERO RODRIGUES, supported by Mr. EIRIKSSON, said that, in his view, the text that the Special Rapporteur had just read out was as satisfactory as the previous version. In order to make the text of article 32 available to the members of the Commission in their working languages, he had proposed at the preceding meeting that the article should be referred back to the Drafting Committee, but the Commission had not endorsed his proposal. Mr. Njenga had, moreover, rightly pointed out that it would be useless to give a person a procedural right if he had no substantive right to defend, but, as it had been adopted, article 33 did not deal with substantive rights. It had originally been designed to supplement article 32. The attempt made at the preceding meeting to merge the two articles had not been very successful, but article 33 would have no autonomy or would have only very limited scope in the absence of a provision on substantive rights. The Commission should make it clear that the victim of harm caused by an activity related to a watercourse was entitled to the same substantive rights as the victim of the same harm in the territory of the State of origin. In his view, article 32 was essential and the Commission should either agree on one of the Special Rapporteur's procedural proposals or adopt his revised version of article 32.

30. Mr. BARSEGOV said that, before the meeting, he had told the Chairman he feared that the adoption of article 33 was being used as a means of pushing through the adoption of article 32. That fear was about to become reality. His approval of article 33 should accordingly be considered null and void.

31. Mr. Sreenivasa RAO said that he shared the views of Mr. Njenga and Mr. Barsegov. He too thought that the

⁶ See 2230th meeting, para. 11.

Commission should have taken a decision on article 32 before adopting article 33. If it absolutely had to adopt article 32, it should do so in line with the proposal made by Mr. Graefrath at the preceding meeting. Substantive rules could not be imposed upon States, particularly since some of them, such as Canada at the time of the *Trail Smelter* case,⁷ were not in a position to offer foreigners the right to seek relief through their courts. An important aspect of that type of provision was the need for inter-State cooperation in that regard. He could not accept the procedure now described.

32. Mr. HAYES suggested that the decision on article 32 should be deferred until the text proposed by the Special Rapporteur had been translated into all the working languages. At the preceding meeting, he had not taken a position on the substance, but he found that there was a difference between articles 32 and 33 inasmuch as the first dealt with the substantive right to relief and the second with the right of access to the courts. He did not believe that an article which provided for the right of access to the courts guaranteed anything other than the right to use available remedies. The right of access to the courts in no way implied that the specific remedy which a person was claiming would be made available to him; hence the need for article 32. At the current stage, it was only logical that the Commission should adopt article 32 along with article 33. If it decided to do so, he would make a minor drafting suggestion relating to the Special Rapporteur's proposed text.

33. Mr. TOMUSCHAT said that several obstacles had arisen in the course of the discussion: the lack of language versions other than English and the very strong opposition to the latest attempt to have the text of article 32 adopted. The Commission should therefore either eliminate article 32 or place it in square brackets, since it clearly did not want to adopt it. He personally attached more importance to article 33 than to article 32 and thought that it was much better for article 33 to be based on a broad consensus than to place both articles in square brackets. He urged the members of the Commission not to go back on their endorsement of article 33 and to put aside article 32, which went well beyond article 33 and might be reconsidered on second reading. The main thing was to prohibit any discrimination between persons of different nationalities: that was the principle embodied in article 33.

34. Mr. BARSEGOV said that, since many members of the Commission had stressed the close links between articles 32 and 33, it would be logical to go back to the suggestion made at the preceding meeting that both articles should be placed in square brackets, all the more so since he was certainly not the only member who had been talked into accepting article 33.

35. Mr. PAWLAK (Chairman of the Drafting Committee) said that he personally supported article 32, of which he preferred the latest version. He would also like the Commission to refer to the General Assembly a set of articles without any square brackets. He therefore proposed that article 32 should be withdrawn in the light of

the discussion in the Commission and that the commentary should reflect as faithfully as possible the positions adopted during the discussion on the need to include substantive rules on remedies, the importance of such rules in future framework conventions and the impossibility at the current stage of drafting a text on the question which was acceptable to the Commission.

36. Mr. BEESLEY said that he wished to reiterate his position of principle concerning article 33: he supported the purpose of articles 32 and 33. He was aware of the procedural difficulties involved, but noted that Mr. Barsegov had suggested the solution of placing those two articles in square brackets. Although that solution did not meet his own concern, it was an interesting possibility inasmuch as opinions were still divided. He proposed that the order of articles 32 and 33 should be reversed and, if the text of the present article 32 continued to give rise to objections, that those two articles should be placed in square brackets, since they were so closely linked.

37. Mr. SHI said that the Commission had to find a way of breaking the deadlock. Since articles 32 and 33 were closely related and the Commission had adopted article 33, it could place article 32 in square brackets so as to leave the decision to Government representatives in the General Assembly.

38. Mr. McCAFFREY (Special Rapporteur) said that, in the light of the comments just made, it would be best to retain article 33, which had just been adopted, and to withdraw article 32, on the understanding, of course, that the discussion would be reflected in the commentary to the article. That would make it possible to preserve its underlying idea both for Government representatives in the General Assembly and for the Commission when the time came to consider the draft on second reading. He thought that the main obstacle was that the new version had not been distributed in all working languages. He had not heard any convincing argument against the need for article 32. Unlike Mr. Tomuschat, he believed that that article did not go as far as article 33 and provided simply that, if there was a remedy in the event of harm caused in the territory of the State of origin, there should also be a remedy in the event of harm caused in other countries.

39. Mr. BARSEGOV said that he was prepared to accept that proposal because he was certain that the Special Rapporteur would do everything he could to draft an objective commentary. His own objection to article 32 was not the result of the fact that he saw no need to compensate harm caused in a foreign country. He recalled that, at the preceding meeting, he had said that, in his view, that text prejudged the solution which would be found to other problems that were still pending. It also seemed to him that the adoption of that provision would be contrary to the nature of the instrument under consideration because it would basically require States to amend their legislation and that might lead to discrimination against their own nationals in relation to foreigners. All those questions had to be considered in depth in the context of other topics so that the Commission might adopt a more general text.

⁷ See 2222nd meeting, footnote 7.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission adopted the proposal by the Chairman of the Drafting Committee and the Special Rapporteur that the text of article 32 should be withdrawn.

Article 32 was withdrawn.

41. Mr. EIRIKSSON, supported by Mr. BEESLEY, said that, for a number of reasons, he had no objection to the withdrawal of article 32. In his view, articles 32 and 33 gave only a partial picture of what a regime of civil liability should be. An instrument such as the one now being formulated should include such a regime, quite independently of the subject dealt with. That would be to the advantage of States, since the result would be fewer disputes between them. However, the regime which the Commission was trying to establish had become much too incomplete because of the amendments made during the discussion. As he had stated at the preceding meeting, the articles should contain enough indications to let States know that they had to envisage a regime of civil liability. He had questioned whether the Commission should submit to the General Assembly two articles in square brackets or a single article accompanied by a very detailed commentary. His understanding was that the Special Rapporteur would draft a detailed commentary on the question, although it was not customary to have a commentary on an article which had not been adopted. In that way, the discussion could be resumed in the General Assembly, as well as in the Commission on second reading. The commentary should therefore include, in square brackets, the text initially adopted by the Drafting Committee, as well as the latest version which had been proposed. It was regrettable that it had not been possible to distribute the text of that version in all working languages.

42. Mr. CALERO RODRIGUES said that, in order not to delay the Commission's work, he had also not expressed any objections, but he had very serious reservations to formulate. The solution which had been adopted was very incomplete and regrettable, for the Commission should have dealt at the same time with substantive rights and procedural rights. He fully shared Mr. Eiriksson's view on the commentary relating to an article which had neither been adopted nor even placed in square brackets.

43. Mr. ROUCOUNAS said that he had been in favour of the inclusion of articles 32 and 33 in the draft. He did not believe that the commentary to be prepared by the Special Rapporteur should include the text of an article which had not been adopted. The only thing the Commission had agreed on was that the problem should be explained in that commentary.

44. Mr. Sreenivasa RAO said that the statements by Mr. Eiriksson, Mr. Calero Rodrigues and Mr. Beesley gave the impression that the members of the Commission who were opposed to the inclusion of articles 32 and 33 in the draft did not think that the substantive and procedural rights in question should be recognized, particularly for natural persons, whereas they had been the ones who had stressed the importance of those rights. The fact was that the regime of civil liability was so

complex that it could not be dealt with in a simplistic manner.

45. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that article 33 should be renumbered 32.

It was so agreed.

TITLE OF PART VI (Miscellaneous provisions)

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the title of part VI.

The title of part VI was adopted.

AMENDMENTS RECOMMENDED BY THE DRAFTING COMMITTEE TO ARTICLES PREVIOUSLY ADOPTED BY THE COMMISSION

47. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles previously adopted by the Commission with the amendments recommended by the Drafting Committee (A/CN.4/L.458/Add.1).

48. Mr. PAWLAK (Chairman of the Drafting Committee) said that document A/CN.4/L.458/Add.1 contained all the articles already adopted at previous sessions by the Commission, but rearranged in what the Drafting Committee considered a more logical order. As indicated in the footnote to the document, the initial numbering of articles appeared in square brackets, cross-references had been adjusted accordingly and the word "[system]" had been eliminated throughout the draft. Furthermore, in a number of provisions, the Drafting Committee had felt that the word "international" before the word "watercourse" could be dispensed with because the context left no doubt as to the international character of the watercourse.

49. In article 3 [4] (Watercourse agreements), the Drafting Committee recommended that the second sentence of paragraph 1 should be deleted and that the words "hereinafter referred to as watercourse agreements" should be added after the words "one or more agreements".

50. In article 5 [6] (Equitable and reasonable utilization and participation), the Drafting Committee had decided to replace the word "optimum" in paragraph 1 by the word "optimal" and had amended the phrase containing that term accordingly. He drew attention to a typing error at the end of the English text of paragraph 2: the words "the present article 5" should read "the present articles".

51. In article 6 [7] (Factors relevant to equitable and reasonable utilization), the Drafting Committee had noted during its discussions that ecological concerns had not been referred to in the list in paragraph 1 (a); it had therefore decided that the word "ecological" should be added after the word "climatic".

52. In article 8 [9] (General obligation to cooperate), the word "optimum" had been replaced by the word "optimal".

53. In the English text of article 11 (Information concerning planned measures), the word "conditions" in the plural was a mistake. It should be in the singular.
54. In article 15 (Reply to notification), the Drafting Committee had considered that the deadline provided for in paragraph 2 for the transmission of a documented explanation should also apply to the communication of the finding itself.
55. It had therefore redrafted the second half of the paragraph to read:
- "... it shall communicate the finding to the notifying State within the period referred to in article 13, together with a documented explanation setting forth the reasons for the finding."
56. In article 17 (Consultations and negotiations concerning planned measures), the Drafting Committee recommended that the wording should be simplified by eliminating, from paragraph 2, the cross-reference to paragraph 1 and, from paragraph 3, the cross-reference to paragraph 2 of article 15. Other minor drafting changes had also been made to the English version of that article. In paragraph 3, the words "of making" had been replaced by the words "it makes".
57. In article 18 (Procedures in the absence of notification), an error in the English text of paragraph 2 had been rectified. The words "the two States" had replaced the words "the States concerned".
58. In article 19 (Urgent implementation of planned measures), in paragraph 1, the reference to "article 5 and 7" should read "articles 5 and 7". In paragraph 3, the words "at the request of any of the States referred to in paragraph 2" had been substituted for the words "at the request of the other States" to make it clear that each one of the States concerned could act individually.
59. In article 21 [23] (Prevention, reduction and control of pollution), the words "for the purposes of the present article" at the beginning of paragraph 1 should be replaced by the words "for the purposes of this article", following the model of article 25 [27]. A few further editorial changes made to other articles were self-explanatory.
60. He paid a tribute to all those who, over the years, had contributed to the elaboration of the draft articles. He thanked the members of the Commission and the Drafting Committee for their work, as well as the secretariat, interpreters and technical staff who had helped to accomplish a difficult but important task so that the General Assembly would have a complete text before it at its next session. He addressed his warm congratulations to the Special Rapporteur for the significant contribution he had made to that achievement.
61. Mr. EIRIKSSON pointed out that, in article 14, a comma should be added after the words "providing them". He joined in the congratulations addressed to the Special Rapporteur.
62. Mr. SHI said that, to bring the Chinese version of the draft into line with the English, a few corrections should be made which he would communicate to the secretariat.
63. Mr. NJENGA said that it was a matter of great satisfaction to him that, after so many years, the Commission had at last completed the consideration of the draft articles on first reading. He congratulated the Chairman of the Drafting Committee for his excellent work and for his efforts to reconcile opposing views. As members would recall, the Preparatory Committee for UNCED had included the question of the protection of freshwater resources on its agenda and it would perhaps be useful to forward to that Committee the text of the articles the Commission had adopted on first reading on the question so that it could take them into account at its next session, due to be held in September. It would also be useful if, during the next session of the General Assembly, the Special Rapporteur could be present at the meetings at which the Sixth Committee would consider the draft so that he could reply to any requests for clarification that might be put to him. He had already made that proposal during the discussion and trusted that it would be taken into consideration by the Bureau.
64. The CHAIRMAN said the Bureau should ensure that all of the Commission's working methods were duly respected, but it would see to it that its work was brought to the attention of the Preparatory Committee for UNCED.
65. Mr. BARSEGOV, expressing satisfaction at the fact that the Commission had brought its work on the topic to a successful conclusion, said he had no doubt that the draft articles would be adopted even more quickly on second reading, since many of the problems had already been solved. He warmly congratulated the Special Rapporteur and all those who had preceded him in his task, as well as the various chairmen who had in turn presided over the Drafting Committee and whose efforts had made it possible to achieve such a satisfactory result.
66. The title of the draft articles was, however, somewhat inaccurate, for it should relate not to international, but to multinational, watercourses inasmuch as every State always retained its sovereignty over a watercourse. He trusted that account would be taken of that comment.
67. The CHAIRMAN said that the question had indeed already been raised and the Special Rapporteur would undoubtedly give it all due consideration.
68. Mr. DÍAZ GONZÁLEZ also congratulated the Special Rapporteur on his praiseworthy efforts in connection with the consideration of an extremely difficult question, as well as the successive chairmen of the Drafting Committee who had successfully carried out their difficult task.
69. With regard to article 3, it seemed superfluous to state, at the end of paragraph 3, that watercourse States would consult with a view to negotiating "in good faith". Was it really necessary to spell that out? So far as he knew, States never negotiated in bad faith. Good faith was always presumed in international law. He therefore wondered whether it would be possible to delete those words and to say simply that States would consult with a

view to negotiating for the purpose of concluding a watercourse agreement.

70. The CHAIRMAN assured Mr. Díaz González that his request would receive favourable consideration in due course. He said that if he heard there was no objection, he would take it that the Commission agreed to adopt the amendments to the draft articles recommended by the Drafting Committee (A/CN.4/L.458/Add.1).

It was so agreed.

ADOPTION OF THE DRAFT ARTICLES ON FIRST READING

71. The CHAIRMAN said that the Commission had thus completed the consideration on first reading of the draft articles on the law of the non-navigational uses of international watercourses. If he heard no objection, he would take it that the Commission agreed to adopt the draft articles as a whole, as amended, on the understanding that the observations made by members in the course of the consideration of the Drafting Committee's report would be reflected in the summary records.

It was so agreed.

The draft articles on the law of the non-navigational uses of international watercourses, as a whole, as amended, were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPOREUR

72. Mr. THIAM reminded members that the Commission traditionally adopted a resolution to congratulate and thank the author of a set of draft articles. He trusted that it would do likewise in order to express its gratitude to Mr. McCaffrey for the patience, modesty and tolerance which had enabled the Commission to reach agreement.

73. Mr. SEPÚLVEDA GUTIÉRREZ said that the spirit of cooperation Mr. McCaffrey had displayed throughout the consideration of the draft articles was beyond praise. Appreciation was likewise due to successive chairmen of the Drafting Committee, all of whom had carried out their task with great tact and efficiency, and to all members of the Committee who had worked with dedication and patience.

74. Mr. BEESLEY associated himself with the expressions of appreciation addressed to Mr. McCaffrey and his predecessors and also to the Drafting Committee, whose efforts had enabled the Commission to achieve such a welcome result. He supported Mr. Thiam's proposal that the Commission should adopt a resolution expressing its gratitude to the Special Rapporteur.

75. Mr. Sreenivasa RAO expressed his deep sense of appreciation to the Drafting Committee for its excellent work and his particular thanks to Mr. McCaffrey for his energy and also for the understanding, patience and tolerance he had shown in taking account of the views of all members of the Commission and enabling them to arrive at a consensus. The Special Rapporteur and the Chairman of the Drafting Committee, which had not forgotten the objective the Commission had set itself

throughout the years, were to be congratulated on that score.

76. Mr. McCAFFREY (Special Rapporteur), thanking members for their kind words, said that the efforts of his predecessors had certainly been of great value and had facilitated his task. It was thanks to them, too, that the Commission had adopted the draft and the way in which it had done so attested to the constructive and cooperative spirit shown by all its members, to whom he too wished to pay a tribute. He also thanked Mr. Pawlak and Mr. Hayes, who, during Mr. Pawlak's absence, had replaced him as Chairman of the Drafting Committee, for their competence and dedication, which had enabled the Commission to complete its first reading of the draft articles.

77. The CHAIRMAN thanked all members of the Commission and of the Drafting Committee and, in particular, the Committee Chairman, Mr. Pawlak, for their contribution to the work which had led to the adoption of the draft articles. He also expressed gratitude to all members of the secretariat for their dedicated cooperation. The Commission and the Drafting Committee could be proud of having thus achieved one of the goals they had set for themselves. That accomplishment was due in large measure to the efforts of the Special Rapporteurs who had successively dealt with the topic and, in particular, to Mr. McCaffrey, who had been responsible for the most decisive phase of the exercise. He therefore proposed that the Commission should adopt a draft resolution to read:

"The International Law Commission,

"Having adopted provisionally the draft articles on the law of the non-navigational uses of international watercourses,

"Expresses to the Special Rapporteur, Mr. Stephen McCaffrey, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles relating to the law of the non-navigational uses of international watercourses."

The draft resolution was adopted.

The meeting rose at 12.10 p.m.

2232nd MEETING

Friday, 28 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr.

Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (A/CN.4/438,¹ A/CN.4/439,² A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF
THE SPECIAL RAPPORTEUR

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22

1. The CHAIRMAN invited the Special Rapporteur to introduce his fifth and sixth reports (A/CN.4/438 and A/CN.4/439 respectively). He recalled that chapters I and II and sections A, B and C of chapter III of the fifth report had been before the Commission at its forty-second session as document A/CN.4/432, but had not been discussed for lack of time. The report had been completed by the addition of section D to chapter III and reissued at the current session.

2. He drew attention to the texts of draft articles 12 to 22 proposed by the Special Rapporteur which read:

Article 12

1. The archives of international organizations and, in general, all documents belonging to or held by them, shall be inviolable wherever they are located.

2. Archives of international organizations shall be understood to mean all papers, documents, correspondence, books, film, tape recordings, files and registers of the international organization, together with ciphers, codes, and the filing cabinets and furniture intended to protect and conserve them.

PART IV

PUBLICATIONS AND COMMUNICATIONS FACILITIES

Article 13

International organizations shall enjoy in the territory of each State party (to this Convention)* the free circulation and distribution of their publications and public information material necessary for their activities, including films, photographs, printed matter and recordings prepared as part of the public information programme of an organization and exported or imported for dis-

play or re-transmission, as well as books, periodicals and other printed matter.

Article 14

International organizations shall enjoy, in the territory of each State party (to this Convention)* in respect of such organizations, for their official communications, treatment not less favourable than that accorded by the Government of such State to any other Government, including the latter's diplomatic missions, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone, telefax and other communications, and press rates for information to the press, cinema, radio and television. However, the international organization may install and use a wireless transmitter only with the consent of the host State.

Article 15

1. The official correspondence and other official communications of an international organization shall be inviolable.

2. Official correspondence and official communications mean all correspondence and communications relating to an organization and its functions.

Article 16

International organizations shall have the right to use codes and to dispatch and receive their official communications by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags under the provisions of the multilateral conventions in force governing matters relating to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

Article 17

None of the above provisions shall affect the right of each State party (to this Convention)* to adopt the necessary precautions and appropriate measures in the interest of its security.

PART V

FISCAL IMMUNITIES AND EXEMPTIONS
FROM CUSTOMS DUTIES

Article 18

International organizations, their assets, income and other property intended for their official activities shall be exempt from all direct taxes; it is understood, however, that international organizations will not claim exemptions from taxes which are, in fact, no more than payment for public utility services.

Article 19

1. International organizations shall be exempt from all national, regional or municipal dues and taxes on the premises of the organization, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the international organization.

Article 20

International organizations, their assets, income and other property shall, in accordance with the laws and regulations promulgated by the host State, be exempt from:

(a) All kinds of customs duties, taxes and related charges, other than charges for storage, cartage and similar services, as well as from import and export prohibitions and restrictions with respect to articles imported or exported by international organizations for their official use; it is understood, however, that articles imported under such exemption may not be disposed of, whether or not in return for payment, in the country into which they have been imported, except under conditions agreed with the Government of that country;

¹ This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook... 1991*, vol. II (Part One).

² Reproduced in *Yearbook... 1991*, vol. II (Part One).

(b) Customs duties and prohibitions and restrictions with respect to the import and export of their publications intended for official use.

Article 21

1. International organizations shall not, in principle, claim exemption from consumer taxes or sales taxes on movable and immovable property that are incorporated in the price to be paid.

2. Notwithstanding the provisions of the foregoing paragraph, when international organizations make, for their official use, large purchases of goods on which such duties and taxes have been, or may be, imposed, States parties (to the present Convention)* shall, wherever possible, adopt the necessary administrative provisions for the remission or refund of the amount corresponding to such duties or taxes.

Article 22

For the purposes of the foregoing articles, the terms "official activity" or "official use" shall mean those relating to the accomplishment of the purposes of the international organization.

* References to the "Convention" have been placed in brackets in order not to prejudice the final form of the draft articles.

3. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), introducing his fifth and sixth reports asked members to note three minor corrections to the Spanish version of the fifth report.

4. He recalled that the Commission had so far considered four reports on the topic. The preparation of those four reports had been guided by the schematic outline adopted by the Commission at its thirty-ninth session and approved by the General Assembly at its forty-second session in 1987, which established the general thrust and scope of the topic and its substance.³ Following the Commission's discussion of the four reports, the first 11 draft articles had been referred to the Drafting Committee. The Commission now had before it, in the fifth and sixth reports, draft articles 12 to 22, forming parts IV and V of the draft articles. The two reports completed the study of the first part of the draft, i.e. sections I A and I B of the outline.

5. The fifth report consisted of two parts, the first, supplementing part III of the draft, being concerned with the archives of international organizations, and the second, relating to part IV of the draft, with the publications and communications of international organizations. The sixth report was on the fiscal immunities of international organizations and their exemptions from customs duties. The draft articles being proposed, namely articles 18 to 22, formed part V of the draft.

6. Like States, international organizations were in permanent communication with member States and with each other. They maintained a steady correspondence with public and private institutions and private individuals. They kept files on their staff, on projects, on studies and on any other action in which they might be involved with a view to achieving the aims for which they were created. They also possessed a body of documentation which was the backbone of their operations. The protection and safe keeping of all such documentation was what constituted the archives of international organ-

izations. In order to preserve, protect and safeguard the confidentiality of those archives, and to protect not only their own safety and their right to privacy and private property, but also the safety and privacy of documentation addressed or entrusted to them, particularly by member States, international intergovernmental organizations must enjoy inviolability of their archives.

7. The inviolability of archives was based on two fundamental principles: a duty of non-interference and a duty of protection, as in diplomatic law. The issue was one of protecting not only secrecy, but also the place where the secret was kept. In the case of diplomatic and consular missions, the receiving State was under an obligation not only to refrain from trying to penetrate the secret, but also to protect it by respecting the place where it was kept, and even to prevent third parties from violating it. The right to privacy, in other words to secrecy, was recognized to be a basic element guaranteeing the freedom of action and functional efficiency of international organizations. Respect for privacy and the preservation of secrecy constituted the very basis of the independence of international organizations, to which they must be entitled if they were to fulfil properly the purposes for which they had been established. That question was examined in detail in the first part of the fifth report.

8. It was hardly necessary to prove that publications were the chief, and indeed it might be said the most basic, form of expression for international organizations. Consequently, the scope of the term "publications", as employed by international organizations both in the legal documents and in practice, was much broader than was usual in domestic law. The breadth of the term varied, of course, from one document to another, as the report showed. International organizations must therefore enjoy the fullest guarantees not only with regard to the inviolability of their publications, but also with regard to the free distribution and circulation of the information required for the conduct of their activities.

9. Naturally, the means of communication made available to international organizations had to be identical to those employed by States or diplomatic missions. In that respect likewise, international organizations were assimilated or equated to diplomatic missions so as to enable them to use the same means of communication. The European Committee on Legal Cooperation had issued an opinion on the question, which he had cited in his fifth report.

10. It should not be of major concern whether all international organizations invariably used all of the exceptional means of communication. What mattered was that the principle should be recognized and applied in appropriate cases. In cases where the functions of the organization did not warrant application of the principle, the organization should have the authority to waive it. In any event, with the increasingly sophisticated advances in communications technology, using means of radiotelephony and radiotelegraphy, such as telex and facsimile transmission, the issue would become less and less important. Indeed, in future the priority would simply be to have the appropriate equipment installed, and to be accorded preferential tariffs and rates for the applicable taxes and service charges.

³The text of the schematic outline is reproduced in *Yearbook . . . 1989*, vol. II (Part Two), p. 132, footnote 323.

11. Mention should be made in that connection of the diplomatic bag and the diplomatic courier. The Commission and the Sixth Committee had considered whether the draft articles elaborated on that topic should be restricted to States or should also be extended to international organizations. Opinions on the matter had been divided. The Special Rapporteur on the diplomatic bag and diplomatic courier had suggested the inclusion of a new paragraph 2 in draft article 1 on the diplomatic courier and the diplomatic bag, to cover the official communications of an international organization with a State or with other international organizations, which he had cited in his fifth report. After lengthy discussion, views being expressed both for and against, the Commission had decided not to include the paragraph. It had been pointed out that the repeated insistence by some Commission members on differentiating between States and international organizations was inopportune. International organizations, it had been said, were established by States, and they used diplomatic couriers and diplomatic bags without any serious objection ever being raised. Both the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies, as well as many international instruments such as headquarters agreements and technical assistance agreements, contained similar specific provisions on the subject. However, given the difference of opinions, the Commission had opted for confining the scope of the draft articles to couriers and bags of States in order not to jeopardize the acceptability of the draft articles. At the same time, it had believed it appropriate for States to be given the choice to extend, if they so wished, the applicability of the draft articles to couriers and bags of, at least, international organizations of a universal character. It had therefore prepared and approved a draft optional protocol two on the status of the courier and the bag of international organizations of a universal character⁴ which stated, in article I, that:

The articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:

(a) With its missions and offices, wherever situated, and for the official communications of these missions and offices with each other;

(b) With other international organizations of a universal character.

12. As to the question of fiscal immunities, the sixth report ended with part V of the draft, namely articles 18 to 22. The fiscal immunity which States granted each other in their mutual relations was, in fact, the counterpart of equality. Under the principle of sovereignty and equality between States, a State could not be viewed as being subject to the tax-levying authority of another State. The principle was established by both custom and practice; it had been confirmed in bilateral and multilateral agreements, or even by unilateral decisions of States, at least as regarded property intended for State purposes. The tax exemption granted to intergovernmental international organizations also appeared to be justified by the same principle of equality between member States. A State could not levy taxes on other States through an international organization, and the host State

must not derive unjustified fiscal benefit from the presence of an international organization on its territory. Moreover, in order to perform their official functions effectively, intergovernmental international organizations must enjoy the greatest possible independence in relation to the States of which they were composed. The principle of the free movement of the articles and capital of international organizations constituted one of the basic elements for preserving and guaranteeing their independence, and enabling them to fulfil the purposes for which they were established. However, States naturally had the right to protect themselves against any abuse or erroneous interpretation of the principle which might distort its true aim. The report therefore focused on two basic principles: the free movement of the articles of international organizations, and the protection of States against abuse or misinterpretation.

13. The CHAIRMAN thanked the Special Rapporteur for his presentation of the two reports.

The meeting rose at 10.40 a.m.

2233rd MEETING

Tuesday, 2 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, 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. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Cooperation with other bodies

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Njenga to address the Commission in his capacity as Secretary-General of the Asian-African Legal Consultative Committee.

2. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee greatly valued its long-standing links with the International Law Commission. As Secretary-General of the Committee, he could speak with conviction of the commitment to strengthen those bonds in the mutual interests of the two bodies.

⁴ Adopted by the Commission at its forty-first session. See *Yearbook . . . 1989*, vol. I, 2132nd meeting, para. 56.

3. The Committee had been particularly happy to welcome the outgoing Chairman of the Commission, Mr. Shi, at its thirtieth session held in Cairo in April 1991. The Legal Counsel of the United Nations, Mr. Fleischhauer, had been unable to attend the session owing to other obligations, but had been represented by the Secretary to the Commission, Mr. Kotliar, who had read out a message from the Secretary-General of the Organization.

4. The Committee had greatly appreciated the comprehensive and informative account Mr. Shi had given of the Commission's progress of work at its forty-second session. Mr. Shi had also stressed how much the members of the Commission had appreciated the interesting comments made by the members of the Committee on the topics on which the Commission was working and how glad they had been to learn that the Committee was interested in, or working on, topics that were often similar or closely related to those on the Commission's agenda. All of that attested to the need to strengthen the exchange of views and experiences between the two bodies.

5. The Committee attached great value to the role of the Commission in the progressive development and codification of international law. The meticulous detail with which it approached its task in order to break fresh ground on matters of vital importance to the international community was to be commended and was universally appreciated. Three items on the Commission's agenda were of particular interest to Governments in the Asian-African region: international liability for injurious consequences arising out of acts not prohibited by international law; jurisdictional immunities of States and their property; and the law of the non-navigational uses of international watercourses. In the case of the two last-mentioned topics, that interest was due to the fact that they were also on the Committee's work programme and had been for some time. The Committee had started to consider the question of the jurisdictional immunities of States as far back as 1958, at its second session.

6. More recently, the Committee had deliberated upon certain aspects of the law relating to the jurisdictional immunities of States and their property in connection with certain developments that had taken place in some of its member countries. In addition to having been debated at the sessions of the Committee, the topic had also been the theme of three meetings of the legal advisers of the member Governments of the Committee in 1984, 1987 and 1989. Now that the Commission had completed its second reading of the draft articles on the subject, the interest of the Committee could hardly be overemphasized. Indeed, at its thirtieth session, the Committee had requested its secretariat to prepare detailed notes and comments on those draft articles and also on the draft articles on the law of the non-navigational uses of international watercourses, the first reading of which had just been concluded by the Commission.

7. As to some of the other substantive items considered by the Committee at its thirtieth session and the current work programme of its secretariat, following the adoption by the General Assembly of resolution 44/23 declaring the period 1990-1999 as the United Nations Decade of International Law, the secretariat of the Committee

had prepared a note for the twenty-ninth session of the Committee on the role of the Committee in the realization of the objectives of the Decade. The Committee had called for an in-depth study on the Decade, which it had submitted to the United Nations Legal Counsel, setting forth its proposals and views. It was a matter of satisfaction to the Committee that it had been one of the few bodies to deal in that way with all the objectives of the Decade. In that connection, the Committee had been pleased to learn from Mr. Vukas, Chairman of the Working Group on the Decade of International Law, who had attended the Committee session in Cairo, that the Working Group had viewed with favour the notes and comments prepared by its secretariat. The item would remain on the programme of work of the secretariat and on the agenda of the Committee in the years ahead and the Committee hoped in that way to make an active contribution to the achievement of the objectives of the Decade. In that connection, at the thirtieth session of the Committee, the hope had been expressed that, at its current session, the Commission would consider ways of achieving the objectives of the Decade and that, when drawing up its quinquennial programme of work, it would make its views on the Decade known; the Committee eagerly awaited those views.

8. The Committee also hoped, *inter alia*, to undertake an in-depth study on the enhanced utilization of ICJ in the broader context of the purpose of promoting methods for the peaceful settlement of disputes between States, including resort to and full respect for ICJ as spelt out in General Assembly resolution 44/23. The representative of the Court had offered to cooperate in that venture.

9. The Committee had always attached great importance to the law of the sea and its contribution to the work of the Third United Nations Conference on the Law of the Sea was well known. The law of the sea was, therefore, a third area in which the Committee's secretariat had taken an initiative by preparing a study on the significance and cost of ratification of the 1982 United Nations Convention on the Law of the Sea. In that study, the secretariat had urged those member States which had not already done so to ratify the Convention. In Cairo, several delegates had expressed the view that the study would allay the fears of the developing countries concerning the financial implications of ratification of the Convention and had commended the secretariat for being one of the few remaining organizations that continued vigorously to promote the ratification of the Convention on the Law of the Sea. That study could be made available to any members of the Commission wishing to consult it.

10. The control of transboundary movements of hazardous wastes and their disposal, particularly in the African-Asian region, was viewed by many members of the Committee as a vitally important aspect of acts not prohibited by international law. Many member States of the Committee had already expressed their concern on that score at the Conference of Plenipotentiaries convened in Basel in 1989. The Committee's secretariat had been actively involved in the meetings of legal and technical experts organized by OAU in Addis Ababa in December 1989 and at the beginning of May 1990 to prepare for a Conference of Plenipotentiaries with a view to

the adoption of an African convention on the subject. In Cairo, participants had paid a tribute to the role played by the Committee's secretariat in the formulation and adoption of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements of Hazardous Wastes within Africa. The secretariat had also been associated with the Ad Hoc Working Group of Legal and Technical Experts to Develop Elements which might be included in a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, set up by UNEP, as envisaged by the Basel Convention. The Committee had been among the first international organizations to urge its member States to ratify the Basel Convention and to bring it into force, and several of them had already ratified it.

11. The secretariat of the Committee was also involved in helping its members to prepare for UNCED to be held in Brazil in June 1992. The secretariat had actively participated in the meetings of the Preparatory Committee of UNCED and, as in other areas, had worked in tandem with other regional and international organizations. The secretariat of the Committee proposed to hold an intersessional meeting at ministerial level to review the work of the Preparatory Committee of UNCED and, in particular, that of its Working Group III (Legal issues), so as to give the members of the Committee an opportunity to adopt a common stand on the protection of the environment and climate without prejudicing their right to sustainable development.

12. In addition, the Committee was now working on the preparation of documents and studies on such diverse subjects as the status and treatment of refugees, a question on which the secretariat of the Committee was organizing a seminar in October 1991 in New Delhi in cooperation with the United Nations High Commissioner for Refugees and thanks to a generous grant from the Ford Foundation; the deportation of Palestinians as a violation of international law, particularly the Geneva Conventions of 1949; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; the concept of a peace zone in international law; the Indian Ocean as a zone of peace; the legal framework for international joint ventures; international trade law matters; and the undertaking of a feasibility study on the establishment of a centre for research and development of legal regimes applicable to economic activities in developing countries in Asia and Africa. The work on all those topics was continuing. The items listed were among those that were to be considered at the Committee's thirty-first session in 1992. It was gratifying to note that the International Law Commission was considering putting some of those topics on its own long-term programme of work.

13. At the Committee's thirtieth session, he had been re-elected Secretary-General for a period of three years starting in May 1991. On behalf of the Committee, he extended to the Chairman of the International Law Commission an invitation to participate in the Committee's thirty-first session, which was scheduled to be held in Islamabad, Pakistan, in 1992.

14. Mr. McCAFFREY, speaking on behalf of the members of the Commission from the Group of Western European and Other States, thanked the Secretary-General of the Asian-African Legal Consultative Committee for his very informative and stimulating statement.

15. He said that he had always been impressed by the number of areas in which the Committee was working. Of all the organizations, it was undoubtedly the Committee which had done the most intensive work in connection with the United Nations Decade of International Law. For years, moreover, it had been studying two topics which were on the Commission's agenda: the jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses. He was aware that the Committee followed the Commission's work with great interest and hoped that it would welcome the conclusions the Commission had reached on those two topics at the current session. He was also sure that, during his new term of office, Mr. Njenga would exercise as competently as in the past his functions as Secretary-General of a body which provided very valuable services to its members, for example, in helping them prepare their comments on the Commission's report to the Sixth Committee of the General Assembly.

16. The CHAIRMAN, speaking as a member of the Commission, also congratulated Mr. Njenga on his reelection as Secretary-General of the Asian-African Legal Consultative Committee.

17. Mr. MAHIOU, speaking on behalf of the members of the Commission from African States, thanked Mr. Njenga, first, for having given such very useful information on the Committee's work, which was, fortunately, continuing despite the financial problems faced by the member countries, and, secondly, for having helped to establish and maintain close and personal ties between the Committee and the Commission. On many points, the concerns of the two bodies were the same. He was thinking in particular of two topics on which the Commission had just adopted a set of draft articles on second and first reading, respectively, namely, the jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses. Those two topics were of particular interest to the Committee because of the problems of the Asian-African region in those fields.

18. Other questions to which the Committee attached great importance also went to the heart of topics being considered by the Commission. For example, the problem of hazardous wastes was one of the important aspects of the topic of international liability of States for injurious consequences arising out of acts not prohibited by international law. Lastly, he noted that the Committee had established an entire list of subjects for research and study, which he believed could provide the Commission with useful inspiration for the preparation of its own agenda, with a view both to the codification and to the progressive development of international law.

19. Mr. BARSEGOV joined the previous speakers in thanking Mr. Njenga for his very interesting and very detailed statement. He said that the activities of the

Asian-African Legal Consultative Committee reflected the concerns of the Eastern European countries, which followed its work with very great interest. He would not refer to each of the points mentioned by Mr. Njenga, since the list of questions dealt with by the Committee was quite impressive, but he would like the statement by the Secretary-General of the Asian-African Legal Consultative Committee to be reflected fully in the summary record of the meeting and he also expressed the hope that the Commission would have access to the documents concerning the work of the Committee to which Mr. Njenga had referred.

20. Mr. SEPÚLVEDA GUTIÉRREZ, speaking on behalf of the members of the Commission from Latin American States, also thanked the Secretary-General of the Asian-African Legal Consultative Committee for his excellent statement, which made it possible to have a better understanding of the problems of the Asian-African region. Mr. Njenga was very well known in the Latin American region too for his fine qualities as a jurist, his organizational abilities and his lofty ideals, and his work was sure to have an impact on the progressive development of international law. There were obvious similarities between the Asian-African region and the Latin American region: they shared the same ideals and the same interests and contacts between them should be encouraged.

21. Mr. SHI congratulated Mr. Njenga on his re-election as Secretary-General of the Asian-African Legal Consultative Committee. He had had the honour of representing the Commission at the Committee's thirtieth session, which had been held in Cairo, and had been very impressed by the importance which the delegations of the member countries of the Committee attached to the work of the Commission and by the seriousness with which they had spoken on the topics on the Commission's agenda. In the statement he had made as outgoing Chairman at the Commission's current session, he had also referred to the very interesting ideas put forward by the Committee with regard, for example, to the jurisdictional immunities of States and their property. He had, moreover, been struck by the similarities between some of the topics on the Committee's agenda and those under consideration by the Commission. That confirmed his belief that cooperation between the Commission and the Committee should not only continue, but that coordination between the work of the two bodies should be strengthened. It was not enough for them to send observers to each other's meetings. More specific ways of working together had to be considered.

22. Mr. JACOVIDES also congratulated Mr. Njenga on his re-election, which was a fitting reward for his dedication to the work of the Asian-African Legal Consultative Committee. His own country had been a member of the Committee for many years and he had had the privilege of attending several of its sessions, particularly in Beijing and Cairo. He had always considered it desirable to establish the closest possible cooperation between the Commission and regional bodies such as the Asian-African Legal Consultative Committee so that regional points of view might be taken more fully into account.

23. As Mr. Shi had quite rightly pointed out, the two bodies had much to learn from one another. Mr. Njenga's statement had given the members of the Commission a better understanding of the concerns of two major regions of the world, Asia and Africa. It was also interesting to note that the Committee placed particular emphasis on the success of the United Nations Decade of International Law, on growing resort to ICJ and on the law of the sea. He was sure the Committee would also be able to make a major contribution in other areas, such as the code of crimes against the peace and security of mankind and State responsibility. In conclusion, he invited the Committee and its Secretary-General to continue their praiseworthy efforts with a view to the codification and progressive development of international law and wished them every success in their work.

24. Mr. Sreenivasa RAO expressed his congratulations to Mr. Njenga on his re-election to the office of Secretary-General of the Asian-African Legal Consultative Committee.

25. Tracing the origins of the Committee, he recalled that it had been set up in the 1950s, following the release of many African and Asian countries from the colonial yoke, in order to bring together the few experienced jurists in those regions and place them at the service of their countries, and through their countries, at the service of the international community, so that the task of the progressive development and codification of international law could be carried out in a spirit of tolerance, justice and equity for all, and especially for the developing countries. The international community was indebted to the Committee, for instance, in the field of the law of treaties and in that of the law of the sea as a result of the adoption of the concept of the exclusive economic zone. It was gratifying to note that the same tradition was continuing and that, in addition to its advisory role, the Committee enjoyed an unrivalled reputation in the world community of internationalists for its work, which it could also undertake at the request of any of its member States. It was, moreover, quite natural, as Mr. Sepúlveda Gutiérrez had noted, that developing countries should all be involved in the progressive development and codification of international law.

Relations between States and international organizations (second part of the topic) (continued)
(A/CN.4/438,¹ A/CN.4/439,² A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL
RAPPORTEUR (continued)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

¹ This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook... 1991*, vol. II (Part One).

² Reproduced in *Yearbook... 1991*, vol. II (Part One).

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22³ (*continued*)

26. Mr. HAYES recalled that, at the preceding session, during the debate on the fourth report,⁴ he had stated that he strongly favoured the functional approach advocated by the Special Rapporteur in paragraph 27 of the report, as well as the idea which seemed to be put forward in paragraphs 51 and 52 of that report that the Commission's objective should be to prepare a general framework of provisions common to all international organizations of a universal character, leaving the details to be developed according to the specific purpose and functions of the organization concerned.⁵ It was in the light of those two criteria that he intended to examine the draft articles contained in the reports.

27. The fifth report (A/CN.4/438) dealt first with the question of archives. The confidentiality—he preferred that term to “secrecy”, which could have a sinister ring in English—of the archives, whether documents for internal use, such as personnel files, or for external use, such as correspondence with member States and other international organizations, appeared to be essential to enable international organizations to perform their functions. They must therefore enjoy inviolability of their archives and only absolute inviolability would suffice. That functional justification was borne out by the provisions of several instruments, including the Convention on the Privileges and Immunities of the United Nations. Paragraph 1 of draft article 12 proposed by the Special Rapporteur was based on article II, section 4, of that Convention and, in his view, it was an appropriate provision. However, he was not sure whether paragraph 2, which purported to give an exhaustive list of the “archives” of international organizations, was detailed enough: perhaps reference should also be made to modern means of communication, such as computers, word processors, electronic mail, and the like. Although he was not a specialist in that field, he thought that the risks of “computer viruses” and “hacking” would fully justify such a precaution.

28. The second subject covered in the fifth report was publication and communications facilities. There again, it was difficult to imagine an international organization for which freedom of publication and communication would not be a functional necessity. That freedom was, moreover, fully reflected in the relevant legal instruments, which specifically provided that the United Nations and the specialized agencies must enjoy treatment no less favourable than that enjoyed by Governments and diplomatic missions. That would obviously include the use of particular diplomatic means of communication such as coded messages, couriers, diplomatic bags, and so forth. Draft articles 14 and 16 proposed by the Special Rapporteur and based on the relevant provisions of the Convention on the Privileges and Immunities of the

United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies were therefore entirely appropriate. However, he wondered whether article 15 was really necessary. Its paragraph 1 seemed to duplicate article 12 on the inviolability of archives and documents and the definition given in paragraph 2 seemed to be superfluous. He also wondered whether the question of publications and the question of communications should not be treated separately; they certainly overlapped in some respects, but they also raised very different problems. Moreover, existing international law seemed to be much more restrictive in respect of publications than in respect of communications. The two main conventions on the subject, the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies, merely exempted the publications of those organizations from customs duties and from prohibitions and restrictions on imports and exports. Draft article 13 went further, providing that international organizations could freely circulate and distribute their publications in the territory of each State party. In that connection, there was an interesting comment in the report of the subcommittee on the privileges and immunities of international organizations of the European Committee on Legal Cooperation, concerning the need to protect public order, quoted by the Special Rapporteur in his fifth report. He wondered whether draft article 17, which enabled a State to take the necessary measures to protect its security, should not also have an exemption based on the need to protect public order.

29. With regard to the sixth report (A/CN.4/439), he noted that the tax exemption granted to international organizations was based fairly and squarely, as the Special Rapporteur had explained in the report, on the principle that a host State should not derive unjustified fiscal benefit from the presence of an international organization on its territory. In that connection, the Special Rapporteur referred to the fiscal immunities of diplomatic missions, as established by practice and codified in the Vienna Convention on Diplomatic Relations. He also referred to the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. He reviewed the relevant provisions of those conventions which established a distinction between direct and indirect taxes and between what might be called fiscal taxes and charges for services; he also stressed the difference between official and non-official activities of an international organization.

30. The Special Rapporteur based the principle of exempting international organizations from customs duties on the premise that, in order to pursue their objectives and exercise their functions, those organizations required complete independence, including the freedom of movement of articles, goods, and so forth. He nevertheless referred to the limits which States had placed on that freedom in order to protect themselves, with reason, against any abuses. In that field, as in that of direct taxation, the question arose of the distinction between official functions and other activities and the problem of the resale of goods which had been imported duty-free was of particular importance. He appreciated the way in which the Special Rapporteur had supported his arguments with

³ For texts, see 2232nd meeting, para. 2.

⁴ *Yearbook . . . 1990*, vol. II (Part One), document A/CN.4/424.

⁵ *Yearbook . . . 1990*, vol. I, 2176th meeting, para. 7.

abundant examples from conventional law and practice; moreover, the conclusions of the Special Rapporteur, as reflected in draft articles 18 to 22, were generally well justified. Draft articles 18, 20 and 21 were adaptations of corresponding provisions in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. He nevertheless wondered whether article 20 (*b*) on publications should not be incorporated into draft article 13, so that the question of publications could be dealt with in a single article.

31. Unlike the other articles mentioned above, draft article 19 was based mainly on the provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, which were also an excellent precedent for granting a tax exemption to international organizations for functional purposes. That exemption was provided for, in different terms, in other relevant instruments as well.

32. In conclusion, he believed that the thrust of the draft articles proposed by the Special Rapporteur was acceptable and that further refinements should be left to the Drafting Committee.

33. Mr. JACOVIDES thanked the Special Rapporteur for having provided a clear picture in his fifth report of the issues involved and the practice followed with regard to the archives and the publication and communications facilities of international organizations, accompanied by the corresponding draft articles 12 to 17.

34. As the Special Rapporteur had rightly pointed out in his report, international organizations, like States, were in permanent communication with member States and with each other; they maintained a steady correspondence with public and private institutions and with individuals and they kept files and had a body of documentation that was essential to their operations. The confidentiality—rather than secrecy, as had been pointed out by Mr. Hayes—and the privacy of their archives must be protected and guaranteed. It was therefore a valid premise that, like States, international organizations were subjects of international law and should enjoy inviolability of their archives. That principle was, moreover, spelt out in international conventions, such as the Convention on the Privileges and Immunities of the United Nations, and was generally accepted in practice. He had no difficulty in accepting the idea that the right to confidentiality was essential to the freedom of action and effective functioning of international organizations. He therefore endorsed draft article 12 proposed by the Special Rapporteur. With regard to the definition of archives, it was his view that paragraph 2 should, for the sake of clarity, be included in the body of the draft article; the wording of that paragraph could be considered in detail by the Drafting Committee, taking into consideration Mr. Hayes' interesting suggestion that modern means of communication, such as computers, and word-processing systems, should be added to the elements already listed.

35. Similarly, it could hardly be disputed that communication facilities were essential to the effective functioning of international organizations: such facilities must permit organizations to communicate freely with

member States and other organizations, to disseminate their ideas and to publicize the results of the tasks entrusted to them. He took note of the analysis of State practice in respect of publications, as provided by the Special Rapporteur in his report, and he readily agreed that, for their official communications, international organizations should enjoy treatment no less favourable than that accorded to Governments, as established, moreover, in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. As a general rule, the inviolability of communications—correspondence, telegraph, telephone, radio—of international organizations should be equivalent to that of communications of diplomatic missions, in so far as the needs of international organizations, in particular the United Nations, were as important as the needs of the government agencies of the host country.

36. The means of communication of international organizations should in principle be the same as those used by States or diplomatic missions. However, it had to be acknowledged that not all international organizations needed to use couriers or to have special facilities for sealed bags, codes and ciphers unless that was justified by their operations, and that was clearly the case with the United Nations, as provided for in the Convention on the Privileges and Immunities of the United Nations.

37. The question of the use of the diplomatic bag by international organizations was the most controversial and had been discussed at length during the consideration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, after which the Commission had decided to limit the scope of the draft articles to couriers and bags sent by States, while, at the same time adopting draft optional protocol two, annexed to the draft articles, and extending, on an optional basis, the applicability of the draft articles at least to couriers and bags of international organizations of a universal character.⁶

38. In his report, the Special Rapporteur reviewed State practice with regard to postal services and existing special postal agreements, such as that for the United Nations peace-keeping force in Cyprus, as well as the security issues raised, from the standpoint of States, by the use of telecommunications and radio stations. In that latter case, it was understandable that States could take an unfavourable view of the fact that international organizations were replacing them in the exercise of functions traditionally within their exclusive competence. The answer might be to strike a balance so that the basic interests of both international organizations and States were protected, in accordance, moreover, with current practice.

39. Draft articles 13 to 17 on publication and communications facilities, as proposed by the Special Rapporteur on the basis of his analysis, seemed to be on the right track. The articles were appropriately based on the principle that international organizations should enjoy

⁶ See 2232nd meeting, footnote 4.

maximum facilities, subject to the consent of the host State in the case of the installation and use of wireless transmitters and subject to considerations of the security of the State concerned. Consequently, the articles deserved to be favourably considered by the Commission.

40. In conclusion, he said he had little doubt that international organizations, as much as States, needed to benefit from the inviolability and protection of their archives and to have at their disposal publication and communications facilities, on the understanding that such benefits should correspond to their functional needs, should not be excessive and should not encroach unduly on their prerogatives.

41. He reserved the right to make a statement at a later stage on the Special Rapporteur's sixth report (A/CN.4/439).

The meeting rose at 11.20 a.m.

2234th MEETING

Wednesday, 3 July 1991, at 10.25 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, 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. Shi, Mr. Solari Tudela, Mr. Thiam.

Relations between States and international organizations (second part of the topic) (continued)
(A/CN.4/438,¹ A/CN.4/439,² A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF
THE SPECIAL RAPPORTEUR (continued)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

¹ This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook... 1991*, vol. II (Part One).

² Reproduced in *Yearbook... 1991*, vol. II (Part One).

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 and

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22³ (continued)

1. Mr. ROUCOUNAS recalled that the first part of the topic had found expression in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. According to the United Nations list of ratifications, to date only about 25 States had acceded to the Convention. Indeed, the majority of the States which acted as hosts to international organizations were not party to the Convention. There were clearly a number of factors responsible for the relatively limited success of the Commission's efforts to codify and progressively develop the law in that area. Nevertheless, the limited number of accessions to the Convention was a signal to the Commission that it had to proceed with caution in elaborating the second part of the topic.

2. He thanked the Special Rapporteur for his comprehensive fifth report, which dealt with relatively easy questions that had not given rise to serious controversy. While the language used in the fifth report might sometimes convey the misleading impression of calling for an increase in the authority of international organizations, the Special Rapporteur had, in fact, limited his considerations to purely functional issues.

3. In considering the case of an international organization's archives, the Special Rapporteur drew an appropriate distinction between inviolability and confidentiality. Inviolability involved preventing third parties from obtaining information about the contents of the archives, using the archives without authorization, violating the secrecy of the archives or destroying their contents. The corollary to that notion was the requirement that States should refrain from any kind of administrative or jurisdictional coercion. Confidentiality was a more general concept which encompassed not only the archives of an international organization but also some of its procedures. Generally speaking, the rule of confidentiality was respected in spite of the difficulties inherent in doing so, particularly in organizations with a large membership. For example, in his experience, there had been only one occasion on which a person from outside the United Nations had been able to gain access to the confidential information being considered by the Commission on Human Rights in its capacity as a closed commission of inquiry.

4. The report indicated that access by officials of an international organization to its archives was regulated by the organization itself and was covered by its internal regulations. In contrast, protection of the inviolability of the archives of an international organization against interference from persons outside the organization, an aspect which thus far had not been regulated in a satisfactory fashion, involved the obligation to refrain and protect, as was the rule in diplomatic law. In that connection, he wondered if the subject of the inviolability of

³ For texts, see 2232nd meeting, para. 2.

the archives of an international organization should not include the issue of respect for and protection of the emblems, names and even, in certain cases, the flags of international organizations. There had been cases, cited in some instances in the *United Nations Juridical Yearbook*, where the use of the emblem or the name of an international organization had raised legal issues. In his opinion, and the Special Rapporteur concurred, it was appropriate to consider that matter under the present topic.

5. As to publications and communications facilities, he endorsed the Special Rapporteur's emphasis, again within a functional framework, on the right to freedom of expression. To his knowledge, there had been only one case, termed "unprecedented" by the United Nations Secretariat, in which a Member State had tried to impede the publication of United Nations documents. In that connection, a memorandum, prepared by the United Nations Office of Legal Affairs on 29 October 1981 had stated clearly that the freedom of the United Nations to publish and circulate documents without restriction was guaranteed both by the Charter of the United Nations and by the Convention on the Privileges and Immunities of the United Nations.

6. In his report, the Special Rapporteur amply demonstrated that United Nations publications did indeed benefit from fiscal immunities and exemptions from customs duties. Furthermore, section 7 (c) of the Convention on the Privileges and Immunities of the United Nations provided that, with respect to its publications, the United Nations was exempt from any customs duties and any import or export prohibitions or restrictions. Moreover, from the legal point of view, international organizations were free to resell publications which had benefited from fiscal immunities and exemptions from customs duties.

7. The provisions of the Convention on the Privileges and Immunities of the United Nations pertaining to communication by radio and telegraph had on the whole been strictly applied, not only by the host States but by the international organizations themselves. There had none the less been a number of cases where the United Nations had had to remind its own agencies or subsidiary bodies of the necessity for the strict application of those provisions. In regard to a case in which an intergovernmental agency had requested the right to use an antenna authorized for United Nations utilization, the Office of Legal Affairs had taken the position that all means of communication authorized for the United Nations should be limited strictly to use by that organization.

8. The report cited certain basic texts on telecommunications, which had been elaborated some time ago. Meanwhile, there had been substantial changes in the international regulation of telecommunications and impressive developments in telecommunications law, which had been reflected in more recent conventions, including successive versions of the 1932 International Telecommunication Convention, as well as in the 1989 ITU Statute. Those developments had undoubtedly had an effect on the way in which international organizations used telecommunications and the Commission should bear that fact in mind in considering the present topic.

9. As to the draft articles in the fifth report, he wondered whether it might not be appropriate to introduce into article 12 a reference to the positive obligation to protect the archives of international organizations. Article 15 stated that

Official correspondence and official communications mean all correspondence and communications relating to an organization and its functions.

Yet, the article did not make any reference to correspondence and communications issued by or intended for an organization. Perhaps the Commission should make the wording of the article more precise. Article 16, on the right of international organizations to use codes and to dispatch and receive their official communications by courier or in sealed bags, stipulated that those matters would be governed by the relevant provisions of the multilateral conventions in force. The article did not, however, refer to any rules, other than those provided for under the conventions, that might be applicable. He wondered about the value of an article that confined itself to citing existing conventions. It might be more appropriate for the article to set out provisions corresponding to those in the conventions in question.

10. Mr. NJENGA congratulated the Special Rapporteur on the meticulous care with which he had prepared his two scholarly reports.

11. With the emergence of international organizations as major actors on the international scene, there had inevitably been an increase in their number and in the variety of activities in which they were engaged. All international organizations should, of course, be deemed to have legal personality since, as stated by ICJ in its advisory opinion in the case concerning *Reparation for injuries suffered in the service of the United Nations*, they were "capable of possessing international rights and duties".⁴ On the other hand, given the diverse nature of their activities and functions, they could not be fully equated to States, for as ICJ had opined in the same case:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights; and their nature depends upon the needs of the community.⁵

It was difficult, therefore, to determine which of the privileges and immunities originally designed for States should be extended *ipso facto* to international organizations, and to what extent.

12. Though international organizations had legal personality both under international law and under the internal law of their member States, their *raison d'être* lay in the functions and purposes for which they had been established. Accordingly, the functional requirements of the organization must be one of the main criteria, if not the only criterion, for determining the extent of the privileges and immunities accorded to it. In view of the wide variety of functions assigned to the various international organizations, however, it was difficult to lay down general provisions within a framework convention of the type contemplated, and the task was further complicated by the fact that the headquarters agreements of most international organizations already provided for a special

⁴ *I.C.J. Reports 1949*, p. 179.

⁵ *Ibid.*, p. 178.

regime to govern their relations with the host country. It was none the less important to establish what might be termed the irreducible minimum to which any international organization should be entitled.

13. It was in the light of those difficulties that he had considered the Special Rapporteur's fifth and sixth reports, together with the proposed draft articles, which were, in his view, justified by the wealth of precedent cited and by the Special Rapporteur's exhaustive analysis.

14. The Special Rapporteur explained the rationale for the protection and safekeeping of archives in the following terms:

In order to preserve, protect and safeguard the confidentiality of these archives and to protect not only their own security and their right to privacy and private property but also the security and privacy of documentation addressed or entrusted to them, particularly by member States, international intergovernmental organizations must enjoy inviolability of their archives.

The right to privacy of the archives was so fundamental that no international organization could function if that right was not respected by the host country. It also reflected a principle which could be regarded as having entered the realm of customary law, as was apparent from the Special Rapporteur's survey of the headquarters agreements of different organizations and of State practice in both peace time and war time. In addition, it was confirmed by the relevant provisions of the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies and, in particular, by the headquarters agreements of the various regional organizations of the United Nations. On the basis of those considerations, draft article 12 was acceptable. To convey more clearly the all-encompassing nature of paragraph 2, however, the Drafting Committee might wish to replace the words "shall be understood to mean", in that paragraph, by "shall include".

15. In regard to that section of the fifth report concerning publication and communications facilities, he agreed that, if an international organization did not enjoy unhindered and uncensored freedom of publication and communication, it would lose its *raison d'être*. That principle was therefore to be regarded as part of the irreducible minimum of privileges for an international organization. As the Special Rapporteur pointed out :

International organizations must have the most extensive communications facilities if they are to function properly: they must be able to communicate freely with member States or other organizations, and be able to propagate and disseminate ideas and the results of the work entrusted to them.

Even in that case, the Special Rapporteur had carefully restricted himself to the functional needs of an international organization by referring to the unhindered dissemination of the results of the work entrusted to the organization: without such freedom of publication an international organization would cease to be functional. The principle had now been generally accepted, as the Special Rapporteur clearly demonstrated with his references to a number of headquarters agreements and also to State practice, which was cited exhaustively in the re-

port. Draft article 13, which took account of that practice, was therefore acceptable.

16. He agreed entirely with the Special Rapporteur that:

Naturally, the means of communication to be made available to international organizations cannot but be identical to those employed by States or diplomatic missions.

Although the principle of assimilating international organizations to diplomatic missions was fully justified, the criterion of functional necessity should none the less caution against extending an unduly elaborate range of means of communication to each and every international organization. Some organizations, such as the United Nations, should, of course, be entitled to the whole range—including diplomatic couriers, postal services and radio stations—but for most international organizations, more modest, albeit secure and uncensored, means of communication would suffice. All that was required, therefore, was to state the general principle and to leave the details to be worked out between the international organization and host government concerned under the headquarters agreement. The cautious approach adopted by the Commission in the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier should be emulated. There was no doubt that it was in the legitimate interests of the host country to adopt appropriate security precautions and to prevent any abuse of the privileges in question.

17. Consequently, he did not disagree with draft articles 14 to 17, but some of them were too elaborate and could be abbreviated by simply stating the basic principle. Article 14, for instance, could stop with the words "diplomatic missions", and he would even omit the last sentence.

18. Article 15 was well balanced and fully acceptable. Article 16 also was satisfactory in general, though he wondered whether it was necessary to refer to the diplomatic courier, which international organizations used only rarely. If an international organization had a particular need to make use of the services of a courier, the matter could perhaps be dealt with under the relevant headquarters agreement. Article 17 contained a virtually indispensable provision and, again, was fully acceptable.

19. As to the Special Rapporteur's sixth report, he fully endorsed the thrust of draft articles 18 to 22. The principle discussed in the report, which concerned fiscal immunities and exemptions from customs duties, was now to be regarded as part of customary law, and it derived from the sovereign equality of States, whereby a State could not be held liable for tax levied by the authorities of another State. That principle should apply fully to international organizations which were, after all, the creation of States: the host country must not do indirectly what it could not do directly and thus derive unjustified fiscal benefit from the fact of having an international organization on its territory. It was, moreover, an absolute principle and should apply to both direct and indirect taxes, and to other fiscal measures. It was only the practical difficulties of collecting the indirect taxes incorporated in the price of goods that perhaps warranted the inclusion of paragraph 1 of draft article 21. Para-

graph 2 of the article was, however, both necessary and acceptable, for when it came to large purchases, international organizations should be entitled to claim and to obtain a refund for indirect taxes.

20. Lastly, it would be of particular assistance at the next session of the Commission if the Special Rapporteur could prepare a brief outline of the remainder of the topic.

The meeting rose at 11.20 a.m.

2235th MEETING

Thursday, 4 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, 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. Shi, Mr. Solari Tudela, Mr. Thiam.

Relations between States and international organizations (second part of the topic) (continued)
(A/CN.4/438,¹ A/CN.4/439,² A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 and

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22³ (continued)

1. Mr. PELLET said that the consideration of the fifth and sixth reports on relations between States and interna-

¹ This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook... 1991*, vol. II (Part One).

² Reproduced in *Yearbook... 1991*, vol. II (Part One).

³ For texts, see 2232nd meeting, para. 2.

tional organizations (A/CN.4/438 and A/CN.4/439 respectively) had not sparked much reaction in the Commission. That certainly did not imply any criticism of the work of the Special Rapporteur, Mr. Díaz González, whose two reports contained a wealth of material based on a meticulous study of practice. The reasons must be sought elsewhere and he could suggest two.

2. First, many members of the Commission did not see the need for the topic because the subject-matter was already covered to a large extent by many conventions relating in particular to each international organization or category of international organizations and it was unlikely that States parties and the international organizations concerned would denounce existing agreements in order to replace them by a future convention. At first sight, therefore, it was difficult to understand the scope of the exercise. However, careful consideration of the reports showed that, although such conventions did exist, their wording was quite different and perhaps an attempt should be made to identify their common denominator, but that did not necessarily mean drafting a convention. In that connection, he welcomed the statement by the Special Rapporteur at the end of his fifth report that he was concerned not to prejudge the final form of the draft articles. However, it was not certain that the existing conventions covered every aspect of the problems which might arise. He regretted that the Special Rapporteur was a bit too cautious in dealing in the articles he was proposing with the "traditional" aspects of the subject, but avoiding newer aspects which probably involved progressive development. He was, for example, not very forthcoming about the use of satellite telecommunications or the highly sensitive problems of privileges and immunities to which the likely increase in peace-keeping operations would give rise. In such new fields, however, it would be well worthwhile to extend and supplement existing instruments by means of treaty provisions. He also thought that it would be useful for the Commission to look into the problem of the settlement of disputes which might arise and which were not given much attention in existing instruments, such as in article VIII of the Convention on the Privileges and Immunities of the United Nations.

3. The second reason for the unease felt by the members of the Commission was that the discussion of the question was probably more within the competence of the Drafting Committee than that of the Commission as a whole. It was very difficult to express general ideas on the topic at such a late stage in the discussion and drafting process. If only to indicate his own interest in the topic and in the work done by the Special Rapporteur, he wished nevertheless to draw the Commission's attention to two points which he had already touched on the previous year, although from a slightly different angle.

4. The first was that, in his view, the Special Rapporteur was rather too generous towards international organizations and too confident that they would not abuse the quite substantial privileges and immunities which they tended to be given. He was less certain than the Special Rapporteur that an international organization should be allowed to decide whether or not to make use of exceptional means of communication. Of course, States should not tell it how to act, but its conduct must

be in conformity with certain legal principles. If exceptional means of communication were not necessary for the organization's activities, it should not only be authorized to waive their use, as stated in the fifth report, but should be duty-bound to do so. In the event of a dispute, there should be methods of settlement to ensure that an international organization did not abuse privileges which must be functional in nature. With regard to the inviolability of the communications of international organizations, the fifth report stated that: "there could be no more favourable system than that which States agree to apply to each other". He shared that view, but the real problem was whether it was right to go as far as the Special Rapporteur seemed to be recommending in the case of international organizations. It must not be forgotten that international organizations were not States, but instruments in the service of States.

5. The second point he wished to stress was that there was a need for a functional approach to the topic; that opinion was apparently shared by most of the members of the Commission and by the Special Rapporteur himself in principle, but perhaps only in principle. That idea was reflected in article 22 which was proposed in the sixth report and according to which: "the terms 'official activity' or 'official use' shall mean those relating to the accomplishment of the purposes of the international organization".

6. By placing that provision at the end of part V of the draft articles, however, the Special Rapporteur seemed to be implying that the meaning would be different in other parts, whereas, in his own opinion, the definition applied to the draft as a whole. It was not sufficient, moreover, and it should be added in general terms that all the privileges enjoyed by international organizations were granted to them in the context of their official activity, as defined. He was thus not sure that the Special Rapporteur had drawn all the necessary consequences from that basic principle. His doubts had been caused by the proposed wording of paragraph 2 of article 15, which defined the official correspondence and official communications of an organization as being all correspondence and communications relating to an organization and its functions. In the French text the verb *concerner* had been used, however, they could not just "concern" the organization; they also had to be necessary to the achievement of its purposes or at least they had to "relate to them" (*s'y rapporter*), to use the wording of article 22. Moreover, by stating in his fifth report that "All communications of international organizations are considered official in so far as the international organizations themselves confer this character upon them", the Special Rapporteur was departing quite radically from the functional approach. It was not certain that an organization could arbitrarily "confer" an official character on its correspondence or communications, which "objectively" had that characteristic if they really related to the purposes of the organization. That was perhaps only a question of terminology, but, if so, the wording used was inappropriate.

7. He was nevertheless not trying to defend the interests of States at all costs against international organizations. Their interests had to be balanced and, in that connection, he felt that article 17 gave too much

weight to the interests of the State in the sense that the principle it enunciated was not counterbalanced by the parallel principle of the protection of the interests of the international organization itself. That principle should be combined with the principle that States must respect and promote the objectives of international organizations.

8. In conclusion, he had two comments which related more to the form than to the substance of the proposed draft articles. The words "in force" in the expression "multilateral conventions in force" in draft article 16 were ill-chosen, since those conventions might be in force without necessarily being binding on all States. If the draft became a convention, States which ratified it would be obliged to accept other treaties which might not be to their liking and, in order to avoid having to do so, they might refrain from becoming parties to the proposed convention. In any event, the end result would be unfortunate. His second comment related to the proposed wording of draft article 21, paragraph 1, which, although taken from or inspired by existing instruments, did not seem very well chosen. It was not appropriate to state that international organizations would not, in principle, claim exemption from consumer taxes. In any case, the expression "in principle" was unnecessary, since organizations either did or did not have the right to claim exemption. Moreover, why should those organizations "claim" a tax exemption? Either they had that right and could therefore exercise it or they did not have it and therefore had no reason to claim anything at all. Those problems were, however, within the competence of the Drafting Committee, which would consider them as and when appropriate, if, as he hoped, draft articles 13 to 22 were referred to it.

9. Mr. PAWLAK said he joined other members of the Commission in congratulating the Special Rapporteur on his fifth and sixth reports on relations between States and international organizations, which contained some very useful and thought-provoking material. He would be grateful, however, if the Special Rapporteur could present an outline of the final set of articles envisaged for the topic so that the Commission might form a general idea of the entire text of the convention or international instrument, to which its work might lead.

10. At the Commission's preceding session, he had already had the opportunity to express his views on the topic under consideration and to emphasize the growing importance of international organizations and of multilateral diplomacy in general in contemporary international relations. He had also said that he supported the main criterion applied by the Special Rapporteur: that the privileges and immunities granted to international organizations and to their staff should reflect only their functional requirements.⁴ He now wished to make some specific comments on articles 12 to 22 proposed by the Special Rapporteur in his two latest reports.

11. Article 12 as proposed in the fifth report was based on similar provisions in existing legal instruments and reflected the main concerns with regard to the required

⁴ *Yearbook* . . . 1990, vol. I, 2177th meeting, para. 29.

inviolability of the archives and documents of international organizations. In his view, two further questions must be taken into consideration. First, archives should include not only documents and other means of conveying information and the necessary files and furniture, but also the premises where they were located, which must have greater protection than other premises of international organizations. Secondly, it would be advisable to consider adding a general description to paragraph 2 of all ways and means of storing and transmitting information rather than giving a list of the various kinds of documents, which in any case would not be exhaustive. Furthermore, he was not convinced by the comparison the Special Rapporteur had drawn between the situation and needs of international organizations and those of States. In his view, international organizations were created by States for particular purposes and their status was defined and limited by States whose tools they were. It was therefore overstating the case to say, that "Like States, international organizations are in permanent communication with member States and with each other", or that "Like States, international organizations are subjects of international law and therefore enjoy inviolability of their archives". International organizations had the right to inviolability of their archives because, without it, they would not be able to fulfil their functions as defined for them by States in documents such as the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations.

12. Turning to the question of the diplomatic bag and the diplomatic courier, he endorsed the position of the Special Rapporteur, who had suggested that article 1 should contain an additional paragraph 2 relating to them. In his view, there was a great deal of similarity between the legal status of diplomatic couriers and bags of international organizations and that of diplomatic bags and couriers of States. International organizations should at least enjoy the same privileges as States in that regard.

13. With regard to draft articles 18 and 22 as proposed in the sixth report, he said that he agreed with the Special Rapporteur's general conclusion that:

... international organizations should, and do enjoy, in the same way as States and the diplomatic missions that represent them, the fiscal immunities indispensable to the effective performance of their official functions.

He would therefore be in favour of the deletion of the last part of article 18 and, if necessary, of the drafting of another article to deal with the obligation of international organizations to cover the costs of public utility services.

14. He had no general comment on article 19 except that paragraph 2 might be unnecessary, since it actually related more to the activities of individuals working for an international organization than to the organization itself.

15. Article 20, on exemption from customs duties, was very important and very much needed. However, the sensitivity of States in that regard must be borne in mind and it might be helpful to use even stronger wording to make it clear that only publications intended solely for official use benefited from the exemption. He also questioned whether it was really necessary to state that international organizations were exempt "in accordance with

the laws and regulations promulgated by the host State". That might lead to abuses, since Governments might adopt such provisions without consulting international organizations, thereby drastically limiting their privileges in that area.

16. He was likewise concerned that the words "in principle" contained in article 21, paragraph 1, might lead States to interpret that provision in various ways and to accord different treatment to international organizations. Furthermore, while international organizations were normally subject to consumer taxes or sales taxes on movable property, with the possible exception of costly modern technical equipment and official vehicles, they should be exempt from that obligation in respect of immovable property because, in such cases taxation would represent a factual limitation on the exercise of their essential functions by the host country, which would thus also be benefiting from the budget contributions paid by the member States to those organizations. He therefore proposed that any reference to the obligation of international organizations to pay taxes on immovable property transactions should be deleted. Lastly, like Mr. Pellet, he considered that article 22 did not belong in part V of the draft, since it enunciated a general principle.

17. Mr. AL-BAHARNA said that international law had long recognized the inviolability of the archives of diplomatic and consular missions. Like States, international organizations were subjects of international law and, accordingly, their archives should also enjoy inviolability. There did not seem to be any reason not to extend the rule in question to international organizations. Moreover, the inviolability of archives was of practical significance to international organizations: if their archives were not confidential, those organizations might not be able to function effectively in international relations. In his fifth report, the Special Rapporteur rightly stated that:

Respect for privacy and the preservation of secrecy constitute the very basis of independence of international organizations, to which they must be entitled if they are to fulfil properly the purposes for which they were established.

It was therefore hardly surprising that the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies and the various headquarters agreements included provisions on the inviolability of the archives of the organizations concerned.

18. The principle of the inviolability of archives required States to protect archives from any external interference. The principle protected international organizations against any order for discovery of documents in the same way as it protected diplomatic missions. The statement by C. W. Jenks, which was quoted in the fifth report, according to which "no order for discovery of documents can be made against an international body corporate which is entitled to inviolability of archives" seemed to be a logical corollary of that principle. It was thus very satisfying to learn, as pointed out by the Special Rapporteur in his fifth report, that "the United Nations interprets strictly the principle of the absolute inviolability of its archives".

19. In respect of draft article 12, as proposed by the Special Rapporteur in that report, he was concerned that the words "in general" in paragraph 1 might give the impression that the documents of international organizations were not always inviolable. He therefore suggested that those words should be deleted. He also proposed that the words "to mean" in paragraph 2 should be replaced by the words "to include". He endorsed the Special Rapporteur's decision to include the definition of archives in the body of the draft article itself instead of in the section on the definition of terms. Except for those drafting amendments, he supported the text of article 12.

20. In chapter III of his fifth report, the Special Rapporteur surveyed the law and practice concerning the publications and communications of international organizations and presented a fairly well rounded and balanced picture of the matter, which called for only a few comments. First, it was clear that publications constituted the lifeblood of international organizations, since it was through publications that international organizations carried out their daily functions. Consequently, international organizations should enjoy freedom of publication. By the same reasoning, they should be exempted from any duties or restrictions whatsoever and he was somewhat dismayed to learn from that report that some countries levied import duties on the publications and documents of international organizations and that there were sometimes restrictions or long delays in clearing them through customs. Arrangements should be made which would avoid delays of that kind and the imposition of import duties on the publications of international organizations.

21. Secondly, in respect of communications, international organizations were generally accorded treatment which was not less favourable than that accorded to the official communications of diplomatic missions. That was clear from the provisions of the multilateral treaties on the privileges and immunities of international organizations cited in the fifth report. However, that report also stated that "The scope of the obligations assumed by the United States towards the United Nations is much more vague". The Commission should thus consider eliminating the "vagueness" in that regard so that the obligations assumed by the Government of the United States of America would be in conformity with the norms of article III, section 9 of the Convention on the Privileges and Immunities of the United Nations.

22. With regard to the means of communication of international organizations, it was evident from the applicable multilateral treaties that their position was identical to that of diplomatic missions. International organizations also could use codes, the diplomatic bag, couriers and telecommunications. Although the majority of the specialized agencies did not use codes, their right to use them could not be denied, as pointed out by the Special Rapporteur.

23. He took it that, in future, the status of the diplomatic bag and the diplomatic courier in international organizations would be governed by optional protocol two to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier relating to the status of the courier and

the bag of international organizations of a universal character.⁵ Accordingly, the proposed draft articles on the status of the diplomatic bag would apply only if the State concerned was a party to that protocol. That situation might not be altogether satisfactory. On that issue, the Special Rapporteur stated in his fifth report that:

The International Law Commission did not consider it appropriate ... to close the loopholes in the Vienna Convention in this area. After extensive discussions, it decided to include the exception to the principle, but only in the case of the consular bag, in the same terms as this is provided for in article 35, paragraph 3, of the Convention on Consular Relations.

As a result, the question whether a diplomatic bag could be opened in certain circumstances remained unanswered. In that connection, he drew attention to the opinion of the Legal Counsel of the United Nations cited in the fifth report. That opinion related to the status of the diplomatic bag in international law, but not to that of the pouch of the United Nations. It was possible that the status of the pouch was analogous, but the question whether the pouch of an international organization was inviolable could not be settled conclusively by reference to the status of the diplomatic bag. In that particular case, it was up to the Commission to define the legal status of the diplomatic bag of international organizations.

24. Draft articles 13 to 17, proposed by the Special Rapporteur in his fifth report, called for several comments.

25. He found the text of article 13 on free circulation and distribution of the publications of international organizations acceptable in principle. He nevertheless wondered whether it would unequivocally cover high-technology materials which were currently used in modern means of communications. If not, it might be desirable to refer to that category of materials in appropriate wording in the draft article.

26. He agreed with the first sentence of article 14, since it was in keeping with the corresponding principles of both the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. He nevertheless had some difficulty in accepting the second sentence, which required the consent of the host State for the installation or use by an international organization of a wireless transmitter. Since the two above-mentioned Conventions did not provide for such a restrictive condition, the Commission could, on the basis of those precedents, consider eliminating it.

27. He welcomed the fact that draft article 15 sought to broaden the protection accorded to international organizations. He nevertheless proposed that paragraph 2 of draft article 15, which defined the expression "official correspondence and official communications", should be deleted and that the draft article should be reformulated to read: "The official correspondence and other official communications relating to an international organization and its functions shall be inviolable."

⁵ See 2232nd meeting, footnote 4.

28. Although he agreed in principle with the text of draft article 16, he questioned whether it was necessary to include the phrase “under the provisions of the multilateral conventions in force governing matters relating to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”, which was found neither in the Convention on the Privileges and Immunities of the United Nations nor in the Convention on the Privileges and Immunities of the Specialized Agencies. If the Commission considered that there should be a reference to some standard, he suggested that the phrase in question should be replaced by the words “under international law”. Moreover, as the law stood at present, there was no universally approved multilateral convention on the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The draft articles on that topic were still in embryonic form. That was why it was safer to refer to international law.

29. In his view, article 17 was more restrictive than the corresponding provision of the Convention on the Privileges and Immunities of the Specialized Agencies. For the reason stated previously, he preferred that provision to the proposed draft article.

30. The sixth report, which was as illuminating and comprehensive as the fifth report, called for a few general comments.

31. The first related to the rationale for fiscal immunities. Why should international organizations be accorded such immunities? The answer to that question had been provided by the Committee of the United Nations Conference on International Organization, which was reproduced in the sixth report, and which stated:

... if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise.⁶

That was the main reason why international organizations should benefit from fiscal immunities. Without them, international organizations might not be able to perform the functions for which they had been established.

32. Secondly, with regard to the extent of fiscal immunities, it was important to know precisely which taxes could be imposed on international organizations and what type of exemptions should be accorded to them. Although international law did not answer that question unequivocally, Article 105, paragraph 1 of the Charter of the United Nations provided a general yardstick for regulating the extent of fiscal immunities of international organizations. It read:

The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

The key words of that provision were “as are necessary for the fulfilment of its purposes”. The Commission should bear that in mind in formulating the legal rules relating to fiscal immunities.

33. His third comment related to the relative importance of the various sources of international law. There were, for example, international conventions containing uniformly applicable rules on the subject, headquarters agreements between international organizations and host States specifying the fiscal immunities to be enjoyed by the organizations; and judicial decisions of national courts interpreting the law on the topic. Those sources did not all have the same normative character and significance. The Commission should therefore be careful in deriving rules from those sources and international conventions should naturally be given pride of place. Article 105 of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies should constitute the primary sources; the other sources could be considered as complementary. The cardinal importance of Article 105 in that connection had been confirmed by the opinions of the Legal Counsel of the United Nations, cited in the Secretariat’s supplementary study on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities.⁷

34. In that light, while the wording of draft articles 18 to 22 was in general satisfactory, there was none the less room for drafting changes. Article 18, for instance, laid down the principle that the property and income of an international organization intended for official activities were exempt from direct taxation, but questions had arisen as to the precise meaning of “direct” and “indirect” taxes and of “official activities”. The Commission might wish to consider explaining the meaning of those terms in the commentary.

35. With regard to article 19, he would like to have some clarification as to the distinction between the expression “for public utility services”, in article 18, and the expression “for specific services rendered”, in article 19. Unless those two expressions referred to quite distinct services, they should be harmonized. He also wondered whether the benefit of article 19 extended to the premises of an organization which were not used for official purposes and functions. In his view, such an extension might not be warranted under the terms of Article 105 of the Charter of the United Nations.

36. Draft article 20 appeared to conform to the rules laid down in international conventions on the privileges and immunities of international organizations. From time to time, however, difficulties had arisen with regard to the meaning of the term “official use” and fears had also been expressed that international organizations might abuse their privileges. That was apparent from the sixth report. Accordingly, it might be desirable to explain fully the meaning and scope of the expression “official use” in the commentary and to indicate how the abuse of privileges by international organizations could and should be prevented. If necessary, a new paragraph could be added to article 20 to indicate the measures of

⁶ See *Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. XIII, p. 705.

⁷ *Yearbook . . . 1985*, vol. II (Part One), Addendum, pp. 151 *et seq.*, document A/CN.4/L.383 and Add. 1-3.

control a State could exercise to prevent the abuse of privileges by international organizations.

37. He welcomed the text of article 21 except for the word "large" in paragraph 2. The corresponding provisions in the conventions on the privileges and immunities of the United Nations and the specialized agencies used the word "important", which was preferable, since it provided for a qualitative test.

Organization of work of the session (*concluded*)*

[Agenda item 1]

38. The CHAIRMAN recalled that, when the Commission had organized its work at the start of the session, it had been envisaged that the Drafting Committee would devote some time to the topic of State responsibility. In the interests of efficiency, however, he suggested, on behalf of the Bureau and with the agreement of the Special Rapporteur, that the Commission should devote some time to the topic in plenary. The report of the Special Rapporteur had been distributed in a number of languages and could be introduced, for instance, at the meeting on Tuesday, 9 July.

39. The Commission had also left in abeyance the question of the action to be taken following the completion of the discussion on the seventh report on international liability for injurious consequences arising out of acts not prohibited by international law. Following consultations with the members of the Bureau, he recommended that, in the time remaining, the Drafting Committee should take up the articles on that topic which had already been referred to it. He invited members' comments on that recommendation.

40. Mr. DÍAZ GONZÁLEZ said that the Drafting Committee was currently working on the draft Code of Crimes against the Peace and Security of Mankind, which had received priority in accordance with the wishes of the General Assembly so that its consideration on first reading could be completed at the current session. The Drafting Committee had still not completed that work and it was not certain that it would be able to do so before the end of the session. He therefore wondered how the Committee could examine other articles, particularly when not all of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law had been examined in sufficient detail in plenary to be referred to the Drafting Committee. The Commission should keep to the programme of work it had adopted. He would none the less like to hear the views of the Chairman of the Drafting Committee on what was feasible for the Committee in that regard.

41. Mr. PELLET said that he shared Mr. Díaz González' concern, though only in part, since he understood that the Drafting Committee needed only a day or two more to complete its work on the draft Code of Crimes. He therefore considered that it could take up another topic. The Bureau's proposal was, however, open to question, in his view. Why should the Drafting Commit-

tee take up international liability for injurious consequences arising out of acts not prohibited by international law before State responsibility? The latter provided the framework on the basis of which liability could be considered. It would be illogical to proceed along the lines proposed by the Bureau. What was more, the debate on the seventh report on the topic showed that it was perhaps not ripe for consideration by the Drafting Committee. He therefore did not support the Bureau's proposal.

42. Mr. CALERO RODRIGUES asked the Chairman of the Drafting Committee how many meetings the Committee could allocate to international liability for injurious consequences arising out of acts not prohibited by international law.

43. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Secretary to the Commission would certainly be in a better position to give an exact reply to that question, but there were five meetings left at most. The Drafting Committee was the Commission's working body and it used whatever time was available to it to review any topic that the Commission might refer to it. The progress it could achieve depended, of course, on the topic and the draft articles it had to consider.

44. Speaking as a member of the Commission, he said that he agreed with Mr. Pellet: it would be preferable for the Drafting Committee to take up State responsibility rather than international liability for injurious consequences arising out of acts not prohibited by international law, even if the draft articles on the latter were awaiting consideration by the Drafting Committee. Without seeking to pass judgement on the relative importance of the two topics, he remembered that, before he had become a member of the Commission, he had criticized it, in the Sixth Committee of the General Assembly, for its inefficiency so far as the consideration of the topic of State responsibility was concerned. There was a risk that the same criticism might be expressed at the forthcoming session of the General Assembly.

45. Mr. CALERO RODRIGUES said it did not seem to have been taken into account that part of the five meetings that were apparently still available to the Drafting Committee would have to be devoted to the Planning Group.

46. The Drafting Committee had worked intensively at the current session and had adopted an unprecedented number of articles, but it did not really have the time to take up the consideration of such a delicate topic as State responsibility except in a very superficial way. He therefore suggested that the meetings scheduled for the Drafting Committee should be reserved for the Planning Group and for the consideration of the Commission's long-term programme of work.

47. Mr. ARANGIO-RUIZ said that, having noted that a number of members had stressed the importance of the topic of State responsibility and had proposed that it should be given priority, he felt bound to intervene as Special Rapporteur for the topic. He had long emphasized to the Chairman of the Drafting Committee and the Chairman of the Commission that the Drafting Committee should devote a number of meetings, as a matter of urgency, to the consideration of five articles in

* Resumed from the 2208th meeting.

his report which, in his view, constituted a whole and dealt with all the substantive consequences of an internationally wrongful act. He had, however, realized that the consideration of those articles would require a certain amount of time and that a brief review of them by the Drafting Committee would not be very helpful from the standpoint of the development of the law on international responsibility. He appreciated the good will which the Chairman of the Drafting Committee had shown in proposing that the topic should be taken up, but it was a very delicate subject which obviously could not be dealt with in three or four meetings and it would therefore be better to abandon the idea. As to the possibility of devoting those meetings to the consideration of the articles on international liability for injurious consequences arising out of acts not prohibited by international law, that topic was, in his view, no less important than State responsibility; those two aspects of responsibility formed part of the same monograph—and a huge one at that—of international law. The meetings in question would therefore not be enough to consider that topic any more than they would be to consider the topic of State responsibility. He would, however, leave that choice to the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law.

48. Mr. EIRIKSSON noted that the question whether the Drafting Committee should consider the draft articles on State responsibility no longer arose, the Special Rapporteur having replied to it in the negative. He would therefore return to the topic of international liability for injurious consequences for acts arising out of acts not prohibited by international law. The Commission was not giving the Drafting Committee any additional work by requesting it to consider draft articles on the topic, since those articles had already been before the Committee for a long time. The only question, in his view, was whether it was a good idea to consider them at the current stage. There was no doubt that it would be useful for the Drafting Committee at least to take stock of the situation, but it would be preferable not to reopen the debate on the matter in plenary.

49. Mr. BARSEGOV said that none of the topics before the Commission was without interest and, during the next five years, it would have the opportunity to give all the importance that it merited to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. For the immediate future, however, it would, in his view, be advisable for the Commission to give priority to State responsibility, since the principles that would be laid down and the concepts that would emerge in the matter would in fact influence the consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

50. The Drafting Committee had only a few more meetings. Bearing in mind that, whenever it took up a new topic, it had to start by clearing the ground, it would be more logical for it to devote the remaining time to the consideration of the draft articles on State responsibility. In fact, the Drafting Committee had still not worked on the topic of international liability for injurious consequences arising out of acts not prohibited by interna-

tional law and, in all probability, it would have to start afresh, in view of the arrival of new members of the Commission.

51. Mr. SHI said that he attached great importance to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. For the reasons stated by Mr. Calero Rodrigues and other members, however, he considered that the Bureau's proposal that the Drafting Committee should take up the consideration of the topic was unrealistic. In previous years, no afternoon meeting had been held in the penultimate week of the session. There were added reasons for following the same course in 1991, as the Commission's report to the General Assembly was very voluminous. It dealt with three topics at length: jurisdictional immunities of States and their property, the law of the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. The members of the Commission should have the time to study that particularly important report carefully. If the Drafting Committee was to meet to consider the topic proposed by the Bureau, that time would not be available and the discussion on the adoption of the report would suffer.

52. Mr. JACOVIDES said that he agreed with Mr. Pellet, Mr. Pawlak and Mr. Barsegov on the importance of the topic of State responsibility. He was disappointed to note that, once again, the Commission had not made any progress on a question that had been under consideration for such a long time. If he had understood correctly, the Special Rapporteur for the topic would simply introduce his report and there would be no substantive discussion in plenary. He would therefore have liked the question at least to have been taken up in the Drafting Committee. Since the Commission had a very full report to adopt at the current session and would also have to consider in plenary the question of the long-term programme of work, however, he realized, but very much regretted, that that would not be feasible.

53. The CHAIRMAN, speaking as a member of the Commission, said he had always stressed that the Commission should complete its work on State responsibility as quickly as possible. He trusted that it would be able to do so during the next quinquennium.

54. Mr. BEESLEY, after giving some technical details concerning the organization of work of the Planning Group, said that it was absolutely essential to complete the work on the topic of State responsibility, in which the Commission had been engaged for over 25 years, as quickly as possible. If the Special Rapporteur for the topic considered that the Drafting Committee did not have time to consider properly the five substantive articles he had proposed, however, he would abide by that decision. It was none the less a matter of regret to him that, on a topic of such importance, the Commission would have to be content with the introduction of the Special Rapporteur's report in plenary.

55. As to whether the Drafting Committee should start its consideration of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he suggested that the Commission should request the view of the Special Rap-

porteur on that topic. The Special Rapporteur apparently felt that the members were largely in agreement on the substantive articles that he regarded as fundamental. In that case, it should not be too difficult for the Drafting Committee to arrive at a consensus on those articles, unless they had to be redrafted. Whatever decision was taken, however, he reminded the Commission that those articles were currently before the Drafting Committee. In 1988, the Commission had referred draft articles 1 to 10 proposed by the Special Rapporteur to the Drafting Committee. In 1989, the Special Rapporteur had submitted a revised version of those articles, reduced in number to nine, and the Commission had again referred them to the Drafting Committee.

56. Since the Drafting Committee already had before it the key articles on the subject, in both the original and the amended versions, it did not seem impossible to him that the Drafting Committee could do useful work on them during its five remaining meetings.

57. Mr. MAHIOU pointed out that the Drafting Committee had an extremely heavy workload because it had to finish preparing the text of the draft Code of Crimes against the Peace and Security of Mankind, a task which was turning out to be more difficult than anticipated. If the Commission wanted to complete its consideration of those draft articles on first reading, it had to avoid reopening the debate in plenary because of flaws in the text.

58. Time for the Planning Group also had to be taken into consideration. As Mr. Barsegov had rightly pointed out, moreover, each new subject referred to the Drafting Committee required a preliminary clearing of the ground and, under those conditions, he doubted whether the Drafting Committee would be able to complete its consideration of even a single article on international liability for injurious consequences arising out of acts not prohibited by international law. It was therefore not physically possible to begin considering that subject.

59. Mr. HAYES said he agreed with Mr. Mahiou that it was better not to adopt anything at all rather than to consider only one or two articles. The Chairman of the Drafting Committee had shown great dedication in proposing that the Committee should consider State responsibility, but he shared the view of the Special Rapporteur on that topic, namely, that there was not enough time left for any real work to be done. The reason the Commission had been unable to make progress on the topic of State responsibility at its current session was that it had had to give priority to other issues on which it had been requested to focus in particular. He drew attention to a point which seemed important to him: the Commission had been invited to submit a progress report in 1991, an "overall assessment of the current status of the topic" of international liability for injurious consequences arising out of acts not prohibited by international law. How much work had been done on that report? How did the Special Rapporteur intend to prepare it? Would he be assisted in his task by a special group? Would it be adopted by the plenary and would it be included in the Commission's annual report?

60. Mr. Sreenivasa RAO said that the Commission's procedural debate might be regarded by some as a waste

of time, but, in fact, it was a very important discussion which the Commission should engage in more often.

61. It was true that, at the start of the current quinquennium, he had been the first to say that the members of the Commission should not think that they had a lifelong mandate and to stress that the Commission had to carry out as much work as possible on each of its agenda items. In view of its workload, however, the Commission had had to make choices. State responsibility was, of course, a very important issue, but the Commission should not feel guilty that the topic had been under consideration for so long. It had decided to speed up its work on the draft Code of Crimes against the Peace and Security of Mankind, jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses and, in those areas, had done a great deal of work of which it could be proud. The Drafting Committee did in fact have little time left and it could be asked how that time should best be used, but account also had to be taken of the adoption of the report, which would be very long in 1991 because of the very detailed commentaries accompanying each article. The 10 or so meetings originally set aside for the consideration of the report would, in his view, not be nearly enough to produce a document which would not simply summarize contradictory viewpoints, but would be both detailed and concise and genuinely represent the essence of the joint efforts that had been made. If there was any time left, he therefore suggested that it should be used for the adoption of the report.

62. Mr. BARBOZA, speaking as Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that, in the first place, he had not made the proposal that the Drafting Committee should begin consideration of the draft articles which had been referred to it. He was of course at the Commission's disposal: if it felt that the Drafting Committee was able to consider those articles, he would not fail to offer it all possible assistance. It nevertheless seemed to him that, in view of the extremely limited number of meetings that might be available to the Drafting Committee before the end of the session and the amount of work it had already done at the current session, there was no point in it undertaking that task.

63. At the same time, he very much hoped that, at the next session, the Drafting Committee would at least begin its consideration of the draft articles in question. That did not mean that the topic which had been entrusted to him was more or less urgent than that of State responsibility. Both were important, the first by its very nature and the second because it had been on the Commission's agenda for many years. Both topics should therefore be given priority during the next term of office. It should be recalled that that had not been the case during the current quinquennium because the Commission had decided to focus on work that was already well advanced on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, jurisdictional immunities of States and their property, the draft Code of Crimes against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses.

64. In reply to Mr. Hayes, he said that it might be useful if, in addition to the customary summary of the debate on the topic, the Commission's report to the General Assembly included an analysis of the outcome of that debate. He was willing to collaborate with any working group which might be entrusted with that task.

65. Mr. DÍAZ GONZÁLEZ, referring to the working methods of the Commission provided for under its Statute, said that, in considering a topic, the Commission first set up a working group responsible for submitting a report to the Commission on such matters as the scope of the topic in question and the plan of work, and it then appointed a special rapporteur who acted as a kind of adviser. At the same time, each member of the Commission became in his turn an adviser to the special rapporteur through the comments he made during the consideration of the reports. A detailed summary of the Commission's work on the topic, prepared by the special rapporteur himself, was considered in depth by the Commission before being incorporated in its annual report to the General Assembly.

66. He personally had full confidence in the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law, who had demonstrated his mastery of the topic and his skill in advising the Commission in that regard. He also had full confidence in the Special Rapporteur's ability to decide whether there was a need to consult with experts in the field, either from within or outside the Commission, as provided for under the Commission's Statute. He therefore saw no reason, whatever arguments had been put forth, to appoint a working group to draft the relevant chapter of the Commission's report to the General Assembly or any other report to the General Assembly on the topic, which would in any case first have to be approved by the Commission. That would simply be a waste of the Commission's time, which was in such short supply.

67. He did not mean that the topic, which was closely linked to that of State responsibility, was not important enough to warrant special attention. All the topics were important at one time or another; however, it was States which attached importance to a topic, not the Commission.

68. Mr. PAWLAK proposed that, in view of the comments made by Mr. Shi and Mr. Mahiou, among others, the original programme of work should be amended by moving up the consideration of the draft report to the General Assembly to Thursday, 11 July 1991, in order to give the Commission two additional meetings for that purpose.

69. Mr. BARSEGOV said that the Commission's working methods had thus far been very effective. He emphasized that every special rapporteur was entirely free to assess the Commission's work on his topic by availing himself, if he so wished, of the services of a particular member of the Commission. However, it was that assessment which would be included in the Commission's report to the General Assembly, not the opinion of a working group of any kind, because, otherwise, an unacceptable precedent would be set.

70. He was therefore formally opposed to the establishment of a working group to submit conclusions, which would not be those of the entire Commission, to the General Assembly.

71. Mr. SOLARI TUDELA said that, since he had understood that the Special Rapporteur had withdrawn his proposal to establish a working group, he was puzzled by the discussion.

72. Mr. BARBOZA said he wished to make it clear once again that he was not the author of the proposal to set up a working group to assist him in evaluating the debate on the topic. If he had accepted the proposal, it was solely in order to submit an indisputably objective evaluation to the General Assembly.

73. Mr. Solari Tudela's hesitation was probably the result of the fact that the establishment of two different working groups had been proposed. In introducing his report at the 2221st meeting, he himself had suggested that, with a view to UNCED, a working group should be set up to study the articles on principles referred to the Drafting Committee and to submit a report to the Commission for approval. When that suggestion had been taken up at a later stage, it had been too late to give effect to it. There had also been a proposal to establish a working group to assess the status of the work on the topic and that was the proposal to which he had objected.

74. The CHAIRMAN, summing up the discussion, said, first, that the Drafting Committee would devote its scheduled time to the draft Code of Crimes against the Peace and Security of Mankind and the time not normally used for the plenary would be allotted to the Planning Group or to the Working Group on the long-term programme of work of the Commission. Secondly, Mr. Pawlak's proposal appeared to be acceptable, subject to technical considerations. Thirdly, it was understood that, during the next quinquennium, priority would be given to the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law.

75. Mr. KOTLIAR (Secretary to the Commission) said that Mr. Pawlak's proposal did not give rise to any particular problems.

Jurisdictional immunities of States and their property (concluded)* (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/XLIII/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING⁸ (concluded)

76. The CHAIRMAN proposed that, in accordance with article 23 of its Statute, the Commission should recommend to the General Assembly the convening of an international conference of plenipotentiaries to review

* Resumed from the 2221st meeting.

⁸ For texts of draft articles adopted by the Commission on first reading, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 7-22.

the draft articles on jurisdictional immunities of States and their property and to draw up a convention on that topic. If he heard no objection, he would take it that the Commission wished to adopt a recommendation to that effect and to entrust the drafting of the recommendation to the secretariat, on the understanding that the Commission would take a decision on that text during its consideration of the chapter on that topic contained in its draft report to the General Assembly.

It was so agreed.

The meeting rose at 12.30 p.m.

2236th MEETING

Friday, 5 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, 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. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (concluded)
(A/CN.4/438,¹ A/CN.4/439,² A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF
THE SPECIAL RAPporteur (concluded)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22³ (concluded)

¹ This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook... 1991*, vol. II (Part One).

² Reproduced in *Yearbook... 1991*, vol. II (Part One).

³ For texts, see 2232nd meeting, para. 2.

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion on his fifth and sixth reports (A/CN.4/438 and A/CN.4/439), thanked members who had participated in the debate for their objective and helpful comments. He said that all those who had spoken had, by and large, agreed, both with the contents of the reports and with the draft articles proposed. Practically all the changes suggested were drafting improvements and would be referred to the Drafting Committee for any necessary action.

2. The idea had been advanced that communications facilities should also cover computers and electronic equipment. As he saw it, the reference to "and other communications" in article 14 covered the matter. Possibly the point might be made clearer by using the formula "and other means of communication". One member had commented on the use of the terms "secret" and "secrecy" in the fifth report. There was of course no intention of introducing any idea of mystery. The purpose was simply to refer to confidential matters, knowledge of which was confined to a very restricted circle. For example, a State secret, sometimes described in English as "top secret", was not known to the public in general.

3. Mr. Roucounas (2234th meeting) had suggested that the draft articles should refer to the use of a flag or emblem by an organization. It was doubtful whether all intergovernmental organizations required a flag. As to the use of an emblem, the cases that had arisen had been solved, curiously enough, by applying the Paris Convention for the Protection of Industrial Property. His own intention had been to deal with the subject along with the right to issue laissez-passer, at the end of the whole draft.

4. Two members had spoken on the content of the topic and on the future work on it. In that connection, he drew attention to the outline adopted by the Commission in its report to the General Assembly at its forty-second session.⁴ The outline established the content and thrust of the topic and was reproduced in a footnote to his sixth report.

5. One member had criticized the use of the words "in principle" in paragraph 1 of draft article 21. Actually, that restrictive wording ran counter to his own more liberal approach to the matter of the privileges and immunities of international organizations, but he had retained it because it was in conformity with State practice. A similar restriction was found, for example, in article II, section 8 of the Convention on the Privileges and Immunities of the United Nations and in article III, section 10, of the Convention on the Privileges and Immunities of the Specialized Agencies. The Drafting Committee could decide whether to retain the words "in principle".

6. Lastly, as all the other comments had concerned drafting points, he suggested that the best course would be to refer articles 12 to 22 to the Drafting Committee for consideration in the light of the discussion.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 12 to 22 to the Drafting Committee.

It was so agreed.

⁴ *Yearbook... 1987*, vol. II (Part Two), document A/42/10, p. 52, footnote 182.

Draft Code of Crimes against the Peace and Security of Mankind⁵ (continued)* (A/CN.4/435 and Add.1,⁶ A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE

8. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles in part one of the Draft Code of Crimes against the Peace and Security of Mankind as proposed by the Drafting Committee (A/CN.4/L.459 and Corr.1).

9. Mr. PAWLAK (Chairman of the Drafting Committee) expressed gratitude to all those who had contributed to the work of the Drafting Committee during the 22 meetings devoted to the topic, as well as to the Special Rapporteur, whose constructive spirit and flexibility had made it possible to arrive at another organized set of draft articles to be presented to the General Assembly at its forthcoming session. He also thanked the secretariat for its valuable cooperation.

10. The Drafting Committee's report consisted of two parts: the first (A/CN.4/L.459 and Corr.1) contained part one of the draft (articles 1 to 14); the second (A/CN.4/L.459/Add.1), devoted to part two of the draft (articles 15 to 26), would be distributed shortly.

11. Because a number of changes were being suggested for articles adopted at previous sessions, the Drafting Committee did not find it advisable to cover in separate documents the articles adopted at the present session and those adopted at previous sessions. It was, instead, presenting its work in the normal sequence of the articles and, in each case, he would indicate whether an article constituted a modified version of a previously adopted text or a new formulation worked out at the present session.

12. When the Committee had started its work on the topic at the present session, it had had before it various elements of the future Code, which had been painstakingly identified and agreed upon over the past four or five years. In that connection, he paid tribute to the valuable work of former Chairmen of the Drafting Committee. At the present session, the Committee, in addition to completing the catalogue of crimes to be covered, had organized the various existing elements into a coherent whole, and had worked out formulations concerning some questions relating to defences. It had tried to devise solutions for a number of basic outstanding issues which had hitherto made it difficult to visualize the final product. The draft now before the Commission still left a few questions unanswered, but it provided a complete picture on which all concerned would, it was to be hoped, find it easier to make useful comments.

13. The Committee considered that the Code should be divided into parts, rather than chapters, as had initially been envisaged. With regard to part one, it suggested that the title "Introduction" should be deleted and that the part should be subdivided into chapters. The headings "Definition and characterization" for chapter I and "General principles" for chapter II remained unchanged.

ARTICLE 1 (Definition)

ARTICLE 2 (Characterization)

14. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for the title of chapter I and for articles 1 and 2, which read:

PART ONE

CHAPTER I

DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

15. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee was not proposing any changes in those two articles.

16. The CHAIRMAN pointed out that no action was needed on articles 1 and 2 since the texts had been adopted previously in their present form.

ARTICLE 3 (Responsibility and punishment)

ARTICLE 4 (Motives)

ARTICLE 5 (Responsibility of States)

17. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for the title of chapter II and for articles 3, 4 and 5, which read:

CHAPTER II

GENERAL PRINCIPLES

Article 3. Responsibility and punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in articles ...] is responsible therefor and is liable to punishment. "Attempt" means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

* Resumed from the 2214th meeting.

⁵ 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.

⁶ Reproduced in *Yearbook ... 1991*, vol. II (Part One).

Article 4. Motives

Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

Article 5. Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

18. Mr. PAWLAK (Chairman of the Drafting Committee) said that articles 3, 4 and 5 were being presented together in view of their interrelationship. At the previous session, the articles referred to the Drafting Committee had included three provisions, namely articles 15, 16 and 17, dealing respectively with complicity, conspiracy and attempt. The Committee, after a long discussion, had felt that those three articles should be examined in the context of article 3 previously adopted by the Commission. That article entitled "Responsibility and punishment" dealt in its two paragraphs with three issues: (a) an individual who committed a crime against the peace and security of mankind was responsible and should be punished; (b) responsibility for the crime was not affected by any motive invoked by the accused and not covered by the definition of the crime; and (c) prosecution of an individual for a crime did not relieve a State of any responsibility under international law for an act or omission attributable to it.

19. The second and third issues, in the Committee's view, also applied to complicity, conspiracy and attempt, and it had therefore decided to restructure article 3 so as to limit article 3 proper to the various forms of participation in a crime under the Code, then to have a separate article (article 4) dealing specifically with the irrelevance of any motives invoked by the accused to the determination of responsibility and punishment, and finally, an article 5, on the responsibility of a State independent of that of the individual whom it prosecuted for a crime.

20. Article 3 dealt with responsibility and punishment. Paragraph 1 was a simplified version of paragraph 1 of the original article 3⁷ and provided for the responsibility and punishment of an individual who committed a crime against the peace and security of mankind. Paragraph 2 was new; it dealt with complicity, conspiracy and incitement, and it incorporated the idea and some of the wording used in original articles 15 and 16 as proposed by the Special Rapporteur. There had been some discussion in the Drafting Committee as to whether complicity was a concept broad enough to include conspiracy and incitement. The issue had been raised more particularly in view of the fact that there seemed to be no clear legal term in French, for example, for "conspiracy". Some English terms which had their legal roots in common law jurisprudence did not appear to have precise equivalents in other languages and systems. However, by the end of the discussion, the Committee had decided to mention other forms of participation since they had been considered in the Nürnberg Principles and in some conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide, as being independent of complicity. In doing so, the Committee had

decided to define complicity, which was a legal term with equivalent meaning in most legal systems, but not to define conspiracy. It referred instead to conspiracy in the same way as it had been mentioned in article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide.

21. Paragraph 2 began by defining complicity as aiding, abetting or providing the means for the commission of the crime. There had been some discussion as to whether complicity *post facto* was also included in that definition. Although the definition of complicity was not entirely clear in that respect, most members of the Committee had felt that *post facto* complicity should not be included, for the article and the whole Code dealt with the commission of a crime and not with what happened afterwards.

22. For the reasons already explained, conspiracy was not defined and was simply mentioned. Similarly, paragraph 2 referred only to incitement, which was also mentioned in the Convention on the Prevention and Punishment of the Crime of Genocide but was qualified by the words "public and direct". In the opinion of the Drafting Committee, incitement to commit a crime against the peace and security of mankind did not need to be limited to public incitement, since that would be too restrictive for the purposes of the Code. Incitement none the less had to be direct.

23. Paragraph 3 dealt with attempt, a separate form of participation. The Committee took the view that even an attempt to commit a crime under the Code was of sufficient gravity to justify responsibility and punishment. Paragraph 3 provided for that responsibility and for punishment of an individual who attempted to commit a crime and it also defined the term "attempt", which was well known in criminal law in all legal systems.

24. Square brackets had been placed around the words "as set out in articles . . .", in the first sentence of paragraph 3, the purpose being to bring to the attention of Governments an issue on which the Committee had not reached agreement, namely, whether an attempt to commit any of the crimes under the Code should be punishable. In further explanation, he pointed out that, under paragraphs 1 and 2 the commission of any of the crimes in the Code, as well as acts of complicity, conspiracy or incitement, would entail liability and were punishable. There was a general consensus in the Committee on that point, but not with respect to an attempt to commit every single one of those crimes. For example, some members did not agree that an attempt to commit the crime of threat of aggression should be punishable.

25. The Committee had felt that it would be appropriate to elicit the views of Governments and the best way to do so was to use square brackets for the phrase in question. In addition, the commentary would explain the matter and would indicate that the question would be reconsidered on second reading, in the light of Government comments.

26. Article 4 was taken from paragraph 1 of the original version of article 3. As he had explained earlier, the article had been restructured. The irrelevance of any motives invoked by the accused, which in the original ver-

⁷ For text, see *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

sion of article 3, paragraph 1, applied to an individual who had committed a crime, now applied also to any person who aided, abetted, provided the means for or conspired in or directly incited or attempted the commission of any of the crimes listed in the Code.

27. Article 5 was paragraph 2 of the former article 3. It indicated the responsibility of a State under international law, independently of the responsibility of the accused, even when the latter was prosecuted for the crime.

28. Mr. ROUCOUNAS noted that the word *Introduction* appeared before the title of chapter I, in the French version of document A/CN.4/L.459, but not in the English version. It should be deleted. He did not understand why, in the French version of article 3, paragraph 3, the word *tentative* appeared in quotation marks. The meaning of “attempt” was already clear from the preceding sentence.

29. Mr. RAZAFINDRALAMBO, commenting on the French version, said that article 5 used the words *un acte ou une omission* whereas the term employed in article 2 was *une action ou une omission*. For the sake of consistency the same wording should be used. Moreover, the term *acte* covered both acts and omissions, and the reference to omissions could therefore be deleted.

30. Mr. SOLARI TUDELA said that the Spanish version of article 3, paragraph 4 contained serious mistakes and he suggested that it should be redrafted by the Spanish-speaking members of the Commission, in conjunction with the secretariat.

31. Mr. PAWLAK (Chairman of the Drafting Committee) said he agreed to the deletion, in the French version, of the word *Introduction* and the quotation marks appearing round the word *tentative* in article 3. The Spanish version should be checked with the secretariat by the Spanish-speaking members.

Articles 3 and 4 were adopted, subject to any drafting changes required in the Spanish version.

32. Mr. GRAEFRATH, referring to Mr. Razafindralambo's suggestion to delete the words “or omission” from article 5, said that an act or omission as mentioned in that article related to the responsibility of States, not individuals. For the sake of clarity, the text of article 5 should be left unaltered.

33. Mr. BARSEGOV and Mr. JACOVIDES said that they agreed with Mr. Graefrath.

34. Mr. RAZAFINDRALAMBO said that, since the wording used in the English version of article 2 and article 5 was identical, the disparity in the wording of those two articles in the French version was inexplicable.

35. Mr. THIAM (Special Rapporteur) said that the reference to *une omission* in the French version of article 5 should not be deleted. Perhaps the French version should refer to *actions ou omissions*.

36. Mr. MAHIOU asked the Special Rapporteur why the term *action* had been used in the French version of article 2, although the term used later in the draft articles

in connection with the list of crimes (articles 15 to 26) was *acte*.

37. Mr. THIAM (Special Rapporteur) said the Drafting Committee had already discussed at length whether the term *acte* should be used throughout the draft to designate both acts and omissions, but the view was taken that the word was not sufficient in itself to cover the characterization of crimes.

38. Mr. TOMUSCHAT said the wording of article 5 should correspond with article 3 of part 1 of the topic of State responsibility, which read:

There is an internationally wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

Accordingly, the term “action” should be used in article 5.

39. Mr. PAWLAK (Chairman of the Drafting Committee) commented that the draft articles on State responsibility had not yet been adopted on second reading. The term “act” should be retained in the English version of article 5 on first reading. It was the term employed elsewhere in the draft, including article 2, and its use in the English version did not affect the French version.

40. Mr. TOMUSCHAT said that, although the draft articles on State responsibility had not yet been adopted on second reading, they were a carefully devised system in which an “act” was an overall concept, encompassing both actions and omissions. In the draft Code, article 5 alone referred to the conduct of a State; hence, in that article alone, the term “act” should be replaced by “action”, to reflect the specific situation of State conduct.

41. Mr. AL-BAHARNA said that article 5 should be left unchanged. The word “act” was the correct term to use in criminal law, in which the expression “actions or omissions” was unknown. The Commission was not concerned at present with the draft articles on State responsibility, and might in any case make changes to that draft.

42. Mr. CALERO RODRIGUES said that the term “act” could be used in both positive and negative contexts to refer to both actions and omissions, and it was therefore the correct term to use.

43. Mr. SEPÚLVEDA GUTIÉRREZ said that *un acto o una omisión* in the Spanish version, was correct from the viewpoint of Spanish terminology in criminal law. The term *acción* would have no meaning in that context.

44. Mr. BEESLEY said the question should be left to the Special Rapporteur and the Drafting Committee. He was inclined to agree with Mr. Al-Baharna that the wording of the draft should reflect customary legal usage as far as the English version was concerned.

45. Mr. EIRIKSSON said he did not accept the use of the term “action” in the draft articles on State responsibility. He preferred to leave the text of article 5 unaltered; it could usefully be accompanied by a commentary.

46. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that article 5 should be left unchanged.

Article 5 was adopted.

ARTICLE 6 (Obligation to try or extradite)

ARTICLE 7 (Non-applicability of statutory limitations)

ARTICLE 8 (Judicial guarantees)

47. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 6, 7 and 8, which read:

Article 6. Obligation to try or extradite*

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 do not prejudice the establishment and the jurisdiction of an international criminal court.

* This article will be reviewed if an international criminal court is established.

Article 7. Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

Article 8. Judicial guarantees

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular, he shall have the right to be presumed innocent until proved guilty and have the rights:

(a) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(b) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt.

48. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee was not suggesting any changes for articles 6 and 7, which had initially been adopted as articles 4 and 5. As to article 8, previously numbered 6, the Committee suggested incorporating in the opening paragraph a reference to the right to be presumed innocent, as well as the phrase introducing the enumeration of the rights of the accused. The resulting

presentation of the article would be closer to usual practice.

49. The CHAIRMAN said that no action was required on articles 6 and 7, the texts of which had been adopted previously in their present form; only the numbering had been changed.

Article 8 was adopted.

ARTICLE 9 (*Non bis in idem*)

ARTICLE 10 (Non-retroactivity)

50. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 9 and 10, which read:

Article 9. Non bis in idem

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.*

2. Subject to paragraphs 3, 4 and 5, no one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by an international criminal court* or by a national court for a crime under this Code if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(a) if the act which was the subject of the previous judgement took place in the territory of that State; or

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

* The reference to an international criminal court does not prejudice the question of the establishment of such a court.

Article 10. Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act, which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

51. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee was suggesting two minor changes in article 9: the inclusion of the word "or" at the end of paragraph 4 (a), and the substitution of the phrase "no one shall be tried or punished" for the phrase "no one shall be liable to be tried or punished". The latter change had inadvertently been omitted from document A/CN.4/L.459. More important, the Committee was suggesting the elimination of the square brackets which had initially been placed around paragraph 1 as well as around the phrase "by an international criminal court or" in paragraph 3. In its view, retaining the brackets would give the impression that the fundamental principle enunciated in paragraph 1 was being called in question. Although it was aware that the final wording of the article depended on the future decision on the establishment

of an international criminal court, the Committee preferred to append a footnote to that effect to article 9, rather than to give the impression that the *non bis in idem* principle was not generally acceptable. The Drafting Committee was not suggesting any change for article 10.

52. Mr. EIRIKSSON said that the comma after the word “act”, in paragraph 2 of article 10, should be deleted.

53. Mr. HAYES, supported by Mr. AL-KHASAWNEH and Mr. BEESLEY, expressed a reservation regarding article 9. Regrettably, the draft articles did not contain an adequate reflection of the *non bis in idem* principle; indeed, it had been said that there was no such principle in international law. The principle must, however, be adequately reflected in the draft, since the Commission was in the process of creating an international code of criminal law.

54. Mr. MAHIU pointed out a discrepancy in the French version of article 9, which referred to the international criminal court as a *tribunal*, although the term *jurisdiction* was used elsewhere.

55. The CHAIRMAN invited the Commission to adopt article 9 and said that no action was required on article 10, the text of which had been adopted previously in its present form; only the numbering had been changed.

Article 9 was adopted.

ARTICLE 11 (Order of a Government or a superior)

ARTICLE 12 (Responsibility of the superior)

ARTICLE 13 (Official position and responsibility)

56. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 11, 12 and 13, which read:

Article 11. Order of a Government or superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

Article 12. Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

Article 13. Official position and responsibility

The official position of the individual who commits a crime against the peace and security of mankind and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

57. Mr. PAWLAK (Chairman of the Drafting Committee) commenting on article 11, said that, in his fifth report,⁸ the Special Rapporteur had presented an article

dealing with exceptions to the principle of responsibility (article 9), establishing, *inter alia*, that the order of a Government or of a superior created an exception to criminal responsibility, provided a moral choice was in fact not possible for the perpetrator. The Drafting Committee had deferred action on that article until the present session and its discussion had revealed many divergent views, as he would explain when the Commission came to consider article 14. However, there was general agreement on the principle, upheld both in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal,⁹ and in the 1954 draft Code, that the perpetrator of a crime against the peace and security of mankind was not, as a rule, relieved of criminal responsibility on the ground that he had acted on the order of a Government or of a superior. The Committee considered that that principle was of such importance in the context of the Code that it should be enunciated in the draft even at the present stage, although the question of defences had yet to be fully resolved. The text of article 11 closely followed article 4 of the 1954 draft Code, except for a few editorial changes. As for its place in the draft, it was thought that the articles dealing with the implications, in terms of criminal responsibility, of the hierarchical position of the perpetrator should be regrouped to form a sequence of articles 11, 12 and 13. Articles 12 and 13, formerly 10 and 11, had been left unchanged, except that the word “criminal”, before “responsibility”, in the title of article 13, had been deleted for consistency with the title of article 12.

58. Mr. AL-BAHARNA said that the indefinite article should be inserted before “superior”, in the title of article 11.

59. Mr. EIRIKSSON said that there was some linkage between articles 11 and 14, as the Chairman of the Drafting Committee had indicated. Neither article could be completed without the other, because together they formed a subgroup dealing with the defence of coercion, which had not yet been fully developed in article 14. Hence there might be a need to return to article 11. As to article 13, he thought it had been agreed that the text would refer to “an individual”, not “the individual”. Moreover, there should be a comma after “the peace and security of mankind”.

60. Mr. ROUCOUNAS said that, in view of the particularly important and complex nature of articles 9 and 11, he would like to receive the commentary to those articles as quickly as possible.

61. The CHAIRMAN said that due note had been taken of that request.

62. Mr. BEESLEY said that he attached such importance to article 11 and to the principle it enunciated that he was prepared to accept the article there and then, even if it was to be amplified later. In his view, the defence in question was so unacceptable that it was essential to limit it.

Article 11, as amended, was adopted.

⁸ *Yearbook*...1987, vol. II (Part One), pp. 1-10, document A/CN.4/404.

⁹ See 2207th meeting, footnote 5.

63. The CHAIRMAN said that no action was required on article 12, the text of which had been adopted previously in its present form; only the numbering had been changed.

Article 13 was adopted.

64. Mr. BEESLEY said that he found it somewhat curious to speak of an individual who committed a crime and then to discuss possible defences. That issue could, however, be discussed on second reading.

ARTICLE 14 (Defences and extenuating circumstances)

65. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 14, which read:

Article 14. Defences and extenuating circumstances

1. The competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime.

2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

66. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as already indicated, the Drafting Committee's point of departure in working out article 14 had been article 9 as proposed by the Special Rapporteur in his fifth report.¹⁰

67. The Committee had discussed at some length a revised version of article 9 proposed by the Special Rapporteur. On most aspects of the text, however, opinions were divided. Self-defence, for example, was viewed by some members as having a place in the draft and by others as irrelevant. Of those who supported its inclusion, some wanted to confine it to the case of aggression, while others considered that it should apply to all crimes. Of those who viewed self-defence as irrelevant in that context, some had observed that use of force committed in accordance with the Charter of the United Nations did not qualify as aggression, whereas others maintained that the acts covered by the Code were of such a nature that they could not conceivably be committed in self-defence. A second aspect of the question of defences which had been discussed on the basis of the Special Rapporteur's revised text was whether coercion, state of necessity, *force majeure* and error should be available as defences to the perpetrators of war crimes provided specific conditions were met. In the Committee's opinion, state of necessity, *force majeure* and error were highly complex concepts that should be analysed in depth before any conclusion could be drawn as to their applicability in relation to crimes against the peace and security of mankind in general and to war crimes in particular. A third element of the Special Rapporteur's text related to the unavailability of defences to the perpetrators of specific crimes. As to the fourth element, the order of a superior, as he had already indicated, the Committee had dealt with it under a separate article, namely article 11, which the Commission had just adopted.

68. On all other aspects of the question of defences, however, the divergence of views could not be recon-

ciled in the Drafting Committee. It had therefore felt that, because of the complexity of the issues involved, it should at that stage work out a general clause that would leave it to the court to determine the admissibility of defences under the general principles of law on defences, in the light of the character of each crime. Similarly, paragraph 2 of article 14 left it to the court to take account of extenuating circumstances, where appropriate, in passing sentence. That article was not intended to be exhaustive where the question of defences and extenuating circumstances were concerned, but rather to serve as a reminder that the question should be addressed again on second reading, when more specific rules could be formulated.

69. The Drafting Committee was aware that, although defences and extenuating circumstances both had implications regarding the extent of the criminal responsibility of the perpetrator, they were very different concepts. It had dealt with them tentatively in two separate paragraphs of the same article, which was itself provisional in nature.

70. Some members of the Committee had expressed reservations about paragraph 2 because they had considered that the question of extenuating circumstances should be dealt with later, rather than in the context of defences.

71. Mr. TOMUSCHAT said that it was essential to be clear about what was meant by the expression "general principles of law", in paragraph 1. Did it refer to the principles mentioned in Article 38 of the Statute of ICJ or to the general principles of law derived from a comparison of all criminal codes throughout the world?

72. Mr. SEPÚLVEDA GUTIÉRREZ said that he agreed with the content and scope of the article, but wished to enter a reservation regarding the expression *causas de justificación*, in the Spanish version. The expression was not appropriate, for a crime could never be justified. It would be preferable to use the technical term *excluyentes* or *eximentes de responsabilidad*.

73. Mr. EIRIKSSON said that, while he had agreed to the Drafting Committee's decisions, he had been opposed to the inclusion of paragraph 2 because it would be inadvisable to refer to the sentencing stage in an article initially designed to cover defences. Moreover, the question of defences had been dealt with in paragraph 1 on the understanding that it would have to be discussed in more detail later. Consequently, there was no need to refer at that stage to extenuating circumstances, which would be considered later within the whole context of sentencing.

74. Mr. MAHIU said that, rather than have two separate paragraphs in the same article, he would prefer to have two separate articles, because defences and extenuating circumstances were two entirely different things: the effect of a defence was to eliminate the offence, whereas extenuating circumstances intervened to mitigate the penalty only after it was found that there had been an offence. Also, there was some ambiguity about the wording of the article, for the words "In passing sentence", in paragraph 2, seemed to refer back to paragraph 1.

¹⁰ See footnote 8 above.

75. Mr. ROUCOUNAS said that he agreed entirely with Mr. Mahiou. Two groups of rules dealing with different aspects of criminal procedure were, of course, covered in the same article. He had, however, taken note in that connection of the explanation by the Chairman of the Drafting Committee to the effect that the article was meant to serve as a reminder and was of a preliminary nature.

76. When the two issues covered by article 14 were re-considered, it would be necessary to understand what was meant by the words "general principles of law". They might, of course, be taken to refer to Article 38 of the Statute of ICJ, which did not exclude international criminal law or indeed any other law. A generous interpretation was therefore required not only because it was a matter of criminal law and of protecting the accused but also because the question of general principles of law had been the subject of considerable effort by legal writers and the courts. For some, those principles represented a cross-section of legal systems throughout the world which could be applied in a given case, whereas for others they already formed part of the international order.

77. Mr. BEESLEY said that he shared the position taken by Mr. Eiriksson and Mr. Mahiou. The distinction between defences, which were pleaded before conviction, and extenuating circumstances, which were taken into account in sentencing, was clear-cut in most systems of law. Though he had reservations about the article, therefore, he did not object to it.

78. Mr. HAYES said that he, too, did not object to adoption of the article as drafted. He had, however, reserved his position on paragraph 2 in the Drafting Committee because he considered that the paragraph related to penalties rather than to the conviction stage. Moreover, the Special Rapporteur, in his ninth report, had dealt with the question of extenuating circumstances in the draft article on sentencing; and that, in his own view, was the right place to do so.

79. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as he had explained in his introduction, the article was of a tentative nature and, on that understanding, he would suggest that it should be adopted. The separation of the article into two paragraphs, or articles, was of secondary importance; what mattered was to draw the attention of Governments and the Sixth Committee to the matter and thus prompt their comments. He would have no objection to two separate articles, however, if that would help to overcome the objections.

80. Mr. CALERO RODRIGUES, noting that the difference of views persisted despite the preliminary nature of the article, observed that one easy solution—which would also forestall any reference by Governments to that particular point—would be to have two separate articles.

81. Mr. RAZAFINDRALAMBO said he had always been of the view that the two concepts of defences and extenuating circumstances, which were quite distinct, should be dealt with in two separate articles. In a spirit of compromise, he had none the less agreed that they should be covered by two paragraphs in the same article.

Should the Commission now favour the adoption of two separate articles, such a course would be perfectly acceptable.

82. Mr. DÍAZ GONZÁLEZ expressed a reservation with regard to the Spanish version of the article. In the first place, the wording of paragraph 1 was very strange, for it was difficult to see what principles of law could justify a crime. How, for instance, was it possible to justify the crime of genocide—or indeed, any other crime against the peace and security of mankind?

83. So far as paragraph 2 was concerned, he agreed entirely with Mr. Sepúlveda Gutiérrez that it would be preferable to use the word *eximentes*.

84. Mr. AL-BAHARNA said that defences and extenuating circumstances were interrelated inasmuch as counsel for the defence, when submitting his case for the accused, would in any event plead extenuating circumstances. For that reason he was opposed to two separate articles. The position would be just the same—counsel for the defence would still plead extenuating circumstances—even if the whole article was deleted from the Code.

85. Mr. BARSEGOV said that he was prepared to accept the draft article either as it stood or in the form of two separate articles. Some members of the Commission had argued that, because their own legal systems did not link them, the questions of responsibility and extenuating circumstances should be treated separately in the draft. It was clear that every legal system drew a distinction between responsibility for an act and extenuating circumstances. That did not mean, however, that there was no connection between the two concepts.

86. Mr. EIRIKSSON said that he had not meant to imply that the entire article lacked substance. In fact, paragraph 1 could stand on its own. His earlier comment on lack of substance had been directed at paragraph 2. He would have strong reservations if it were to become a separate article, particularly since the matter it dealt with did not belong in that section of the draft Code.

87. Mr. Sreenivasa RAO said he shared Mr. Al-Baharna's view that there was an interrelationship between defence and extenuating circumstances. Article 14 was an accurate reflection of the sequence of events before a court of law. In his initial submissions, the counsel for the accused customarily presented the defence *per se*; he might, in addition, make reference to extenuating circumstances, which would then be taken into consideration at the time of sentencing. The article was therefore acceptable as it stood. In his view, what mattered was the manner in which the Commission presented the issues to the General Assembly. Rather than choosing a solution about which many members had strong reservations, it would be better to adopt the article as it was, on the understanding that it might eventually take a different form; mention of that reasoning could then be made in the Commission's report.

88. Mr. MAHIOU said that, in commenting earlier on the possibility of turning the two paragraphs into separate articles, he had stressed that the matter should be considered on second reading. He was not, therefore, ob-

jecting in any way to provisional adoption of article 14. The reservations members had expressed so far would be reflected in the commentary and would be taken into consideration on second reading.

89. The CHAIRMAN, speaking as a member of the Commission, said he had earlier held the view that extenuating circumstances belonged exclusively in the domain of penalties. However, as Mr. Al-Baharna and Mr. Sreenivasa Rao had observed, stressing the interrelationship between the defence and the extenuating circumstances did not diminish the force of article 14. He recalled that in the *Corfu Channel* case,¹¹ ICJ had used the justification of extenuating circumstances as a defence. As international jurists, the members of the Commission were under an obligation to respect the jurisprudence of ICJ. The Commission should therefore adopt the article in its present form.

90. Mr. THIAM (Special Rapporteur) said that he shared the view of the Chairman. In treating the paragraphs separately, the Commission might well end up with two articles of very little substance. If the Commission took that course of action, the two articles would certainly have to be elaborated further. Any changes of that nature would have to be considered on second reading. In his opinion, article 14 should be adopted as it stood. The fact that the article contained two paragraphs would demonstrate that the Commission was fully aware of the distinction between responsibility and extenuating circumstances.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in view of the debate so far, he would appeal to members to withdraw or limit their reservations to article 14. Attaching a large number of reservations to an article of such importance could convey a misleading impression and give rise to doubts about the collective wisdom of the Commission. The article was being considered on first reading and was simply a "hook" on to which States could hang their views. Further elaboration was always possible on second reading.

92. With respect to the question raised by Mr. Tomuschat (para. 70 above), article 14 had been drafted on the understanding that the term "general principles of law" referred to the general principles of penal law rather than to the general principles under Article 38 of the Statute of ICJ. If appropriate, that clarification might be reflected in the commentary.

93. Mr. BEESLEY said that, as others had pointed out earlier, the reservations being expressed with respect to article 14 should be given due consideration at a later stage. In that connection, it was gratifying that the Chairman had mentioned the *Corfu Channel* case, the relevance of which could be considered on second reading of article 14. In his view, the Commission should move ahead and adopt the article.

94. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 14 as it stood.

Article 14 was adopted.

95. Mr. PELLET said that he had participated actively in the work of the Drafting Committee and had not opposed the necessary compromise solutions. At the same time, his enthusiasm for the draft as a whole was limited. In that connection, he wished to point out two major shortcomings with respect to chapter II, on General principles. The first and most serious concerned the problem of the responsibility of groups. Although frequently raised in the Commission's debates, the issue had not been taken up by the Drafting Committee and there was no mention of it in the draft Code. While it was true that article 3, paragraph 2, spoke about conspiracy, the article concerned only the individual conspirator, not the group as a whole. The issue was to determine whether legal persons could be held responsible for participating in or committing crimes. As long as the Commission refused to take a position on that complex issue, the draft Code would remain incomplete. The second shortcoming lay in the absence in the Code of any reference to the question of advocating crimes against the peace and security of mankind. Did the fact of advocating a crime constitute a crime in itself? If not, the Commission should have said as much in the Code and suggested that such advocacy should be considered as an offence. The Code also failed to address the related issue of the denial that certain crimes against the peace and security of mankind had even been committed, which was currently a very painful issue in his own country, France. For all those reasons, he wished to express a general reservation with regard to part one of the draft.

96. Mr. THIAM (Special Rapporteur) said that he had deliberately chosen not to introduce into the Code the question of assigning responsibility to groups. It was a difficult matter on which viewpoints differed widely. At the present stage, such a provision did not belong in the Code, which dealt exclusively with responsibility of the individual. Even in the case of domestic law, the concept of the responsibility of groups continued to be a matter of debate.

97. In his opinion, addressing the issue of advocating crimes would only be a further unnecessary complication to the already difficult task of arriving at precise definitions of the crimes under the draft Code.

98. Lastly, he did not think that the absence of references to the responsibility of groups and to the advocacy of crimes weakened the Code in any fundamental way.

99. Mr. MAHIOU said the Commission had discussed the issue of the criminal responsibility of legal persons at great length. The debate had given rise to serious divisions of opinion and the decision had thus been made to confine the Code to individuals. It was not appropriate to include advocacy of crimes. To his knowledge, even under domestic law, it was considered as an offence and not as a crime. Therefore, it would be difficult to include it in a code which related to crimes of the most serious nature.

100. Mr. PELLET said it should have been stated explicitly in part one that the provisions of the Code were entirely without prejudice to the attribution of responsibility to groups. Furthermore, the fact that an issue was difficult did not mean that it should not be addressed; for

¹¹ *I.C.J. Reports 1949*, p. 4.

that reason, he was not convinced by the Special Rapporteur's explanation.

101. The CHAIRMAN said that Mr. Pellet's concerns were shared by other members of the Commission. Perhaps the Commission should include in its final report a statement to the effect that a decision had been taken to limit the Code to the responsibility of the individual.

The meeting rose at 12.40 p.m.

2237th MEETING

Tuesday, 9 July 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, 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. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Cooperation with other bodies (*concluded*)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN welcomed Mrs. Killerby, Observer for the European Committee on Legal Cooperation, and invited her to address the Commission.

2. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) said that the European Committee on Legal Cooperation (CDCJ) had been kept regularly informed of the activities of the Commission and had had the privilege of hearing a statement in that regard by Mr. Pellet at its 54th meeting, in December 1990.

3. Since she had addressed the Commission at its previous session, two more States had become members of the Council of Europe—Hungary and Czechoslovakia—and other Central and Eastern European countries, with which the Council now had an extensive programme of

cooperation in the legal field, were expected to become member States in the near future.

4. CDCJ had in particular the task of developing European cooperation between member States of the Council of Europe with a view to harmonizing and modernizing private and public law, examining the functioning and implementation of Council of Europe conventions and agreements in the legal field (except in the penal sector) with a view to adapting them and improving their practical application where necessary, and preparing, jointly with the European Committee on Crime Problems, the Conferences of European Ministers of Justice and ensuring the follow-up, having regard to the relevant decisions of the Committee of Ministers. An informal meeting of European Ministers of Justice had taken place in Ottawa in June 1991 to consider questions relating to sentencing and the rule of law and the citizen. The eighteenth Conference of European Ministers would take place in Nicosia (Cyprus) in June 1992.

5. The Committee of Experts on Public International Law, which followed the Commission's work very closely, and of which Mr. Eiriksson was a member, had referred in particular, at its meeting in September 1990, to the importance of the Valletta meeting on the peaceful settlement of disputes, organized by the Conference on Security and Cooperation in Europe, the desirability of contributing to the United Nations Decade of International Law and the need to enhance the role of the Sixth Committee of the General Assembly of the United Nations. The Committee of Experts had also made certain proposals concerning its own future role and had suggested in particular that it should meet at the level of chief legal advisers to Ministers of Foreign Affairs and report directly to the Committee of Ministers of the Council of Europe. The Committee of Ministers had accepted those proposals and the Committee of Experts, which was now an ad hoc committee—the Committee of Legal Advisers on Public International Law—was directly answerable to the Committee of Ministers. Its terms of reference were, in particular, to exchange views on and to examine questions of public international law at the request of the Committee of Ministers, the European Committee on Legal Cooperation and at its own initiative. At its first meeting, in Strasbourg in April 1991, the Committee had welcomed the positive results of the Valletta meeting and had held a preliminary exchange of views concerning the privileges and immunities of certain "experts on missions" for the United Nations. It had also stressed the value of the United Nations Decade of International Law as a means of strengthening international law and had expressed the hope that States and organizations, and in particular the Council of Europe, would contribute to the Decade. The Council of Europe had replied to the request for information made by the General Assembly in resolution 45/40 on the United Nations Decade of International Law. At its meeting in September 1991, the Committee would consider, for example, the work of the General Assembly and the International Law Commission, the United Nations Decade of International Law, and current problems of international law, including matters concerning the Conference on Security and Cooperation in Europe.

* Resumed from the 2233rd meeting.

6. Commenting on some of the international instruments prepared by CDCJ, she said that the European Convention on certain international aspects of bankruptcy had been opened for signature in 1990. The Convention provided for legal cooperation with respect to certain international aspects of bankruptcy such as the power of administrators and liquidators in bankruptcy to act outside national territory, the possibility of resorting to the opening of secondary bankruptcies in the territory of other Parties and the possibility for creditors to lodge their claims in the bankruptcies opened abroad.

7. A committee of experts of CDCJ was continuing its work on a draft convention on civil liability for damage resulting from activities dangerous to the environment, the object of which was to provide for means of prevention and reinstatement and to ensure adequate compensation. It was expected to complete its work in 1992 and, subject to the approval of the Committee of Ministers, would then begin to examine the question of compensation funds.

8. Another committee of experts had been instructed to prepare a draft European convention on the exercise of rights by a child, the aim being to ensure that children were given assistance and certain procedural rights in order to implement their rights, in keeping with article 4 of the United Nations Convention on the Rights of the Child, whereby States undertook to take all the legislative, administrative and other measures necessary to implement the rights recognized under the Convention. CDCJ had proposed that, when the committee of experts had completed that work, it should examine questions relating to transsexuals and, subsequently, to adults subject to a disability. A second European Conference on Family Law would be held in Budapest in 1992.

9. Another CDCJ committee of experts was preparing a second protocol to amend the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality in order to permit dual nationality. The draft protocol would in particular enable contracting States to allow persons to retain their nationality of origin in certain cases, namely, persons resident in the host country from an early age (second-generation migrants) who acquired the nationality of the host country; a spouse who acquired the nationality of the other spouse; and children who acquired the nationality of a parent. CDCJ had proposed that, when that work had been completed, the committee of experts should examine new problems connected with nationality.

10. CDCJ had also adopted a number of draft recommendations prepared by its subordinate committees, for instance, a draft recommendation on administrative sanctions, which had been adopted by the Committee of Ministers of the Council of Europe as Recommendation No. R (91) 1 and which set forth the principles concerning administrative acts that imposed a penalty on persons on account of conduct contrary to the applicable rules; a draft recommendation on family matters, which provided for emergency measures to be taken when the interests of children and other persons in need of special assistance and protection were in serious danger; a draft recommendation stipulating that communication to third

parties, in particular by electronic means, of personal data held by public bodies should have its basis in law and be accompanied by safeguards for those concerned; and, lastly, a draft recommendation, adopted by the Committee of Ministers of the Council of Europe as Recommendation No. R (90) 19, which related to the protection of personal data used for payment or other related operations and which set forth principles to ensure respect for privacy in the collection, storage, use, communication and conservation of personal data.

11. As to its future work, in 1992 in particular, CDCJ had made proposals concerning: administrative law (privatization of public services and enterprises, and rules for an administrative and court system to guarantee legal security for citizens); data protection (examination of current data protection problems and preparation of appropriate legal instruments); civil justice (proposal to include in the existing work on criminal justice an aspect of civil justice entitled: "Efficiency and fairness of civil justice"); and legal data processing.

12. In addition to the European Convention on certain international aspects of bankruptcy, already mentioned, a number of instruments prepared by CDCJ had been opened for signature in 1990, namely, Protocol No. 9¹ to the Convention for the Protection of Human Rights and Fundamental Freedoms, which introduced further improvements to the procedure provided for under the Convention; the Fifth Protocol² to the General Agreement on Privileges and Immunities of the Council of Europe, which provided that the salaries, emoluments and allowances of members of the European Commission of Human Rights and the European Court of Human Rights should be exempt from taxation; the European Convention on the General Equivalence of Periods of University Study;³ the European Social Security Code (revised);⁴ and, lastly, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,⁵ which sought to deprive criminals of the proceeds from crime and property used to commit a criminal offence and provided for measures to be taken at the national and international level in that connection.

13. In addition to the treaties being prepared by CDCJ, to which she had already referred, the Council of Europe had prepared certain international instruments: a draft European charter requiring States to comply with provisions concerning regional or minority languages spoken within their territories; a draft European convention on the protection of the rights of ethnic, linguistic and religious minorities; a draft framework convention setting forth general common rules for the protection of the human person in the context of biomedical sciences; a draft instrument on the mobility of young persons; a draft convention to improve participation by foreigners in public life at the local level, especially by enhancing the possibilities for them to participate in local public af-

¹ Council of Europe, *European Treaty Series*, No. 140 (Strasbourg), 1991.

² *Ibid.*, No. 137 (Strasbourg), 1990.

³ *Ibid.*, No. 138 (Strasbourg), 1991.

⁴ *Ibid.*, No. 139 (Strasbourg), 1991.

⁵ *Ibid.*, No. 141 (Strasbourg), 1990.

fares; a draft convention on copyright law and neighbouring rights in the framework of television by satellite; a revised draft European convention on the archaeological heritage, incorporating concepts and ideas that had become accepted practice.

14. In her statement she had summarized some of the work being carried out in the legal field by the Council of Europe, on which she would be happy to answer any questions members might wish to raise.

15. The CHAIRMAN thanked Mrs. Killerby for her very clear account of the impressive work of CDCJ, and wished the Committee every success. He expressed the hope, on behalf of the Commission, that the mutually beneficial cooperation between CDCJ and the International Law Commission would continue.

16. Mr. PELLET, speaking on behalf of members from the Group of Western European and other States, thanked Mrs. Killerby for an extremely comprehensive, meticulous and concise account of the work of CDCJ.

17. At the request of the Chairman at the forty-second session, he had represented the Commission at the 54th meeting of CDCJ and had given a brief account of the work of the Commission at that session. In the exchange of views that had followed, the participants had stressed the importance of the Commission's work and the special interest for CDCJ of the draft articles on jurisdictional immunities of States and their property, the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law, and the draft Code of Crimes against the Peace and Security of Mankind. They had also welcomed the effective cooperation between the United Nations and the Council of Europe within the framework of the United Nations Decade of International Law, although some had expressed the hope that the two organizations would go further than mere coordination. The Chairman of CDCJ had suggested that the question should be included on the agenda for its future work.

18. He shared in the hope voiced by most members of CDCJ who trusted that the cooperation between that Committee and the Commission—and the United Nations in general—would be intensified. Personally, he did not altogether see what forms such strengthened cooperation could take but he considered that it was a useful subject for the Commission to consider in the context of consideration of its working methods. At all events, he was convinced that the two organizations would probably have much to gain by strengthening their cooperation, and the Commission might perhaps wish to establish direct links with the ad hoc Committee of Legal Advisers on Public International Law, in view of its new status.

19. Lastly, he asked Mrs. Killerby to convey his sincere thanks to the members of CDCJ and the members of the secretariat of the Council of Europe for the welcome they had given him.

20. Mr. JACOVIDES, speaking on behalf of the members from the Asian Group, thanked Mrs. Killerby for her comprehensive statement, which was particularly

useful since the Commission could derive nothing but benefit from legal work carried out at the regional level.

21. He had noted the emphasis placed by CDCJ on the Valletta meeting on the peaceful settlement of disputes and its participation in the United Nations Decade of International Law. He would like to know whether CDCJ had taken up the question of the draft Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court.

22. At the General Assembly's latest session, he had had an opportunity to participate in a meeting organized in New York, on the sidelines of the Sixth Committee, by Mr. Correl, Vice-Chairman of the ad hoc Committee of Legal Advisers on Public International Law. He urged all members of the Commission able to do so to attend a similar meeting which was planned for 28 October 1991, again in New York.

23. Mr. BARSEGOV, speaking also on behalf of Mr. Pawlak, thanked Mrs. Killerby for her extremely interesting statement on the legislative activities of CDCJ. Those activities opened up new perspectives, made possible by the far-reaching changes in the eastern European countries which had led to the removal of the political, legal and economic obstacles that had until then hampered relations between all European countries. Much remained to be done, of course, if the common European home was to be constructed and the foundation laid for effective cooperation and genuine economic integration. A European legal area would also have to be created—though, clearly, that was no easy matter in view of the gap that had opened up between European legal institutions—and against that background information with respect to the legal norms drawn up within the European framework would have to be mutually exchanged.

24. Mr. THIAM, speaking on behalf of members from the African Group, thanked Mrs. Killerby for her very informative statement which attested to the fruitful activities of CDCJ. Since the questions with which CDCJ was dealing were very similar to those on the Commission's agenda, it would be entirely fitting for the two organizations to develop and strengthen their cooperation.

25. Mrs. Killerby's statement offered Africa much food for thought in its quest for economic, social and legal integration, which was why it paid close attention to European experiences.

26. Mr. SEPÚLVEDA GUTIÉRREZ, speaking on behalf of members from the Latin American Group, expressed his sincere thanks to Mrs. Killerby for her erudite and eloquent statement. The work of CDCJ served as an example for the Organization of American States in that it attested to the part played by meaningful cooperation in strengthening the rule of, and respect for, international law.

27. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) thanked members for their kind words. She welcomed the proposal that the Commission should enter into direct cooperation with the ad hoc Committee of Legal Advisers on Public Inter-

national Law and would for her part suggest that the two organizations should explore ways of arranging such cooperation. The former Committee of Experts on Public International Law had been kept informed, both by Mr. Eiriksson and by Mr. Pellet, of the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind and, in particular, on the possible creation of an international criminal court. The Committee of Experts had held a brief exchange of views on the matter which made it quite clear that the idea of creating an international criminal court—which would of course have to be considered in depth—was extremely attractive.

28. She trusted that the cooperation between the Committee and the Commission would continue and prosper.

The law of the non-navigational uses of international watercourses (concluded)* A/CN.4/436,⁶ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

29. The CHAIRMAN reminded members that the Commission still had to decide, pursuant to articles 16 and 21 of its Statute, to transmit to Governments, through the Secretary-General, the draft articles it had adopted on first reading, inviting them to submit their comments and observations to him by 1 January 1993.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind⁷ (continued) (A/CN.4/435 and Add.1,⁸ A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the second part of the Committee's report, which contained the titles and texts of the articles in part two of the draft Code as adopted by the Drafting Committee (A/CN.4/L.459/Add.1).

31. Mr. PAWLAK (Chairman of the Drafting Committee), introducing part two of the draft Code, said the Committee had been of the view that the title already adopted by the Commission ("Crimes against the peace

and security of mankind") should be retained. The purpose of part two was to define the scope *ratione materiae* and *ratione personae* of the draft Code. In that connection, the Drafting Committee had had a twofold task, first, to complete the list of crimes by providing definitions of war crimes and a series of other crimes, such as genocide and apartheid, and, secondly, to provide answers to basic questions of general import, the consideration of which it had deferred until a clearer idea had emerged of the scope of the draft *ratione materiae*. The first of those questions was whether the distinction between crimes against peace, war crimes and crimes against humanity should be retained. On that point the Drafting Committee took the view that, although the distinction had proved useful in determining the approach to be adopted in relation to each crime, it had become unnecessary now that solutions had emerged with respect both to the constituent elements and to the attribution of each crime. Accordingly, Part Two was not subdivided into chapters but into twelve articles, with a preliminary clause which appeared, *mutatis mutandis*, in each article.

32. The second basic issue which had arisen concerned attribution, namely, the identification of the persons to whom responsibility for each of the crimes listed in the Code should be ascribed. The Commission had found a tentative solution to that issue in the case of aggression, by using the wording "any individual to whom responsibility for acts constituting aggression is attributed under this Code". That wording did not, however, have any substantive content and merely served as a reminder that, sooner or later, the question of attribution would have to be addressed. At the present session, the Committee had worked out three types of solution to the problem, depending on the nature of the crimes concerned. Some of the crimes defined in the Code, such as aggression, threat of aggression, intervention, colonial domination and apartheid, were always committed by, or at the order of, individuals occupying the highest decision-making positions in the political or military apparatus of the State; a second group of crimes—international terrorism and mercenarism—would come under the Code, in accordance with decisions already taken by the Commission, whenever agents or representatives of a State were involved. A third group of crimes—illicit traffic in narcotic drugs, war crimes, genocide, systematic or mass violations of human rights and wilful and severe damage to the environment—would be punishable under the Code by whomsoever they were committed, in other words, even in the absence of State involvement.

33. The last issue of general import considered by the Drafting Committee concerned penalties. Different trends had emerged in that connection during the Commission's debate. Some members had taken the view that the matter should be left to domestic law. Others had recalled that the absence of any provision in that respect in the 1954 draft Code had been regarded by many as one of the draft's major flaws, and hence their insistence that the question should be dealt with. Some had advocated the inclusion of a scale of penalties that would be applicable to all crimes, while others had been in favour of accompanying the definition of each crime by the corresponding penalty. The Committee had not attempted to

* Resumed from the 2231st meeting.

⁶ Reproduced in *Yearbook* . . . 1991, vol. II (Part One).

⁷ 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.

⁸ Reproduced in *Yearbook* . . . 1991, vol. II (Part One).

reconcile those divergent views. It had merely signalled the problem by including between square brackets, at the end of the introductory paragraph of each article, the word "to" followed by a blank space. In that way, all positions were safeguarded and on second reading the Commission would be able to revert to the issue, including the question of the penalties to be applied for complicity, conspiracy and attempt, in full knowledge of the various approaches identified thus far. The Committee might wish to indicate in its report to the General Assembly that the matter was one on which the views of Governments would be of particular interest.

PART TWO (Crimes against the peace and security of mankind)

ARTICLE 15 (Aggression)

34. Mr. PAWLAK (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for the title of part two and for article 15, which read:

PART TWO

CRIMES AGAINST THE PEACE AND SECURITY
OF MANKIND

Article 15. Aggression

1. An individual who as leader or organizer plans, commits or orders the commission by another individual of an act of aggression shall, on conviction thereof, be sentenced [to . . .].

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

35. The order in which the crimes were listed did not imply any value judgement as to the degree of seriousness of those crimes. Article 15, like the next three articles, defined a crime which presupposed decisions taken at the policy-making level and in which large segments of the population of a State might be regarded as being directly or indirectly involved. In order to keep the scope *ratione personae* of the provisions concerned within reasonable limits, the Drafting Committee had restricted the circle of potential perpetrators to leaders and organizers, a phrase borrowed from the Charters of the Tokyo⁹ and Nürnberg¹⁰ Tribunals and which should be read in conjunction with the provisions on complicity and conspiracy. Article 15 did not require that leaders or organizers should themselves have perpetrated the act of aggression: it made them liable for the mere ordering of such an act. The same remark applied to all subsequent articles in part two.

36. The Drafting Committee proposed that paragraph 1 as initially adopted should be replaced by the new text now before the Commission. The new provision made it a crime not only to commit but also to plan an act of aggression, having regard to the definition of a crime of aggression as laid down in the Charters of the Tokyo and Nürnberg Tribunals and Allied Control Council Law No. 10.¹¹ Paragraphs 2 to 7 remained unchanged. The bracketed portions signalled divergences of opinion which the debate in the Sixth Committee should help to reconcile.

37. Mr. PELLET said that, before dealing with the questions raised by article 15, he wished to make two comments of a general nature. The first, which was of lesser importance, concerned the structure of the draft. He noted, with respect to the French version, that a *première partie* of the draft had first been referred to the Commission but that it now had before it a *Titre II*. As the words *partie* and *titre* were not interchangeable, that, albeit minor, drafting problem had to be resolved. His second remark concerned the unduly summary introduc-

⁹ See 2210th meeting, footnote 7.

¹⁰ See 2207th meeting, footnote 5.

¹¹ 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)).

tory phrase in each article, which the Drafting Committee had adopted in his absence. The crime of aggression, for instance, would as a general rule consist of orders given by an individual probably to groups of individuals or to institutions but not to individuals; that was why he had reservations about the words “the commission by another individual” which appeared in the articles in part two.

38. As for article 15 itself, he not only had reservations about it but was absolutely opposed to it, even though his views would have no effect since the Commission had already adopted the article in substance. The reason for his opposition was not that aggression did not amount to a crime against the peace and security of mankind—indeed, it was the very epitome of such a crime—but because he was against a procedure which consisted of simply lifting the Definition of Aggression from the annex to General Assembly resolution 3314 (XXIX), and for three reasons. First, the general view was that the Definition was poorly drafted and did not really show what was meant by “aggression”; proof of that could be seen in the use of the words “In particular” in paragraph 4 of article 15, which the Drafting Committee had rightly placed between square brackets. An illustrative list was never acceptable in a criminal law instrument and, generally speaking, the Definition had never been regarded as properly defining anything. When it had adopted the Definition, the General Assembly had known full well that the Security Council would remain free to characterize an act as aggression as it saw fit, and according to its own criteria. Accordingly, it was highly questionable to reproduce in a criminal code a text with no specific scope.

39. Secondly, the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) was not in any event meant to provide the basis for characterizing an act as a crime under criminal law. It was designed to enable the Security Council to decide, in a given situation, whether or not there had been aggression. In the case of the Gulf, the Security Council had not concerned itself with the Definition at all.

40. Thirdly, as a matter of principle, it was not a good idea to include in the Code excerpts from other texts. A definition of aggression would probably prove to be an insurmountable task for the Commission, should it decide to tackle the matter again. The only possible course, therefore, was to indicate that aggression constituted in itself a crime against the peace and security of mankind, with the consequences defined under the Code, and to leave it to the courts which had jurisdiction, in other words, to domestic courts or to a future international criminal court, to decide, in the light of the facts of the case and in accordance with general principles of international law, whether aggression had occurred and to draw the appropriate conclusions. That had not been the approach adopted by the Drafting Committee and the Commission, which had preferred to reproduce a General Assembly recommendation in a text destined to become a treaty that would be binding on States. That was asking a lot of the States which had voted for a recommendation in the knowledge that it did not, as such, have binding force.

41. Mr. BARSEGOV said that he shared some of Mr. Pellet’s concerns. He therefore suggested that the words “by another individual of an act of aggression”, in paragraph 1 of article 15, should be replaced by “an act constituting an aggression”.

42. Prince AJIBOLA said that it was difficult to reconcile the use of the word “individual” in paragraph 1 with the references in the subsequent paragraphs to the use of armed force and to the armed forces of a State. In a State, could the same individual be vested with the power to order and to direct an act of aggression? In many States, decisions were taken in a wholly democratic way, which was why it was difficult to know whether an order to commit aggression should be attributed to the same individual. At present, the Code contained no provision to cover such a case, but it should be catered for, in one way or another. Either the Commission should define the word “individual” as including a “group of individuals” or it should add the words “or group of individuals” after “individual”. The same applied to the words “another individual” although it was quite conceivable that those words, when used in the singular, encompassed the plural as well.

43. Mr. NJENGA paid a tribute to the vigour and determination shown by the Chairman and the other members of the Drafting Committee in arriving at a text the Commission would be able to adopt on first reading.

44. The word “individual” in paragraph 1 created no difficulty, since it had been agreed from the outset that the Code would be restricted to the criminal responsibility of individuals, but the words “by another individual” were far more problematic. Aggression was generally committed not by an individual but by armed forces or by a group of individuals and, on that point, the text could be improved. The deletion of the words “by another individual”, proposed by Mr. Barsegov, would make paragraph 1 clearer, and the same applied to the first paragraph of the other articles.

45. Unlike Mr. Pellet, he considered that the use of the Definition of Aggression as adopted by the General Assembly in resolution 3314 (XXIX) was justified. It had taken over 40 years of effort to get that resolution adopted by consensus. Had the Commission attempted to draft its own definition of aggression, it would probably have required the same amount of time. The wording of article 15 could perhaps be improved on second reading so far as points of detail were concerned, but any radical departure from its terms would certainly not facilitate the drafting of an acceptable text, and it would be a futile exercise to try to do so.

46. Mr. CALERO RODRIGUES said that the criticisms voiced with regard to the wording of article 15 illustrated the difficulties inherent in the basic object of the draft Code, which was to deal with individual responsibility. Aggression, as that concept was defined, consisted of the use of armed force by a State and it therefore had to be decided which individuals would be held personally responsible for acts that could be carried out only by a State. In that context it seemed difficult to arrive at a formulation that was very different from the one under consideration.

47. He supported Mr. Barsegov's proposal to delete the words "by another individual", from paragraph 1 of article 15.

48. Mr. TOMUSCHAT said that he too supported Mr. Barsegov's proposal, as it would bring the wording of paragraph 1 into line with paragraph 2, which stipulated that aggression was the use of armed force "by a State". Also, there was no need to revert to the question whether the virtual word-for-word quotation of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) had been justified. It was not such a bad definition, and it defined correctly what amounted to aggression. The Commission should stick to what it had decided two years earlier.

49. Mr. ROUCOUNAS said that thus far the Drafting Committee had concentrated mainly on defining the crimes, and had left in abeyance to some extent the question of the perpetrator of the crimes. From the explanations given by the Chairman of the Drafting Committee, he understood that three categories of perpetrators were to be distinguished: an individual who acted as leader or organizer, for example, in the crime of aggression or apartheid; an individual who acted as the agent or representative of a State, for example, in the crime of international terrorism; and, lastly, any individual, (*tout individu*), for example, in the crime of illicit traffic in narcotic drugs or systematic or mass violations of human rights. The Commission should therefore specify in one way or another, possibly in the commentary, which of the crimes listed under part two of the Code were committed by leaders and thus gave rise to the special responsibility of certain agents of the State, which crimes could also be committed by other agents of the State, and which were punishable when committed by "any individual" without further qualification. In his view, the question of the perpetrator should be considered very carefully on second reading.

50. Mr. EIRIKSSON said that he also favoured deletion of the words "by another individual", from paragraph 1 of article 15. However, that deletion would not, of course, have the effect of criminalizing acts by groups. Persons who had acted as part of a group would none the less be prosecuted individually.

51. As to Mr. Pellet's general reservation, he too had made the same reservation when the Commission had adopted the draft article before referring it to the Drafting Committee, since it had seemed inadvisable to him to incorporate a resolution of a political nature into a code of crimes. At that time he had proposed a very simple definition, much like the one to be found in the United Nations Convention on the Law of the Sea, which had been confined to paragraph 2 of article 15. He would not, however, object to the adoption of article 15.

52. Mr. GRAEFRATH said that he supported Mr. Barsegov's proposed deletion but would remind members of the decision taken by the Commission at the outset to limit the scope of the Code to individuals, which was normal for a criminal code. He also believed that the concept of leader or organizer used in paragraph 1 had been taken from the Charters of the Nürnberg and Tokyo Tribunals: there was thus a legal precedent and the wording was not as indefinite as had been suggested.

53. Article 13¹² provided the answer to the question raised by Prince Ajibola since it stipulated that the official position of the individual who committed a crime, and in particular the fact that he had acted as head of State or Government, did not relieve him of criminal responsibility. That was one of the most important decisions the Commission had taken in the matter.

54. Mr. THIAM (Special Rapporteur) said that he endorsed Mr. Barsegov's proposal to delete the words "by another individual", from paragraph 1 of article 15.

55. With regard to Mr. Pellet's statement, he was shocked that a member of the Commission had voiced "absolute opposition" to a draft article. Any member could, of course, express his reservations or misgivings, but none had the right of veto. So far as substance was concerned, Mr. Pellet criticized the article for reproducing the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) which, he considered, had a purely political purpose and bore no relation to the Definition of Aggression under criminal law. The Definition of Aggression was, however, directly linked to the Code since work on the drafting of the 1954 Code had been suspended pursuant to General Assembly resolution 897 (IX) pending the adoption of the Definition of Aggression by the General Assembly. There was no denying that a few small difficulties remained. Some members had taken the view that the list of acts which appeared in the Definition of Aggression adopted by the General Assembly was not sufficiently exhaustive, which was why the words "in particular" had been added between square brackets in paragraph 4 of the article. It should be emphasized that the Drafting Committee had made considerable efforts to prepare a text on such a difficult question—a text which could, in any event, be improved, if necessary, on second reading, as far as points of detail were concerned.

56. Mr. PAWLAK (Chairman of the Drafting Committee) said that the drafting of article 15 had created the most obstacles during the Commission's work on the topic. The Committee had been faced with a choice either of accepting the Definition of Aggression drawn up by the General Assembly or of trying to draft its own definition. It had decided to use the definition that existed already, in the realization that it would be virtually impossible for it to draft a definition likely to enlist from the international community support as broad as that for the definition annexed to resolution 3314 (XXIX), which the General Assembly had adopted by consensus.

57. He was not opposed to deletion of the words "by another individual" from paragraph 1 of article 15 but was not in favour of any other change in that provision.

58. The whole concept underlying the draft Code was the responsibility of individuals. Care should be taken not to revert to the outdated concept, rejected by contemporary international criminal law, of the criminal responsibility of the group, even though, as Prince Ajibola and Mr. Roucounas seemed to suggest, in the case of certain crimes the individuals responsible could perhaps be more clearly specified.

¹² For text and discussion, see 2236th meeting, paras. 56-63.

59. He had proposed in the Drafting Committee that the words "in particular", which appeared at the beginning of paragraph 4 between square brackets, should be deleted; some members had, however, been opposed to the idea, preferring to leave it to the Commission to decide the question. Those words did not appear in the definition adopted by the General Assembly, which article 15 otherwise reproduced virtually word for word. He would welcome members' views in that connection.

60. Mr. JACOVIDES said that he supported the proposal to delete the words "by another individual" from paragraph 1 of article 15. For the rest, he considered that, although the definition was certainly not perfect, it was the result of a compromise which had been worked out over a period of several years and it would be a mistake to start to tinker with it at that stage. On second reading of the draft, certain minor details could perhaps be revised in the light of the discussion that would be held in the Sixth Committee.

61. He reminded members that, when the Commission had started to draft the Code, several members had wanted to go beyond the responsibility of the individual and to deal with the responsibility of States as well as the responsibility of groups. A compromise had had to be reached so that the work could move ahead, but it would be advisable, as the Commission was completing its first reading of the draft articles, to record that fact in some appropriate form in the report to the General Assembly.

62. The CHAIRMAN said that the report to the General Assembly would refer to the Commission's decision to deal for the time being only with the responsibility of individuals.

63. Mr. EIRIKSSON said he wondered what precisely was the purpose of paragraph 4 (*h*); he believed that it must have some link with the words "In particular", which appeared between square brackets in the opening clause of paragraph 4 but not in the Definition of Aggression adopted by the General Assembly.

64. Mr. GRAEFRATH said that the words "In particular", which appeared between square brackets, in paragraph 4, like the whole of paragraph 5, had been introduced into the text to cover two eventualities: the Security Council might determine that there was an act of aggression on the basis of acts other than those listed in the definition in article 15, or it might find that, notwithstanding the presence of acts listed in the definition, there was no aggression. A delicate problem thus arose of the relationship between the Code, the decisions of a possible criminal court, and the decisions of the Security Council. As that was politically sensitive, the square brackets should be retained to allow States to decide during the discussion in the Sixth Committee on the way in which the relationship between a possible criminal court and the Security Council should be resolved.

65. Prince AJIBOLA said that he was grateful to the Chairman of the Drafting Committee and to other members for their explanations regarding the use of the word "individual" but would still like it to be made clear at some point that, so far as responsibility under the Code was concerned, it mattered little whether the individual

had acted on his own behalf, on behalf of the State, or on behalf of a group, and that in the two latter instances the individual would also incur criminal responsibility.

66. Mr. McCAFFREY said that Prince Ajibola's concern was perhaps partly met by article 13. As to the drafting proposals which had just been made, he agreed with deletion of the words "by another individual", from paragraph 1 of article 15, and considered that the words "In particular" in square brackets in paragraph 4 were not really necessary, for two reasons. First, they did not appear in the definition of acts of aggression laid down in article 3 of the Definition annexed to General Assembly resolution 3314 (XXIX) and, secondly, subparagraph (*h*), which had been added to paragraph 4 of draft article 15 and was based directly on article 4 of that Definition, made it clear that the list of acts referred to in paragraph 4 was not exhaustive.

67. In his view, therefore, the words "In particular" could be deleted without difficulty.

68. Mr. THIAM (Special Rapporteur) said it had been suggested that the words "In particular" should be included in paragraph 4 to create a link between the jurisdiction of the Security Council and that of a possible international criminal court. The problem was that an international criminal court might never be able to treat a given act as an act of aggression if that act was not included in the draft Code.

69. Personally, however, he had no definite views on the matter. He would prefer the words "In particular" to be deleted but would not object to their being retained if that was the wish of the majority. His remarks could perhaps appear in the commentary.

70. Mr. PAWLAK (Chairman of the Drafting Committee) said that the question of the inclusion of the words "In particular" in paragraph 4 had not arisen in connection with paragraph 5 alone. In that connection, he would refer members to article 4 of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) which read:

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the Charter.

It was that provision that lay behind the introduction of the words "In particular" in paragraph 4. In the circumstances, if the Sixth Committee decided to keep paragraph 5, which appeared between square brackets, the words "In particular" would not be necessary and could be deleted. That was the solution he personally favoured.

71. With regard to the points raised by Prince Ajibola, he would refer him to articles 4 and 5,¹³ concerning the motives and responsibility of States, and to article 13,¹⁴ which provided that "The official position of the individual who commits a crime . . . does not relieve him of criminal responsibility". Those articles should partly meet his concern.

¹³ *Ibid.*, paras. 17-31.

¹⁴ See footnote 12 above.

72. Prince AJIBOLA said that he was satisfied with those explanations.

73. The CHAIRMAN, summing up the discussion, said that the Commission had to take a decision on two proposals with respect to article 15. In the first place, it was suggested that the words “by another individual”, in paragraph 1 of the article, should be deleted. The proposed new text would then read:

“1. An individual who as leader or organizer plans, commits or orders the commission of an act constituting aggression shall, on conviction thereof, be sentenced [to . . .].”

74. Mr. TOMUSCHAT said he did not think it was necessary to replace the former expression “an act of aggression”, in paragraph 1, by “an act constituting aggression”, since “act of aggression” appeared at several points in the article.

75. Mr. PAWLAK (Chairman of the Drafting Committee), endorsing Mr. Tomuschat’s remarks, said that he could agree to deletion of the words “by another individual” only if no other change was made to paragraph 1, which should read:

“1. Any individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to . . .].”

It was so agreed.

76. The CHAIRMAN invited members of the Commission to take a decision on the proposal to delete the words “[In particular]”, from paragraph 4 of article 15. If he heard no objection, he would take it that the proposal was adopted.

It was so agreed.

77. The CHAIRMAN said that no action was required on the title of part two as there had been no amendment to the wording previously adopted. If he heard no objection, he would take it that the Commission wished to adopt article 15, as amended.

Article 15, as amended, was adopted.

ARTICLE 16 (Threat of aggression)

ARTICLE 17 (Intervention)

ARTICLE 18 (Colonial domination and other forms of alien domination)

78. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 16, 17 and 18 which read:

Article 16. Threat of aggression

1. An individual who as leader or organizer commits or orders the commission by another individual of threat of aggression shall, on conviction thereof, be sentenced [to . . .].

2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

Article 17. Intervention

1. An individual who as leader or organizer commits or orders the commission by another individual of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .].

2. Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

3. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 18. Colonial domination and other forms of alien domination

An individual who as leader or organizer establishes or maintains by force, or orders another individual to establish or maintain by force, colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to . . .].

79. Mr. PAWLAK (Chairman of the Drafting Committee) said that it had been decided to introduce articles 16, 17 and 18 together, since the changes made to those articles, which corresponded in turn to former draft articles 13, 14 and 15 provisionally adopted by the Commission,¹⁵ were the direct result of the basic approach he had already explained.

80. With regard to article 16 (Threat of aggression), the text of former article 13 had become paragraph 2, and the beginning of the article included the standard paragraph that now preceded the definition of each crime: “An individual who as leader or organizer . . .”. The only change the Drafting Committee had made to paragraph 2 was to replace the opening clause, “Threat of aggression consisting of declarations”, by “Threat of aggression consists of declarations”.

81. Similarly, in article 17 (Intervention), paragraphs 1 and 2 of former article 14 had become paragraphs 2 and 3; and, in new paragraph 2, the Committee had made the grammatical adjustments required by the restructuring of that provision.

82. In the course of the review of article 17, it had been pointed out that it was conceivable that the leaders or organizers of a State which had intervened in the internal or external affairs of another State might have relied on the collaboration of their counterparts in the victim State, which raised the question whether both groups of individuals should be treated as criminals under the Code. The Drafting Committee had answered that question in the negative, being of the view that the leaders and organizers of the State against which the intervention was directed should be treated in accordance with the domestic law of that State.

83. Some members of the Committee had also reiterated their objections to the article, pointing out in particular that intervention was too vague a concept to form the basis for making an act a crime under the Code and that it was difficult to conceive of individuals committing acts of intervention.

¹⁵ See *Yearbook . . . 1989*, vol. II (Part Two), para. 217.

84. With regard to article 18 (Colonial domination and other forms of alien domination), the definition adopted in former article 15 had been incorporated into the new preliminary clause worked out by the Drafting Committee at the present session.

85. Mr. EIRIKSSON pointed out that the decision to delete the words "by another individual", from paragraph 1 of article 15, had an effect on the wording of articles 16, 17 and 18, where the same words appeared. Deleting them from articles 16 and 17 created a drafting problem which could be solved by replacing the words "by another individual of", in paragraph 1 of both articles, by the words "of an act constituting . . .", as had been proposed for article 15.

86. Mr. PELLET said that he had no objection to Mr. Eiriksson's proposal regarding paragraph 1 of article 16. He wondered, however, whether the word "act" was well chosen and whether it could apply, for instance, to a communication. It would in any event be superfluous to add it to paragraph 2. The wording of paragraph 2 seemed to be quite well drafted but, since he was firmly opposed to article 15, he could not agree to article 16 either.

87. Mr. BEESLEY said that, while he agreed with Mr. Eiriksson on the need to harmonize the draft articles, he too would prefer not to introduce the word "act" in paragraph 2 of article 16. He had no definite opinions on the matter, however, and would abide by the majority view. He also noted that, in article 18, deletion of the words "another individual" would make it necessary to replace the words "to establish or maintain" by "the establishment or maintenance".

88. Mr. BARSEGOV said he considered that Mr. Eiriksson's proposal should, on the contrary, apply to all the articles. The words "an act constituting . . ." seemed particularly appropriate in the legal context and could be used everywhere. That drafting problem could perhaps be solved on second reading of the draft.

89. Mr. McCAFFREY said that he supported Mr. Eiriksson's proposal but only with respect to the opening clause of each of the two draft articles. The expression "an act constituting . . ." seemed to him to be entirely appropriate, at least in English, where a declaration and a communication were also "acts".

90. He wondered, however, whether, for the sake of proper grammar, the indefinite article "a" should not be added before the word "threat", in paragraph 1 of article 16.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in view of the amendment the Commission had decided to make to paragraph 1 of article 15, he would have no objection to the proposed changes to paragraph 1 of article 16, which would then read:

"1. An individual who as leader or organizer commits or orders the commission of an act constituting a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

92. With the deletion of the words "by another individual", paragraph 1 of article 17 would read:

"1. An individual who as leader or organizer commits or orders the commission of an act constituting intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .]."

93. In article 18, the words "to establish or to maintain" would be replaced by "the establishment or maintenance".

94. Those three changes were the logical consequence of the changes made to article 15 and seemed perfectly acceptable to him.

95. Mr. AL-BAHARNA said that he agreed with Mr. Eiriksson's suggestion regarding article 17. If the words "by another individual" were deleted, the paragraph did not read well. It was therefore preferable to add the words "of an act constituting" after "the commission". On the other hand, it was necessary to add those words to paragraph 1 of article 16.

96. Mr. PAWLAK (Chairman of the Drafting Committee) said that such matters were, after all, a question of style, but for his own part he would prefer to add the words "an act constituting . . ." both in article 16 and in article 17 since the text would be clearer. If there was no major objection, he would therefore support Mr. Eiriksson's proposal.

97. Mr. PELLET said he did not think that an act constituting a threat of aggression could be "committed". A threat was not of itself an act. It would be more logical to say "An individual who as leader or organizer threatens to commit an act of aggression . . .". It was there that the problem arose. Admittedly, it would be difficult to change the rest of the article but an awkward turn of phrase at the outset would be unfortunate. He therefore proposed that paragraph 1 should be worded to read:

"1. An individual who as leader or organizer threatens to commit an act of aggression or orders the commission of an act constituting a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

98. Mr. BEESLEY said that, while he understood Mr. Pellet's point of view, he appealed to him not to press his proposal. A threat of aggression should be treated as a serious matter, with grave implications, which in itself already constituted an act of aggression. He was not shocked, therefore, by the proposed wording.

99. Mr. GRAEFRATH said he too felt that Mr. Pellet's proposed changes might alter the substance of the article. He would prefer to retain the present wording.

100. Mr. RAZAFINDRALAMBO likewise urged Mr. Pellet to withdraw his proposal, which could disrupt the harmony established between article 16 and the other articles in the Code. Threat of aggression was a concept that amounted to the characterization of a crime in itself. Furthermore, paragraph 2 of the article spoke of "threat of aggression" and those words formed a whole. He would, however, prefer to retain the original wording of article 16 and not introduce the words "of an act constituting . . .", either in paragraph 1 or in paragraph 2. That would place undue emphasis on the word "act", in the

French version, which already appeared at the end of paragraph 1. Neither declarations nor communications, however, were acts.

101. Mr. EIRIKSSON said that, although he was not really in a position to analyse the precise tone of Mr. Pellet's proposal, he realized that it did pose a problem. He would remind members of the difficulties that had arisen when it had been necessary, in the provision that now formed the subject of paragraph 3 of article 3, to make a choice between the noun "attempt" and the verb "attempts". In any event, in proposing the addition of the words "of an act constituting" it was not his intention to modify the substance of the articles in question.

102. Mr. PELLET said he continued to think that a threat was not an act in itself, but since he objected in principle to article 16, in any event, he did not feel he had the right to impose his views as to the way in which it should be worded.

103. The CHAIRMAN, speaking as a member of the Commission, said that the declarations, communications and demonstrations referred to in paragraph 2 of article 16, could be regarded equally as acts of aggression and as threats of aggression.

104. Mr. PAWLAK (Chairman of the Drafting Committee) said he considered, in the light of the discussion, that it would be best to make the fewest possible changes to article 16. He therefore proposed that the Commission should adopt the following wording for paragraph 1:

"1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

Paragraph 2 would remain unchanged.

105. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 16 as amended by the Chairman of the Drafting Committee.

Article 16, as amended, was adopted.

106. The CHAIRMAN invited the Commission to adopt articles 17 and 18.

107. Mr. PELLET said that he was absolutely opposed to those articles.

108. Mr. CALERO RODRIGUES pointed out that the question of the words which appeared between square brackets in paragraph 2 of article 17 had still not been dealt with.

109. The CHAIRMAN suggested, in the light of those comments, that the Commission should revert to articles 17 and 18 at the next meeting.

It was so agreed.

The meeting rose at 1.10 p.m.

2238th MEETING

Wednesday, 10 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, 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. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (A/CN.4/440 and Add.1,¹ A/CN.4/L.456, sect. E, A/CN.4/L.467, ILC(XLIII)/Conf.Room Doc.5)

[Agenda item 2]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on State responsibility (A/CN.4/440 and Add.1).

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the chapter dealing with the regime of countermeasures was the most difficult one in the whole topic of State responsibility, even if confined to delicts. It also formed the very core of part 2 of the draft articles, which was itself central to the topic. The codification of the regime of countermeasures was characterized by two features, the first being the drastic reduction in, if not total absence of, any analogies with municipal law. Whereas it had been possible in the case of substantive consequences to draw on municipal law, when it came to instrumental consequences it was necessary to contend with an entirely different structure. The second feature was that in no other area was the lack of an adequate institutional framework for present or conceivable future regulation of State conduct so keenly felt. He was thinking, in particular, of two aspects of the sovereign equality of States—the propensity of any State to refuse to accept any higher authority, and the contrast between the equality of States in law and their inequality in fact. The self-evident nature of that remark in no way detracted from its importance.

3. Practice in the matter was abundant, but often the recourse to unilateral measures did not conform to the existing rules, still less to what was desirable in the matter of the progressive development of international law, and it was difficult at times to identify the precise content of some of the general rules. Uncertainty was manifest in the doctrine of the so-called "self-contained" regimes,

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

and it was hard to identify future trends in the development of the law, as well as the avenues the Commission could explore in seeking to improve it. One of the crucial aspects of that area of the progressive development of international law related to the impact of the de facto inequality between States: the Commission's task appeared to be to devise ways and means of reducing the impact of that inequality. He had argued in his second report²—though not without challenge—that the secondary rules on cessation and reparation operated equally to the advantage or disadvantage of all States: any State, weak or strong, could find itself in the position of the injured State or of the wrongdoer. While that might apply to substantive consequences, however, it could certainly not be said of countermeasures, in which respect there was an enormous difference between States that were powerful and rich and States that were weak or poor. His third report, therefore, was concerned with the identification of the specific problems involved in the legal regime governing countermeasures, and its purpose was to elicit comment and reaction. In view of the wide variety of terms used, before taking up substantive matters, he had dealt with terminology; he trusted that that would help to avoid misunderstanding. Also, he had often used the word “reprisals” as a synonym for countermeasures, though he realized that that word was generally disliked because of the implication it carried of the use of force; considered in its proper context, however, it should not be deemed to include any element of violence. He had also used the word “measures” as an abbreviation for “countermeasures”.

4. The first major problem considered in the third report was whether, and to what extent, an internationally wrongful act was a precondition for the lawfulness of a particular countermeasure. In the view of some, a bona fide belief on the part of the injured State that an unlawful act had been committed against it was sufficient; others, however, argued that such a belief was not enough and that there must actually have been an unlawful act. Any State which reacted on the basis of its own belief, even if held in good faith, would do so at its own risk. That point was covered basically by part I of the draft,³ which defined the conditions under which an internationally wrongful act would be held to have been committed and under which the act in question was attributable to a State. It was not necessary therefore to deal with it in any of the articles on countermeasures. The way in which the matter was handled was obviously connected with the question whether there was any prior claim for reparation and any prior recourse to a dispute settlement procedure, for which negotiations were a prerequisite.

5. On the question of the function of countermeasures, there was a divergence between those who believed that it was exclusively compensatory, and those who believed that it was punitive. In his view, the Commission should not enter into that argument. Under both national and international law, and in the case of both substantive and instrumental consequences, countermeasures and

remedies had the dual function of securing compensation and exacting retribution, though obviously, depending on the nature of the wrongful act, one or other of those two functions would predominate in a particular case. More important than the question of the function of countermeasures, perhaps, was the question of the aims pursued by a State in resorting to such measures. Those aims were important. It was one thing if a State resorted to countermeasures to obtain reparation which had been denied or if the offending State pleaded that there was no case to answer. It was another thing if a State attempted to resort to countermeasures, simply with a view to establishing a dialogue between the injured State and the offending State or in order to have recourse to a dispute settlement procedure.

6. In the case of a prior demand for reparation, two main trends emerged, both of which related to the question of the aims pursued by the injured State in resorting to countermeasures. A minority of legal writers took the view that there was no need, as a matter of law, to address a demand for cessation or reparation to the offending State before reprisals were taken. A different position was held by those who espoused the classical theory of State responsibility whereby reprisals were seen essentially as a means of coercion for obtaining cessation and/or reparation. According to that theory, it was natural to assume that an act of reprisal could not, as a rule, be lawfully resorted to before a protest and demand made for cessation and/or reparation had first proved unsuccessful. The essence of the latter view was that the consequences of an internationally wrongful act were not merely of a compensatory nature but were also retributive. However, there were important exceptions to the idea that reprisals, whatever their function, could not lawfully be resorted to unless a demand for cessation and/or reparation had been unsuccessful. Wengler, for instance, believed that the aggrieved State could lawfully resort to reprisals without any preliminaries in the event of *dolus* on the part of the law-breaking State. It had also been suggested that no preliminaries were required for measures to be taken against a State responsible for an international crime. Yet others saw an exception in the case of an internationally wrongful act of a “continuing character” under article 25 of part I of the draft, or in the case of economic measures. Still others believed that, in the case of economic measures, a prior demand was unnecessary. He was disinclined to agree with that opinion, because countermeasures were mainly economic once the use of force was excluded. A more accurate study of international practice would provide more reliable information on the effective legal relevance of a prior demand for reparation. Only on that basis would it be possible to determine to what extent a provision, which made such a demand a prerequisite for the lawful resort to any measures, would be the subject merely of codification or of a desirable progressive development of international law. In terms of progressive development, the rules laid down by his predecessor in 1985 in articles 1 and 2 of part 3 of the draft⁴ could perhaps be improved by specifying more narrowly the requirement of prior

² *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, para. 33.

³ Provisionally adopted on first reading at the thirty-second session. See *Yearbook . . . 1980*, vol. II (Part Two), pp. 26 *et seq.*

⁴ Referred to the Drafting Committee at the thirty-eighth session. See *Yearbook . . . 1986*, vol. II (Part Two), p. 35, footnote 86.

demand in relation to given kinds of measures or to the aims pursued.

7. One key problem, which related to the question of prior demand for reparation and/or cessation and to the aims pursued, concerned the impact of dispute settlement obligations. In that connection, a distinction had to be made between the general obligation concerning peaceful settlement, on the one hand, and any specific agreement between the alleged wrongdoer and the alleged injured party, on the other. So far as the latter was concerned, a number of legal writers took the view that the commitments deriving from specific agreements between the injured State and the wrongdoer should, under given conditions, have a decisive impact on the lawfulness of the measures taken. In other words, in given cases, prior recourse to one or more of the procedures envisaged would be a condition of lawful resort to countermeasures.

8. In that regard, he had referred in his report to the position taken by the International Law Institute as reflected in a resolution it had adopted in 1934. A distinction had to be drawn between an instrument that opened the door to a unilateral application by the injured State to an international body for dispute settlement, and an instrument that was merely an agreement to arbitrate—a *pactum de contrahendo*—which would require an ad hoc agreement between the parties on any procedure to be implemented. In his opinion, it should be made clear whether the requirement of availability, which was provided for in his predecessor's draft, referred to the possibility of an automatic unilateral application for a third-party procedure, or to the case where a third-party procedure could be opened only on the basis of an ad hoc agreement. In both cases, the procedure should be regarded as available for the purposes of maintaining the obligation of the injured State to resort to the procedure in so far as it was available to convince the other party. Measures of a less serious kind could, of course, be applied to try and coerce the other party to agree to arbitration or to come to a settlement.

9. The other category of peaceful settlement obligations was in a sense more important. He had in mind the general obligations under Article 2, paragraph 3, and Articles 33 to 38 of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,⁵ the Manila Declaration on the Peaceful Settlement of International Disputes⁶ and Principle V (Peaceful settlement of disputes) of the Final Act of the Conference on Security and Cooperation in Europe⁷ as well as subsequent developments in the context of that Conference. Some of those developments were in fact somewhat more encouraging than the Declaration on Friendly Relations so far as the development of peaceful settlement procedures was concerned. Save for that part which coincided with the principle laid down in Article 2, paragraph 4, of the Charter of the United Nations, concerning the prohibi-

tion on the settlement of disputes by force, he found it more difficult to accept the proposition that the principle laid down in Article 2, paragraph 3, had become a rule of customary general international law. Some legal writers believed that the latter principle condemned as unlawful any unilateral countermeasure resorted to, first of all, prior to the submission of appropriate demands for reparation or cessation and, secondly, prior to bona fide recourse to the peaceful settlement procedures provided for under Article 33 of the Charter of the United Nations.

10. Other legal writers, however, interpreted the second of those requirements as applying only to measures involving force. That was linked to the idea that Chapter VI of the Charter of the United Nations covered only such disputes as might endanger international peace and security. Personally, he was inclined to think that, within the framework of the draft on State responsibility and of the chapter on countermeasures, the more demanding of those two views concerning the obligations of the injured State should be accepted, namely, that there should be a strict obligation to have recourse to a procedure for the peaceful settlement of disputes before resort was had to any countermeasure. It was a key problem for the codification and progressive development of the law in general and for the regime of countermeasures in particular.

11. A crucial question concerned the requirement of proportionality. In the 1920s, two well-known writers had argued that proportionality was not a legal requirement but merely a moral obligation. Contemporary doctrine, however, was decidedly in favour of such a requirement. The prevailing definitions of proportionality were formulated in negative terms. The International Law Institute, in the 1934 resolution to which he had referred, had demanded that the measure should be proportional to the gravity of the offence and the damage suffered. A less strict concept emerged from the *Air Service* award which had referred to "some degree of equivalence" and to the fact that judging the proportionality of countermeasures could at best "be accomplished by approximation",⁸ while it had been held in the *Naulilaa* case⁹ that reprisals should not be out of all proportion to the unlawful act. The previous Special Rapporteur, who had been one of the arbitrators in the *Air Service* award, had seemed to agree that the requirement of proportionality should be formulated in less stringent terms. For his own part, he was inclined to favour a stricter formulation and considered, first, that the requirement should be expressed in positive, not negative, terms; and second, that proportionality should be a requirement with respect not only to the nature of the act but also to other elements, including the attitude of the wrongdoer and the aim pursued by the reacting State.

12. One delicate problem that had not, perhaps, been adequately dealt with so far was the suspension and termination of treaties and the regime to which such sus-

⁵ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁶ General Assembly resolution 37/10 of 15 November 1982, annex.

⁷ Signed at Helsinki on 1 August 1975.

⁸ See *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No.E/F.80.V.7), pp. 443-444.

⁹ *Portuguese Colonies case* (Naulilaa incident), *ibid.*, vol. II (Sales No. 1949.V.1), pp. 1011.

pension and termination should be subject within the framework of State responsibility as distinct from the regime to which it was subject for the purpose of the law of treaties. As was well known, the relevant rules of the law of treaties covered such matters as the kind of treaty breaches that justified suspension or termination; the conditions in the presence of which a treaty could be suspended or terminated totally or in part; and the requirements with which the injured State had to comply in order lawfully to proceed to suspension or termination. It was for the purposes of codification and progressive development of the rules of general international law that the United Nations Conference on the Law of Treaties had adopted article 60 of the 1969 Vienna Convention on the Law of Treaties and the auxiliary provisions embodied in articles 65-67, 70 and 72 of that Convention.

13. The question arose, however, whether the rules of general international law concerning suspension and termination of treaties as unilateral measures were available to the injured State in response to any internationally wrongful act. If so, the legal regime of suspension and termination of treaties within the framework of the instrumental consequences of an internationally wrongful act should cover such cases as suspension or termination of a treaty, or any rule or part thereof, in response to any infringement of one or more of the obligations deriving from the same treaty, including not only the material breaches covered by article 60 of the Vienna Convention but also minor breaches of any international obligation in respect of which article 60 provided neither for suspension nor for termination; suspension or termination of a treaty, or any rule or part thereof, in response to a breach of any other treaty or treaties; and the suspension or termination of a treaty in response to a breach of a rule of general international law, whether it was an ordinary customary rule or a rule of *jus cogens*. It followed that the legal regime of suspension and termination of treaties must first be studied in the light of the rules and principles tentatively explored so far with regard to countermeasures in general. In that connection, he would refer, for example, to the limitations regarding the kind of measures to which recourse could be had and regarding the conditions that must be met before recourse could be had to something such as prior demand for cessation or reparation and prior recourse to a dispute settlement procedure.

14. A problem arose where recourse to suspension or termination of a multilateral treaty as a countermeasure affected the rights of States other than the law-breaking State. Some legal writers suggested that a distinction should be drawn between "reciprocal" or "divisible" multilateral treaty obligations, on the one hand, and "integral" or "indivisible" multilateral treaty obligations, on the other. While the first group of obligations could be suspended or terminated by the injured State unilaterally, there could be no lawful suspension or termination in the case of the second. Unilateral suspension or termination of compliance with obligations by the injured State by way of a reprisal would be detrimental to other States participating in the treaty and would go beyond the mere legal injury which derived simply from the infringement of the treaty. Other writers took the view that a distinction should instead be made between termina-

tion and suspension: termination of a multilateral treaty would be inadmissible where any participating States were "third" States in relation to the breach. Suspension, on the other hand, would be admissible. Paragraphs 1 (a), (b) and (c) and paragraph 2 of draft article 11 as proposed by the previous Special Rapporteur in 1985 were partly in conformity with the distinction between divisible and indivisible obligations. Paragraph 2 was acceptable in substance. It covered the case where the multilateral treaty provided for a procedure in the event of a breach and for the kind of measures that should be taken collectively by the participating States *vis-à-vis* the wrongdoer. So far as paragraph 1 of article 11 was concerned, he had strong doubts about the distinction between the three hypotheses. In particular, he wondered whether the question of suspension of compliance with certain obligations should not be envisaged within a wider context to cover not only multilateral treaties but also rules that provided for *erga omnes* obligations. That would be more in conformity with article 17 of part 1 of the draft. Multilateral treaties should also provide that an injured State could terminate the treaty unilaterally if the internationally wrongful act was a manifest violation that destroyed the very purpose and object of the treaty. He had in mind, for example, disarmament treaties.

15. He had strong doubts about the so-called self-contained regimes. Some of the commentary in that connection had perhaps overstated the issue. For example, the European Community system might well be considered a self-contained regime, although not in absolute terms. That did not exclude the possibility that, under certain conditions, a State might resort to measures outside of the European Community framework. The elaboration of the regime of countermeasures should, if possible, be free from the hypnotising influence of a concept under which a group of States was confined within a particular system, thus preventing those States from resorting to countermeasures in the case of injury.

16. Another important issue was the problem of differently injured States. It was as perplexing as that of self-contained regimes. Clearly, in the case of a breach of an international obligation, considerable differences could exist between injured States, as the concept of "injured State" was defined in draft article 5 of part 2: some States might be affected directly, others might be affected indirectly, while others might fall between those two extremes. In any event, he did not believe that there was a need for a special article dealing with the case of the indirectly injured State. In the final analysis, the distinction between indirectly and directly injured States was merely a matter of the degree to which a State was affected by a wrongful act. Thus, the position of each injured State should be left to depend simply on the normal application to that State, based on the circumstances of the specific case, of the general rules governing the substantive and instrumental consequences of internationally wrongful acts.

17. The concept of the indirectly injured State concerned more than just countermeasures. A morally affected State—for example, one that had been injured by a breach of a treaty on human rights—would not be entitled to compensation. However, it would be entitled to claim from the offending State *restitutio*, and possibly

compensation, for the morally and physically injured victims; it would be entitled to seek satisfaction and guarantees of non-repetition; and it would be entitled to apply reprisals of a proportional nature. It was therefore clear that the question of the non-directly injured State had an impact not only on the right to resort to countermeasures but also and most importantly on the rights to cessation and reparation, which constituted the substantive consequences of an international wrongful act.

18. The remainder of his third report dealt with substantive limitations issues, which included the unlawfulness of resort to force; respect for human rights; the inviolability of diplomatic and consular envoys; and compliance with imperative rules and *erga omnes* obligations. In the case of force, he had extended the scope to include the question of whether all forms of armed reprisals or countermeasures were prohibited, as provided for under the Declaration on Friendly Relations and under Article 2, paragraph 4, of the Charter of the United Nations. Some claimed that certain forms of unilateral reprisals had survived those sweeping prohibitions or should be resuscitated as a justifiable form of reaction, particularly in the case of reprisals against guerrilla activities or violations of human rights. It was clear that such views were unacceptable and that such practices should be condemned: the Commission was duty-bound to take that position in view of the fact that the prohibition under the Charter of the United Nations was sacrosanct and did not admit of any exception. At the same time, the Commission should not ignore the existence of such practices as it elaborated the regime of countermeasures. If certain States found themselves obliged to resort to violence, it was because adequate and effective remedies for action in the case of an internationally wrongful act were not available. To curb the temptation to resort to force, a more comprehensive system of countermeasures had to be elaborated and greater efforts had to be made in the area of progressive development of the law.

19. The Western countries had long interpreted the concept of force to mean military force. The concept had been modified with the 1970 Declaration on Friendly Relations and the 1973 oil embargo. Since that time, some Western countries had begun to reconsider the matter, moving closer to the views of the developing and socialist countries, which advocated the prohibition of certain types of economic coercion. As far back as 1977, he himself had maintained that there were cases in which economic force might be seen as equivalent to military force.

20. He had some reservations about the substantive limitations on resort to countermeasures, arising from the notion of the inviolability of specially protected persons. It was his impression that the issue had given rise to a certain amount of exaggeration. A distinction should be made between the case of the inviolability of the person or the premises of a diplomatic envoy and that of the privileges and immunities of diplomatic envoys, where reprisals might be justified.

21. He was not able to propose a solution to each of the matters dealt with in the report. One thing was clear: it was unlikely, particularly with respect to delicts, that there would be in the short- or even the medium-term, an

adequate degree of institutionalization, at least at the international level, of remedies available to injured States. While there were examples of regional institutionalization, those cases were rare. For the time being, the only area in which some modest developments might be expected was that of political and military security. Thus, with the exception of infrequent cases of regional or special institutionalization, remedies against "ordinary" internationally wrongful acts were limited to inorganic inter-State measures, a system which, in the absence of any real centre, could be euphemistically termed "decentralized".

22. In view of those considerations, the Commission was duty-bound to pursue two objectives. First, it should be much more generous in its formulation of all the articles relating to countermeasures. Secondly, it should make greater efforts towards progressive development in that area. In pursuing those objectives, the Commission had to fulfil two requirements which might not be fully compatible. The first was to ensure that countermeasures were not abused by allegedly injured States. The second was to define countermeasures which were effective enough to guarantee cessation and reparation. The difficulty lay in the fact that effectiveness decreased as restrictions increased. The absence of effectiveness led in turn to violations of the restrictions and eventually to use of force. The only way to strike a balance between those two requirements was to develop dispute settlement procedures, in particular third party settlement procedures. In that connection, the requirement of prior resort to settlement procedures should be made as strict as possible. That should be done in respect of the general non-specific procedures provided for under Article 33 of the Charter of the United Nations and in respect of such specific procedures as arbitration, judicial settlement and consideration as well. In particular, the Commission should go beyond what was currently provided for under article 10.

23. It would be premature to discuss part 3 of the draft in detail. Settlement of disputes was, for obvious reasons, an area in which it would be more difficult to achieve progress. Articles 3, 4 and 5 of part 3 needed considerable improvement. At the same time, he pointed out that a number of members of the Commission had taken a prudent attitude with regard to the question of dispute settlement. Most members were concerned that States might not be willing to accept significant innovations, especially in the context of State responsibility, which covered practically every area of international relations. In spite of those considerations, the Commission should be courageous and imaginative in its approach to the present topic. Members should bear in mind that they were participating in the Commission as individuals and not as government representatives. Therefore, the Commission was in a position to put forward certain far-reaching proposals which it deemed necessary for the progress of international law even if such proposals might not be immediately acceptable to States. In that regard, he wished to recall the views of Gilberto Amado, who, while discouraging adventurous proposals, had insisted that the Commission should be imaginative and not be discouraged by the difficulties its drafts might eventually meet on the part of Governments. In the field of State responsibility, the Commission should do any-

thing with regard to countermeasures, except leave things as they stood.

24. Finally, at the forty-fifth session of the General Assembly, a question had been raised in the Sixth Committee about the status of the topic of State responsibility and the time-frame for the completion of the project. The current status of the work was that part 1 had been completed on first reading; the Commission was currently considering the section of part 2 concerning delicts and had yet to consider the difficult issue of the regime of crimes. Part 3 also remained to be examined, although a considerable portion would already have been discussed under part 2. What remained to be done could surely be completed within the next five years. Thus, within that time-period, parts 2 and 3 could be adopted on first reading; in addition, there might be enough time for a second reading of part 1, on which research had already begun.

25. Mr. McCaffrey said that he had two questions in connection with dispute settlement obligations and so-called self-contained regimes. He was thinking particularly of the *Air Service* case. Two sources, the 1934 report of the International Law Institute and the judgment of ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*,¹⁰ stated that prior recourse should be had to any applicable dispute settlement regime. However, in the *Air Service* case, the arbitral tribunal had held that there was no requirement to have prior recourse to a tribunal which had not been constituted at the time when the countermeasures in question were taken; consequently, it was permissible to take countermeasures without going through the dispute settlement procedure. Did the Special Rapporteur think it was advisable to have an inflexible rule whereby States must always have prior recourse to dispute settlement procedures? Should cases such as *United States Diplomatic and Consular Staff in Tehran* be treated similarly to the *Air Service* dispute?

26. Secondly, he wondered whether the General Agreement on Tariffs and Trade would qualify as a self-contained regime. It was indeed a multilateral treaty, and contained specific provisions stating which actions could be taken by States parties in the event of a breach. According to that Agreement, the only permitted responses were those spelt out therein; responses outside the regime of the Agreement were not permissible.

27. Lastly, he welcomed the Special Rapporteur's invitation to the Commission to adopt an imaginative and forward-looking approach to the topic.

28. Mr. ARANGIO-RUIZ (Special Rapporteur) said that there was certainly a considerable difference between the *Air Service* and the hostages cases. The lawfulness of different kinds of international acts varied from case to case, depending on circumstances. The hostages case had pointed very clearly to the consequences which might arise from a lack of institutionalization of international society. Indeed the absence of effective mechanisms was the reason why the hostages had been held for such a long time. He had therefore urged the strengthening of the system of peaceful settlement. Re-

course to ICJ should always be the first step in such cases; and indeed in another recent incident involving aircraft that had been the reaction of the country involved.

29. With regard to self-contained regimes, although the General Agreement on Tariffs and Trade and the European Community treaties spelt out their own solutions, the principles of general international law remained, and must be preserved. The answer in the event of a breach of the General Agreement on Tariffs and Trade would depend on the nature of the breach and whether an effective response could be obtained through the Agreement's machinery. If not, other measures could be contemplated.

30. The CHAIRMAN said that it would be helpful to suspend the meeting so as to enable the Planning Group to meet.

The meeting was suspended at 11.20 a.m. and resumed at 12.15 p.m.

Draft Code of Crimes against the Peace and Security of Mankind¹¹ (continued) (A/CN.4/435 and Add.1,¹² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 17 (Intervention) (concluded)

31. The CHAIRMAN invited the Chairman of the Drafting Committee to explain the position on article 17.

32. Mr. PAWLAK (Chairman of the Drafting Committee) said that articles 16, 17 and 18 had been introduced as a group, but at the previous meeting the Commission had wisely decided to take them up separately for the purposes of adoption.¹³ At that meeting, the Commission had adopted article 16 and, as far as article 17 was concerned, there were now two groups of proposed amendments. The first would have the effect of reverting to a principle that had been adopted earlier by deleting the words "by another individual" from paragraph 1 and replacing the word "intervention" by "an act of intervention". The beginning of paragraph 1 would thus read: "An individual who, as leader or organizer commits or orders the commission of an act of intervention . . .".

33. The second group of proposals concerned paragraph 2 of article 17. The question was whether the Commission wished to take action regarding the words "[armed]" and "[seriously]". The Drafting Committee had not discussed that issue and, therefore, had not reported on it.

¹¹ 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.

¹² Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

¹³ For texts and discussion, see 2237th meeting, paras. 78-109.

¹⁰ *I.C.J. Reports 1980*, p. 3.

34. The text of paragraph 2 had been adopted previously by the Commission and he stressed that the words “armed” before “subversive or terrorist activities” and “seriously” before “undermining the free exercise by that State of its sovereign rights” were intended to delimit the scope of intervention. The word “armed” indicated that only armed subversive or terrorist activities constituted intervention for the purposes of article 17. Similarly, the word “seriously” indicated that the article was intended to cover only a grave act of undermining a State’s sovereign rights.

35. He suggested that the Commission should take a decision first on paragraph 1 and then on paragraph 2.

36. Mr. THIAM (Special Rapporteur) said that the question whether intervention should be armed or not had been discussed at great length by the Commission at previous sessions. His own view was that the square brackets round the word “armed” should be removed. Otherwise, an intervention of any kind whatsoever would be treated as a crime against the peace and security of mankind. It would be a mistaken approach because some interventions could not be described as crimes; indeed, in his reports he had given many examples of interventions of a friendly nature. If the term “armed” were left within square brackets it would be extremely difficult to determine whether a particular act of intervention could be treated as a crime against the peace and security of mankind.

37. The word “seriously”, placed in square brackets in paragraph 2, was perhaps unnecessary, because any act which undermined the free exercise of a State’s sovereign rights was bound to be serious. However, members might wish to keep the word without square brackets so as to introduce the idea of a scale of gravity in the matter; it would then be for the court to decide in each case whether an act of intervention was serious in character.

38. Mr. EIRIKSSON said that in paragraph 1 the word “intervention” could be replaced by “an act constituting intervention”, a formulation that would create a better link with paragraph 2, in which the concept of intervention was defined for the purposes of the draft. As employed in article 17, it was not a well-recognized concept that was already a term of art.

39. Mr. PELLET said he wished to reiterate his general and absolute reservations to article 17. Unlike those he had entered with regard to earlier articles, they concerned not only the form but also the substance. He had strong reservations about the characterization of intervention as a crime against the peace and security of mankind. There were only two possibilities. Either there was an armed intervention, in which case article 17 was superfluous because that act would constitute aggression, a crime already covered by article 15, which, incidentally, gave an imperfect definition of aggression. Alternatively, if the intervention was not armed, it could not be characterized as a crime against the peace and security of mankind in the present state of international law and international relations. In either case, he objected to intervention being included in the draft under a separate article. Since it was not possible for him to oppose the

article at that stage, he requested that his strong reservations should be placed on record.

40. If, however, the Commission decided to keep article 17 in the draft, removing the square brackets around the words “armed” and “seriously” would be the lesser evil. It would still not be a good solution, because there were cases of armed intervention which were perhaps unlawful under international law but which certainly did not constitute crimes against the peace and security of mankind. In that connection, he preferred to give examples taken from the history of his own country. France had engaged on a number of occasions in armed intervention in Chad. It would be quite unreasonable to contemplate branding the President of the French Republic as a criminal in those circumstances and suggesting that he should be tried by an international criminal court.

41. On the other hand, if the word “armed” were retained with square brackets, the result would be to suggest the possibility of nearly all heads of State throughout the world being indicted as criminals under the article.

42. Mr. TOMUSCHAT said that he had the same objections to article 17 as Mr. Pellet. It was not necessary because the draft already contained an article on aggression. In any event, the least the Commission could do was to delete the square brackets around the word “armed”. The Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States annexed to General Assembly resolution 36/103, of 9 December 1981, had greatly extended the scope of intervention and, obviously, the temptation would be to construe article 17 in the light of that Declaration.

43. Mr. SHI said that he accepted the amendment suggested by the Chairman of the Drafting Committee for paragraph 1 and favoured deletion of the words “armed” and “seriously”. Subversion, even if unarmed, was always an extremely serious crime. Following the Second World War there had been many instances of Governments being overthrown by subversion without the use of armed force. Acts of that kind constituted crimes against the peace and security of mankind and were no less serious than armed intervention. As a compromise, he would none the less be prepared to accept article 17 as it stood, with the square brackets, so as to elicit comments from Governments for the purposes of the second reading of the draft. He was, however, strongly opposed to keeping the words “armed” and “seriously” in the article without the square brackets.

44. Mr. NJENGA said that he could accept the wording suggested by the Chairman of the Drafting Committee and endorsed by the Special Rapporteur. Article 17 was a very important article which should have a place in the draft and he strongly objected to the attempt to eliminate it.

45. As to the question of the use of the word “armed” to qualify intervention, he would emphasize that his own continent, Africa, afforded many examples of unarmed intervention which had caused a great deal of suffering. His own preference would, therefore, be to eliminate the word “armed”. If that suggestion did not prove accept-

able, the word should be left between square brackets in order to obtain the views of the Sixth Committee and of Governments.

46. He agreed with the Special Rapporteur that it was advisable to omit the word "seriously" altogether. Among other difficulties, one question that would arise was who was to be the judge of seriousness in the matter.

47. Mr. SOLARI TUDELA expressed strong support for article 17, which, in his view, embodied a vital principle enunciated in the Charter of the United Nations, which was essential in contemporary international relations; and any violation of it constituted a crime against the international community. The word "armed" should be deleted, for unarmed intervention was just as serious as armed intervention. He was also in favour of removing the word "seriously" from paragraph 2.

48. Mr. Pellet's example was unconvincing. Under the terms of paragraph 2, the intervention in question consisted of fomenting armed subversive or terrorist activities and undermining the free exercise of a State's sovereign rights. The French interventions in Chad bore no resemblance to acts of that kind.

49. Mr. CALERO RODRIGUES said that he had reservations about the article and about the concept of intervention itself. The problem of intervention was a very difficult one and article 17 did not deal with it adequately. Paragraph 2 stated that intervention consisted of fomenting armed subversive or terrorist activities. Terrorist activities were covered by article 24, on international terrorism. In the case of subversive activities, however, article 17 was not well drafted and its provisions should deal with subversive activities by a State against another State. Intervention was undoubtedly an unlawful act, but not all acts of intervention were serious enough to warrant treatment as crimes against the peace and security of mankind. Perhaps the best solution would be not to use the term "intervention" at all but to speak of fomenting subversive or terrorist activities, organizing, assisting or financing such activities or supplying arms for the purpose of such activities.

50. Mr. Sreenivasa RAO said that he agreed with Mr. Shi and Mr. Njenga that armed subversion was not the only serious form of intervention that undermined the free exercise of a State's sovereign rights. The word "armed" should therefore be removed from paragraph 2. The word "seriously" was unnecessary.

51. Intervention was always illegal, but the position with regard to interference was somewhat different. Some forms of interference in the affairs of another State, whether for protection or for other reasons, were lawful. Article 17 did not clarify all the doubts in the matter. The subject of intervention was very complicated both from the legal and from the political point of view, the main difficulty being to determine the cases in which intervention should be treated as a crime. Perhaps the whole of article 17 could be placed in square brackets so as to invite comments from Governments on the problems at issue.

52. Mr. RAZAFINDRALAMBO said he agreed with members who had stressed that article 17 was essential to the draft. Intervention was the modern form of aggression. Nowadays, small countries were rarely the victims of armed aggression, but intervention by stronger States in various forms was a frequent occurrence. He therefore felt strongly that there was a place for article 17 in the draft code. It was, however, essential to define clearly the limits or the scope of intervention under article 17. For example, in the case mentioned by Mr. Pellet, France's armed intervention had been in response to a request by the legitimate Government of Chad. It fell clearly outside the scope of article 17. Paragraph 2 of the article spoke of "fomenting subversive or terrorist activities" and "undermining the free exercise" of a State's "sovereign rights". The words "armed" and "seriously" should be deleted. He could accept, however, the solution of retaining the square brackets as a compromise and awaiting the response of Governments in order for a decision to be taken on second reading.

53. Prince AJIBOLA said he agreed with Mr. Razafindralambo. In the developing countries acts of armed subversion or acts subverting the sovereign authority of Governments were not infrequent, and such cases were properly addressed by article 17. The article must be retained. However, the word "armed" should be deleted, since even serious acts of that nature were not necessarily carried out by force of arms.

54. Mr. BARSEGOV said that the problem of criminal responsibility for acts of intervention, and of how to punish the individuals concerned, had lost none of its political or legal significance. However, the threshold of criminality and the degree of responsibility were matters on which the Commission required the views of Governments. In its present form, the article perhaps failed to reflect the complexity of international events. There were certain rare cases of intervention of a humanitarian kind which were fully in accordance with the rules of international law and the Charter of the United Nations; indeed sometimes the purpose of the intervention was to prevent genocide, and, in a recent case, a national group had placed itself under the protection of international law for that very purpose. Such cases might recur. If the article was retained, it should be redrafted on second reading in order to provide for them.

55. Mr. DÍAZ GONZÁLEZ said he was in favour of retaining the article. The wording could be improved on second reading, at which time a decision could be made on the words in square brackets. Greater precision would be possible in the light of the comments made in the Sixth Committee. He would point out that Latin American States were continuing to suffer intervention in various violent forms: not merely armed intervention, but also the assassination of political leaders and economic intervention. He agreed with the solution proposed by Mr. Calero Rodrigues.

56. Mr. THIAM (Special Rapporteur) said he was in favour of retaining article 17 in its present form and awaiting the views of the Sixth Committee. The particular nature of intervention was already defined for the purposes of the draft. Mr. Pellet was doubtless aware that the elements of the definition were borrowed from the judgement in the case brought by Nicaragua against

the United States of America.¹⁴ Those elements should be kept, regardless of the exact title of the article. A key element of the definition lay in the use of force or organized terror against another State. Drafting improvements to article 17 and a decision on the words in square brackets should be left for the second reading.

57. Mr. PELLET said he could not accept article 17 in its present form. Taken literally, it would mean that the President of the United States of America would have to be indicted by an international criminal court for a crime against the peace and security of mankind. It was precisely because he felt that that would be unreasonable that he objected to the article. The Commission must take a responsible stance, in the light of international realities. He did not support either United States intervention in Nicaragua, or acts of intervention by other countries, but was disturbed by the idea that they could be characterized as crimes against the peace and security of mankind. Indeed the very title of the article invited misinterpretation and misuse for political ends. He proposed that it should be replaced by "subversive activities". As to the content of the article, he agreed with Mr. Calero Rodrigues that, if the article was retained, the words in square brackets should be deleted.

58. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that the words "by another individual" in paragraph 1 should be deleted, and replaced by "an act".

59. Mr. ARANGIO-RUIZ, referring to paragraph 1, said he agreed with the views expressed by Mr. Calero Rodrigues and Mr. Pellet on the question of intervention. It was a singularly difficult concept to define. Inevitably, article 17 was somewhat vague, since a crime was a highly specific matter. However, the actions of the United States of America or any other particular country were not relevant to the condemnation of intervention as such.

60. Mr. EIRIKSSON said that he had a number of reservations about the article, but they related to the title rather than to the substance.

61. The CHAIRMAN, speaking as a member of the Commission, said that the difficulty of characterizing the crime of intervention was well known. Acts carried out with the consent of the second State would of course escape the rubric of intervention. Paragraph 2 sought to define the scope of the article, and to indicate the criminal elements in intervention. It did not take a political stance. As for paragraph 3, he felt, as a member of the Drafting Committee, that it did not properly belong in the article. However, it was a wise decision to refer the article as a whole to the General Assembly for comments and advice, with a view to making improvements on second reading.

62. Mr. BARSEGOV said that paragraph 3 was drawn from General Assembly resolution 36/103, containing the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. Likewise, the definition of aggression in the draft articles was based on the relevant General Assembly resolution.

63. Mr. McCAFFREY said that although he had not spoken during the discussion, he wished to place on record that his views were unchanged since the Commission's previous adoption of article 17, without the new paragraph 1.¹⁵

64. The CHAIRMAN suggested that the Commission should adopt article 17 with the amendment to paragraph 1 proposed by the Chairman of the Drafting Committee. He endorsed the latter's proposal to retain paragraph 2 in its present form. Paragraph 3 would likewise be retained.

Article 17, as amended, was adopted.

The meeting rose at 1.05 p.m.

¹⁵ Adopted as article 14 (Intervention) at the forty-first session, in 1989.

2239th MEETING

Thursday, 11 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacobides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 18 (Colonial domination and other forms of alien domination) (concluded)

1. The CHAIRMAN invited the Commission to resume its consideration of article 18.

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... 1991*, vol. II (Part One).

¹⁴ See 2209th meeting, footnote 6.

2. Mr. PAWLAK (Chairman of the Drafting Committee) said it had been proposed (2237th meeting) that the words "another individual" should be deleted and that the words "to establish or maintain" should be replaced by the words "the establishment or maintenance". As thus amended, article 18 would read:

"Article 18. Colonial domination and other forms of alien domination

"An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to . . .]."

3. Mr. THIAM (Special Rapporteur) said that he agreed with those changes.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 18, as amended.

Article 18, as amended, was adopted.

ARTICLE 19 (Genocide)

5. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 19 which read:

Article 19. Genocide

1. An individual who commits or orders the commission by another individual of an act of genocide shall, on conviction thereof, be sentenced [to . . .].

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

6. Mr. PAWLAK (Chairman of the Drafting Committee) explained that article 19 (Genocide), as well as articles 20, 21, 22 and 26, had been worked out at the present session. Its scope *ratione personae* extended to all individuals.

7. With regard to the definition of the crime of genocide contained in paragraph 2, it would be recalled that, in plenary, the Commission had generally approved the approach taken by the Special Rapporteur in closely following the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Drafting Committee had, however, felt that the limitative list of acts constituting genocide which was to be found in article II of that Convention should not be made into an open list, as had been suggested by the Special Rapporteur. In the Committee's view, the principle *nullum crimen sine lege* required that the list should

be exhaustive. Furthermore, it would be inadvisable to depart from a widely ratified instrument such as the Convention.

8. The Drafting Committee had therefore eliminated the word "including" which had been used in paragraph 1 of the former article 14 (Crimes against humanity), as proposed by the Special Rapporteur.³ The opening words of article II of the Convention ("In the present Convention . . .") had also been eliminated in order to adapt the definition to the requirements of the Code.

9. With regard to paragraph 2 (c), the Drafting Committee had discussed whether the definition of genocide should not encompass the deportation of members of a national, ethnic, racial or religious group with the intent of destroying the group. In that connection, the Committee had considered it undesirable to depart from the provisions of the Convention and had preferred to cover that aspect in article 21 (Systematic or mass violations of human rights).

10. Lastly, he indicated that one member had expressed a reservation on article 19, paragraph 2 (e), maintaining that its scope should extend to all members of a group and not only to children. It had also been proposed that the words "by another individual" should be deleted from paragraph 1, as had been done in articles 16, 17 and 18.

11. Prince AJIBOLA said that, in paragraph 1, it might be better to refer to "a crime of genocide" rather than to "an act of genocide", in view of the seriousness of that crime.

12. Mr. TOMUSCHAT said that, for the sake of consistency, the words "act of genocide" should be retained, particularly since the words "act of aggression" and "act of intervention" were being used in articles 16 and 17.

13. He also thought that the words "by another individual" should not be deleted because genocide could be committed by one person, unlike aggression or intervention.

14. Mr. RAZAFINDRALAMBO said he agreed with Mr. Tomuschat that it would be preferable to retain the words "act of genocide" in paragraph 1. However, he did not believe that the deletion of the words "by another individual" in that paragraph would give rise to any real problem, since it was understood that individuals could be involved in an act of genocide.

15. In paragraph 2, he suggested that the words "Genocide means any of the following acts" should be replaced by the words "Genocide consists of any of the following acts . . ." in order to bring the text into line with that of other articles, particularly article 20 (Apartheid).

16. Mr. BARSEGOV said he also considered that the deletion of the words "by another individual" would make the text more homogeneous without changing the

³ *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/419 and Add.1, para. 30.

meaning of the article. Genocide was, of course, committed by a State, but through the intermediary of individuals. It was not because those words had been deleted that those individuals would no longer be responsible.

17. Mr. PAWLAK (Chairman of the Drafting Committee) said that it would be better to bring article 19 into line with articles 16, 17 and 18 by deleting the words "by another individual".

18. As to Prince Ajibola's proposal that the words "an act of genocide" should be replaced by the words "a crime of genocide", he noted that article 2 of the draft Code had already been adopted by the Commission and dealt with the characterization of an act or omission as a crime. If the two articles were taken together, it was only logical that the word "act" in article 19 should be retained; in any case, all the acts mentioned in the Code were crimes. One single exception had been made in that regard, namely in article 20, the words "crime of apartheid" had been retained by reference to the International Convention on the Suppression and Punishment of the Crime of Apartheid. He would have the opportunity to come back to that point during the consideration of article 20.

19. Prince AJIBOLA again noted that, in his view, some acts were basically crimes. That was the case of genocide, which differed, for example, from intervention in that it constituted a crime from the outset, whereas there might well be a peaceful intervention or an intervention decided by common consent.

20. If, for the sake of uniformity, however, the Commission decided to retain the present wording, he would not object to it.

21. Mr. BARSEGOV said that article 19 raised a very important issue of principle, namely, that of deportation as a means of committing genocide. He was thinking, for example, of mass deportations of populations driven from territories which were their ancestral lands. That was obviously a politically delicate issue which was supposed to be covered by paragraph 2 (c). The Chairman of the Drafting Committee had indicated, during the discussion of that subparagraph, that that was to be clearly reflected in the commentary. In his own view, it was essential to say so specifically.

22. Mr. NJENGA said he agreed with Prince Ajibola that genocide was essentially a crime in the same way as apartheid. The expression "crime of genocide" was, moreover, commonly used.

23. Mr. EIRIKSSON said he did not think that a substantive debate on paragraph 1 of the articles on genocide and apartheid should be started at the current stage. The Drafting Committee had tried to find introductory wording that could be used for each of the articles of part two of the draft Code. A number of solutions were possible, including the one suggested by Prince Ajibola, but, taking particular account of article 3 of part one, the Committee had decided to use the word "crime" in the title of part two so as to indicate that all the acts referred to in articles 15 to 26 constituted crimes. It had not considered it necessary to repeat it in the articles themselves. In his view, it would be necessary, for the sake of

consistency, to use the word "act" instead of the word "crime" in article 20 as well. Moreover, the conventions on which certain articles were based, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, were not always models of uniformity. If distinctions were made between the articles, there would be a danger of creating problems of substance and upsetting the structure of the text.

24. Mr. PELLET said that he agreed with Mr. Eiriksson on the advisability of using the word "act" both in article 19 and in article 20. The use of the word "crime" was not logical. It was under the Code that was being drafted that certain acts would be characterized as crimes against the peace and security of mankind.

25. Unlike Mr. Barsegov, who would like the list in article 19, paragraph 2, to be as full as possible, he believed that the Commission should not try to be exhaustive because there was the risk that it might leave out some particularly unacceptable acts it had not thought of. Article 18, which had just been adopted without any problem, did not contain a list and its wording was entirely satisfactory. He was opposed to any addition to the lists contained in articles 19 and 20, which he thought were already too long; they could be only illustrative in nature, no matter what might be said.

26. Mr. DÍAZ GONZÁLEZ said that he would also prefer the use of the words "crime of genocide" by reference to the Convention on the Prevention and Punishment of the Crime of Genocide. He pointed out that, at the beginning of paragraph 2, the word "Genocide" was used by itself and that it was therefore not consistent with paragraph 1.

27. Mr. CALERO RODRIGUES stressed that, from the standpoint of criminal law, individuals committed acts and the law then characterized those acts as crimes.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said he also considered that, since all the acts referred to in the Code constituted crimes, there was no need for repetition by replacing the word "act" by the word "crime". Those in favour of that change should bear in mind that they were drafting a criminal code and that, if the rights of the defence were to be respected, they must refer a priori to acts and not to crimes. It would also not be appropriate to make any distinction between the acts referred to in the various articles, which were all very serious.

29. With regard to the point which Mr. Barsegov had raised and to which he himself had referred in his introduction to article 19, he pointed out that the question of deportation had been dealt with in article 21 (Systematic or mass violations of human rights). However, it might be useful to mention in the commentary that article 19, paragraph 2 (c), was meant to be broad in scope and to cover deportation as well.

30. As to the advisability of drawing up an exhaustive list of acts of genocide, he recalled that it was from the standpoint of criminal law that the Drafting Committee had decided to be specific and to delete the word "in-

cluding", which appeared in the former article 14 proposed by the Special Rapporteur. The Commission could, however, come back to that question during its examination of the draft articles on second reading if that approach was considered unsatisfactory.

31. The CHAIRMAN, speaking as a member of the Commission, said that, paradoxically, Prince Ajibola and Mr. Calero Rodrigues were both right. However, although he agreed with Prince Ajibola, he stressed that genocide had at all times been regarded as a crime under international law, as the Convention on the Prevention and Punishment of the Crime of Genocide had confirmed. In that sense, genocide was different, for example, from apartheid: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid was the first instrument which had made apartheid a crime.

32. Mr. NJENGA said that it would be more correct to refer to the "crime of genocide". He considered that the Commission should not spend any more time on that question and expressed the hope that it would avoid the same debate on article 20.

33. Mr. THIAM (Special Rapporteur) said that the question had been discussed at length in the Drafting Committee, some members favouring the use of the words "crime of genocide" and others, the words "act of genocide". It had finally been decided that the word "act" should be retained for the sake of harmonization. In fact, substance counted more than form. Genocide was, of course, a crime, since it was covered by the Code. To refer to an "act of genocide" did not mean that genocide was not a crime.

34. Prince AJIBOLA recalled that the Commission had held a lengthy discussion of the question whether, in the English version of the title of the draft articles, the word "offences", a generic term covering all breaches of criminal law, should be replaced by the word "crimes". In the end, the term "crimes" had been chosen. There could thus be no question now of referring simply to "acts".

35. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Commission could adopt article 19 as proposed by the Drafting Committee, with the deletion from paragraph 1 of the words "by another individual". It was understood that genocide was a crime, and even a grave crime, but all the other acts characterized as crimes in the draft Code were defined as "acts".

36. In reply to Mr. Díaz González, he said that it was naturally the crime of genocide itself which was defined, not the act.

37. The CHAIRMAN thanked Prince Ajibola for his comments, which seemed to have attracted some support in the Commission. He stressed that the Commission was now considering the draft articles on first reading only and that it would have every opportunity to come back to that question later during the consideration on second reading.

38. If he heard no objection, he would take it that the Commission wished to adopt article 19 as proposed by

the Drafting Committee, subject to the deletion of the words "by another individual" from paragraph 1.

Article 19, as amended, was adopted.

ARTICLE 20 (Apartheid)

39. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 20, which read:

Article 20. Apartheid

1. An individual who as leader or organizer commits or orders the commission by another individual of the crime of apartheid shall, on conviction thereof, be sentenced [to . . .].

2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

(a) denial to a member or members of a racial group of the right to life and liberty of person;

(b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

(d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

(e) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

40. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 20 (Apartheid) had also been entirely worked out by the Drafting Committee at the present session. It would be recalled that, in his seventh report, the Special Rapporteur had presented two alternative texts for the article;⁴ one was a short version consisting of a very general definition and the other, a longer version modelled on article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The Drafting Committee had preferred the second version because it was closer to the definition of apartheid that was generally accepted, namely, discrimination based on race, and also because it was incorporated in an international instrument. The definition of apartheid which the Committee was now proposing was a simplified version of article II of the 1973 Convention, to which two basic changes had been made. First, since the 1973 Convention had been drafted to fit the particular situation which had existed in southern Africa, the Committee had reworded the definition of apartheid so as to look to the future as well. Secondly, the Committee had considered that the definition should be limited to the description of the crime of apartheid only and that the examples should be deleted, since they could not be exhaustive.

⁴ Ibid.

41. As in the other articles, paragraph 1 specified that the crime should be linked to individuals—either to leaders or to organizers who committed or ordered the commission of the crime by others. As it had decided in the case of other articles, the Commission might want to delete the words “by another individual”.

42. The *chapeau* of paragraph 2 gave a general definition of apartheid, namely, acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing and maintaining domination by one group over any other racial group and systematically oppressing it. It should be stressed that the words “any other racial group” applied to one or more racial groups. In the Drafting Committee’s view, there was no reason to refer each time to “group or groups”, as the 1973 Convention did, since the commission of a crime against one group was sufficient to be considered a crime under the Code. In conformity with the approach adopted for the other articles, apartheid was defined by reference to acts listed in subparagraphs (a) to (f), which were simplified versions of subparagraphs (a) to (f) of article II of the 1973 Convention; the examples had been deleted and only the description of the acts had been retained.

43. The Drafting Committee had decided to retain the title of the article as: “Apartheid”.

44. Lastly, in view of the discussion which had taken place on article 19, the Commission should, for the sake of uniformity and logic, consider the possibility of replacing the word “crime” in paragraph 1 by the word “act”, without prejudice to the characterization of apartheid as a crime.

45. Mr. NJENGA said that his willingness to agree that the term “act” should be maintained in article 19 did not mean that he agreed that the words “crime of apartheid” should be replaced by the words “act of apartheid” in article 20. He stressed that apartheid was not an act or a succession of acts: it was a system, a systematic policy of racial discrimination based on the oppression of a racial group. It would be absurd to speak of an “act of apartheid” and he could not accept that term.

46. Prince AJIBOLA said that the arguments of uniformity and logic put forward by the Chairman of the Drafting Committee in order to propose, in the light of the discussion on article 19, that the word “crime” used by the Drafting Committee should be replaced by the word “act” were inadmissible. The law did not worry about logic or uniformity. The Commission’s concern should be to submit to the General Assembly not so much a word perfect document, but one which reflected the law as perceived by the jurists composing the Commission. Everyone knew that apartheid was a crime. Since that was the case, why not say so clearly?

47. He had no firm opinion on the proposal to delete the words “by another individual”.

48. Mr. Sreenivasa RAO said that it was important to retain the word “crime” in the present instance, since apartheid was different from the other crimes in that it was not an act, but a system.

49. Mr. PELLET said that he had strong reservations about article 20 for a number of reasons which could be summed up as one, namely, that the Drafting Committee had tried to follow the wording of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. That was, however, a special-purpose Convention and it was intended exclusively to combat apartheid as practised until quite recently in South Africa. As a result, article 20 failed to take account of the intolerable aspect of systematic policies of racial discrimination, no matter where and against whom, they were practised. That was apparently the only reason why the Drafting Committee had, contrary to the principle it had adopted for other articles, used the words “crime of apartheid”, but that was not a valid reason.

50. He also found that paragraph 2 was very poorly drafted. First of all, it defined apartheid as consisting of “acts based on policies and practices of racial segregation and discrimination”, when, in reality, apartheid consisted of those very policies and practices, which the article should have condemned and which were a crime. Moreover, the list was inappropriate, inasmuch as it probably did not cover all possible acts of apartheid. The Drafting Committee seemed to be aware of that fact, judging by the use in two places, in subparagraphs (d) and (e), of the words “in particular”, which suggested that the Committee believed that there were probably other such acts without being able to define them. Subparagraphs (c) and (d) placed emphasis on legislative measures, something that was highly debatable, since the problem was not to know the source of those measures, but rather what they were. In fact, administrative measures of systematic discrimination were just as inadmissible as legislative measures. Reference should also have been made to constitutional apartheid, which was or would be the most serious. His reservations did not, however, amount to opposition.

51. Mr. EIRIKSSON said that the words “act of apartheid” were politically more acceptable and that, for reasons of drafting logic, a definition of the “crime of apartheid” might be included in paragraph 2. Of course, reference could simply be made to “apartheid”. In any event, matters could be explained in the commentary.

52. Mr. JACOVIDES, noting that everything had already been said on the question at one point or another, proposed that the Commission should adopt the article as it stood, on the understanding that the commentary would give all the necessary details.

53. Mr. CALERO RODRIGUES said that the proposals that the word “crime” should be replaced by the word “act” or that reference should quite simply be made to “apartheid” would raise more problems than they would solve. In any case, the law was not logical, as Prince Ajibola had pointed out. He was therefore in favour of the adoption of the text as proposed by the Drafting Committee.

54. Mr. PAWLAK (Chairman of the Drafting Committee) said he could agree that the word “crime” should be retained. He nevertheless maintained his proposal that, for the sake of uniformity, the words “by another individual” should be deleted from paragraph 1.

55. Mr. EIRIKSSON referring to, but not insisting on, the model adopted for article 22, proposed that the *chapeau* of paragraph 2 should be amended to read: "The crime of apartheid consists of any of the following acts . . .".

56. Mr. THIAM (Special Rapporteur) said that the Commission could adopt that proposal, which met the concerns of Prince Ajibola and other members of the Commission.

57. Mr. TOMUSCHAT said that, on second reading, the Commission should take another look at the words "the following acts based on", which were inappropriate, since the acts in question were the expression, or the instruments, of policies and practices of racial segregation and discrimination.

58. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was certainly not a political organ and that it worked on the basis of legal elements. As it happened, article I of the International Convention on the Suppression and Punishment of the Crime of Apartheid stated that apartheid was a crime against humanity, whereas, according to article I of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide was "a crime under international law". Moreover, apartheid had been constitutionally established in 1948. Since the Constitution was a legislative act under the system in force in South Africa, apartheid was a legislative measure. After 1948, of course, other measures had been taken to strengthen the system. Lastly, the words "legislative measures and other measures" could also be taken to mean administrative measures.

59. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20, subject to the deletion of the words "by another individual" from paragraph 1.

Article 20, as amended, was adopted.

ARTICLE 21 (Systematic or mass violations of human rights)

60. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 21, which read:

Article 21. Systematic or mass violations of human rights

An individual who commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to . . .]:

— violation of human rights in a systematic manner or on a mass scale consisting of any of the following acts:

(a) murder;

(b) torture;

(c) establishing or maintaining over persons a status of slavery, servitude or forced labour;

(d) deportation or forcible transfer of population;

(e) persecution on social, political, racial, religious or cultural grounds.

61. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the list of crimes against humanity proposed by the Special Rapporteur included slavery, forced labour, expulsion or forcible transfer of populations, per-

secution and murder. The Drafting Committee had considered that, instead of dealing with those crimes in separate articles, it could bring them all under a single article, which would then deal with crimes other than those referred to in separate articles. The fact that all those crimes had a common feature, namely, that they were all violations of human rights, had made that approach easier. All violations of human rights, whatever their degree, were abhorrent and intolerable, but, in order to be included in the Code as crimes against the peace and security of mankind, they had to be sufficiently serious.

62. Article 21, like other articles, began with a *chapeau* to relate the crime to an individual. As in the case of apartheid, any individual could commit the crime. The indented part of the *chapeau* set out the general principle and the criteria in accordance with which the acts listed should be evaluated. Under the *chapeau*, such acts must first be violations of human rights and, secondly, they must be systematic or on a mass scale. The latter criterion was intended to exclude from the scope of the article single acts which were violations of human rights, such as a murder or a single case of torture. Subparagraphs (a) to (e) listed the acts to which the *chapeau* applied. He emphasized that the list in the subparagraphs had to be read together with the *chapeau* because the crimes in question had to be committed in a systematic manner or on a large scale.

63. Some of the acts listed in the subparagraphs were already defined in existing human rights conventions. Others did not yet have conventional definitions, but, in the Drafting Committee's view, they were important enough to come under the Code.

64. Subparagraph (a) listed murder. The crime was self-explanatory and was defined in national criminal codes. In the Committee's view, systematic and mass murder was a crime against the peace and security of mankind.

65. Subparagraph (b) listed torture, which was defined in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There had been general agreement among the members of the Drafting Committee that torture was of a highly destructive nature and should therefore be included in the Code.

66. Subparagraph (c) listed slavery, servitude and forced labour. The crime of slavery was defined in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. In addition, article 8 of the International Covenant on Civil and Political Rights prohibited slavery, as well as servitude, a concept which included bondage and forced labour. A number of ILO Conventions defined and dealt with forced labour. The Drafting Committee had considered that slavery was a classic case of a crime against the peace and security of mankind and should therefore be listed in the Code.

67. Subparagraph (d) dealt with deportation and forcible transfer of population. The Drafting Committee had noted that, in most cases, deportation or forcible transfer of population occurred in time of war. However,

such crimes had been committed and still occurred in peacetime and should therefore be included. The commentary to the article would provide further elaboration and clarification, since there was no conventional definition for it.

68. Subparagraph (e) dealt with persecution on social, political, racial, religious or cultural grounds. Persecution had been listed in the 1954 Code and was referred to in the International Convention on the Suppression and Punishment of the Crime of Apartheid, but there was no conventional definition of it. Many members of the Drafting Committee had considered that many human beings had been and were being persecuted on social, political, racial, religious or cultural grounds. Persecution ran counter to the most basic human rights that formed the foundation upon which civilized human beings built their communities and lived peaceably together. It was therefore appropriate that systematic or large-scale persecution should constitute a crime under the Code. There was no conventional definition of persecution and the commentary would therefore explain what it meant and give examples of the forms it could take.

69. A few members of the Drafting Committee, while not disagreeing with the statement that systematic persecution was a very serious crime, had expressed concern because the term "persecution" itself was not legally defined and its content was not entirely clear. In their view, the Code should include only crimes that could be easily defined. For that reason, two members had expressed reservations about subparagraph (e).

70. The title of the article had been taken from its *chapeau* and read: "Systematic or mass violations of human rights".

71. Mr. THIAM (Special Rapporteur) pointed out that, in subparagraph (a), the word "murder" should be replaced by the words "wilful killing".

72. Mr. JACOVIDES said that the text originally proposed by the Special Rapporteur for paragraph 4 of article 14 read:

"4. (a) Expulsion or forcible transfer of populations from their territory;

"(b) Establishment of settlers in an occupied territory;

"(c) Changes to the demographic composition of a foreign territory."⁵

He wished to know why the second and third points had not been repeated in subparagraph (d) of the text under consideration. If the Commission had good reasons not to retain them, it should at least refer to them in the commentary to article 21. The commentary should also refer to the denial of the right of persons displaced systematically or on a mass scale to return home.

73. Mr. PELLET said that the points raised by Mr. Jacovides came under article 22 (War crimes), in so far as those types of crimes were serious violations of

the law applicable in international armed conflict and, in particular, the law governing wartime occupation, rather than violations of human rights.

74. Mr. JACOVIDES said that crimes such as those referred to in paragraph 4 (b) and (c) of the original article 14 could be committed both in time of war and in time of peace. As it now stood, article 22 was also silent on those acts.

75. Mr. TOMUSCHAT said that the practice of systematic disappearances in certain countries was at present one of the main concerns with regard to human rights. He realized that, at the current stage, it was not possible to add that crime to those listed in article 21, particularly since it might be covered by subparagraph (e). He nevertheless suggested that the commentary should mention the question and that the Commission should come back to it on second reading.

76. Prince AJIBOLA said that the word "murder" in subparagraph (a) was not very appropriate because it belonged more to the realm of internal law. In the present context, it was the term "pogrom" that came to mind more readily.

77. Mr. THIAM (Special Rapporteur) said that, in order to follow the terminology used in the relevant international instruments, he had proposed that the term "murder", which was too narrow in scope, should be replaced by the term "wilful killing" which covered both murder and manslaughter.

78. Mr. PAWLAK (Chairman of the Drafting Committee) said that the use of the term "murder" had been discussed at length in the Drafting Committee. As he had stressed when introducing article 21, that term had to be read together with the provisions of the *chapeau*. Reference was therefore being made not to an isolated wilful killing, but to wilful killings committed during a pogrom or in connection with other human rights violations.

79. One of the problems involved in the drafting of the Code had been that of choosing the crimes to be covered. Since it was obviously impossible to deal with all those crimes, only the most serious should be listed, if they were committed systematically or on a mass scale.

80. The comments made by Mr. Jacovides could be looked at during the consideration of the Code on second reading, but he believed that subparagraph (d) on deportation or forcible transfer of population also covered changes to the demographic composition of a foreign territory. He suggested that the words "of population" in that subparagraph should be replaced by the words "of a population".

81. Mr. PELLET said that he had no objection to the drafting suggestion made by the Chairman of the Drafting Committee, even though he found the French text more satisfactory. The wording proposed by Prince Ajibola was symptomatic of a drafting flaw: since Prince Ajibola had not taken part in the work of the Drafting Committee, he was concerned by the wording of article 21. The Drafting Committee could maintain that that article dealt with systematic or mass violations of human

⁵ Ibid.

rights by the practice of murder or torture in a systematic manner or on a mass scale, but that article could also be interpreted as meaning that a murder or an act of torture was in itself a systematic and mass violation of human rights and, in that respect, article 21 was not sufficiently clear.

82. Mr. JACOVIDES said that the Chairman of the Drafting Committee had only partly met his concern. The demographic composition of a territory could be changed both in time of war—and that would be a war crime—and in time of peace, in which case it could be said that there had been a systematic and mass violation of human rights. His comment on the establishment of settlers in an occupied territory had not elicited any response. Those two points should be dealt with in article 21, as should the right of displaced populations to return home. If that was not possible, all those questions should be considered again on second reading and, for the time being, referred to in the commentary.

83. Mr. McCAFFREY, referring to the English text, said that, from the drafting point of view, it was preferable to say “transfer of populations” rather than “transfer of a population”, which implied the transfer of an entire population. In the Drafting Committee, he had proposed that the words “violation . . . consisting of any of the following acts” should be replaced by the words “flagrant and systematic or mass violations of human rights by committing any of the following acts:”. Although he would not press that proposal, which had not met with the approval of the Drafting Committee, he had wanted to refer to it again so that the members of the Commission could bear it in mind in case the present text continued to give rise to problems.

84. Mr. THIAM (Special Rapporteur) said he did not think that the Commission had to wait until the consideration of the draft on second reading in order to improve its wording. The important thing was to stress that murder and torture had to be practised in a systematic manner and on a mass scale in order to constitute a crime against the peace and security of mankind. He proposed that subparagraphs (a) and (b) should be replaced by the following:

- “(a) the systematic and mass practice of murder;
- “(b) the systematic use of torture;”.

85. Mr. PELLET said that, of the two drafting proposals made by Mr. McCaffrey and the Special Rapporteur, the first had the advantage of covering subparagraph (c) as well. If it did not meet with any opposition, it would considerably improve the text of article 21.

86. Mr. CALERO RODRIGUES, supported by Mr. GRAEFRATH, suggested that, since the discussion had shown that the wording of article 21 stood in need of improvement, a small working group composed of the Chairman of the Drafting Committee, the Special Rapporteur and Mr. McCaffrey should redraft the text for submission to the Commission.

It was so agreed.

87. Mr. GRAEFRATH said that Mr. McCaffrey’s proposal could give rise to a problem by implying that arti-

cle 21 related to an act committed in a systematic manner, whereas that was not its purpose, since it dealt with systematic and mass violations of human rights, not with the systematic and mass perpetration of the act in question. The working group would have to take that drawback into account.

88. The CHAIRMAN, speaking as a member of the Commission, suggested that the working group should also take account of the following text:

“Any individual who commits or orders the commission by another individual of the following acts: systematic or mass violations of human rights consisting of murder, torture, the act . . . persecution on social, political, racial, religious or cultural grounds, shall, on conviction thereof, be sentenced [to . . .].”

It would be more logical to list the crimes before referring to the penalty that was applicable to them.

89. Mr. BARSEGOV said that he supported Mr. Jacovides’ proposal that a reference to changes to the demographic composition of a foreign territory and to the establishment of settlers in an occupied territory should be added to subparagraph (d). In a number of resolutions, the General Assembly and the Security Council had declared that the forcible changing of the demographic composition of a foreign territory was unlawful and a violation of human rights and, in particular, the right of self-determination.

90. Mr. PAWLAK (Chairman of the Drafting Committee) asked Mr. Barsegov which instruments he was referring to. If he was thinking of the Convention on the Prevention and Punishment of the Crime of Genocide, that aspect was covered by article 19, paragraph 2 (c), of the Code.

91. Mr. BARSEGOV said that deportations and forcible and arbitrary changes to the demographic composition of a territory, except, of course, for population exchanges pursuant to international agreements, could either form part of the acts declared to be crimes by article 19 (Genocide) or come under article 21 (Systematic or mass violations of human rights). Since the Commission had decided not to refer to them in article 19 and article 21 mentioned deportations and forcible transfers of population as violations of human rights, the Commission would be entirely justified in dealing in that article with changes to the demographic composition of a territory. The resolutions he had had in mind were resolutions adopted in specific cases, such as that of Palestine, for example.

92. Mr. PELLET said that, to his knowledge, the question of changes to the demographic composition of a territory had been mentioned only in the resolutions concerning the occupation of Arab territories by Israel. He was not opposed to the idea of referring to the question in the Code and was even in favour of it, but he took the view that that question had its proper place not in article 21, but in article 22, because it related to a violation of the law of international armed conflict. If only for reasons of simple logic, moreover, he did not see how the Commission could refer in article 21 to the right of populations to return because the crime in question was

deportation or the forcible transfer of population and the denial of the right to return was the consequence.

93. Mr. JACOVIDES said it was clear that the situations which article 21 should cover had nothing to do with those dealt with in agreements between States. He also pointed out that the case of the occupation of Arab territories by Israel was not the only example that could be cited in that regard. He suggested that article 21 (*d*) should be amended in the light of article 14, paragraph 4, which he had read out earlier.

94. Mr. BARSEGOV said that he understood Mr. Jacovides' concern about the denial of the right to return, but that concern created problems for other members of the Commission. He suggested that the starting-point should be the idea that that concern was met by recognition of the unlawful nature of the actual act of population transfer. An act could not be considered unlawful if its consequences were not also considered unlawful. Moreover, the question of return must be discussed in connection with State responsibility.

95. Mr. THIAM (Special Rapporteur) said that, although the General Assembly had placed considerable emphasis on the points he had listed in paragraph 4 of the text to which Mr. Jacovides had referred, the Drafting Committee was of the opinion that the establishment of settlers related more to the question of war crimes and changes to demographic composition than to the crime of genocide. On second reading, the Commission would have to discuss those problems in greater detail.

96. Mr. EIRIKSSON said that the lack of any obvious reasons to explain why the Drafting Committee had not included a particular crime should be reflected in the commentary, which should also indicate why the Drafting Committee had considered it appropriate to refer to a given crime in a particular article of the Code rather than in another. That would be better than trying to fill any possible gaps.

97. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the consideration of article 21 should be suspended until the proposed small working group had completed its work. The idea of referring in the Code to the establishment of settlers had all his sympathy, but, as the Special Rapporteur had already pointed out, it was difficult to commit such a crime in time of peace, so that it had to be made a war crime. Furthermore, the Drafting Committee had endeavoured to be as specific as possible and to prevent crimes from overlapping between one article and another. The commentary could not replace the article, since its role was simply to explain the article.

The meeting rose at 12.55 p.m.

2240th MEETING

Thursday, 11 July 1991, at 3.10 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 21 (Systematic or mass violations of human rights) (*concluded*)

1. The CHAIRMAN invited the Chairman of the Drafting Committee to report on the results achieved by the small working group of members which had been set up at the previous meeting to attempt to draft a new version of article 21.

2. Mr. PAWLAK (Chairman of the Drafting Committee) read out the text for article 21, as prepared by the small working group of members:

“Article 21. Systematic or mass violations of human rights

“An individual who commits or orders the commission of any of the following violations of human rights in a systematic manner or on a mass scale, shall, on conviction thereof, be sentenced [to . . .]:

“(a) murder;

“(b) torture;

“(c) establishing or maintaining over persons a status of slavery, servitude or forced labour;

“(d) deportation or forcible transfer of population;

“(e) persecution on social, political, racial, religious or cultural grounds.”

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 . . . 1991*, vol. II (Part One).

3. He said that the *chapeau* of the article, which had been awkwardly worded, had been amended, and the words "by another individual" had been deleted, for the sake of consistency with other articles in the draft. The *chapeau* now included the previously indented reference to a violation of human rights in a systematic manner or on a mass scale and was followed, as before, by an enumeration of such violations comprising five different categories of crimes.

4. Mr. BARSEGOV said that the new text was a valuable attempt to achieve a generally acceptable solution. However, there was a certain shift in emphasis, since all the acts listed in subparagraphs (a) to (e) must now be committed in a systematic manner or on a mass scale. The latter concept was now transferred to the acts themselves. He had no objection to that, except with regard to subparagraph (d) "deportation or forcible transfer of population". The new text implied that one act of deportation would not be sufficient.

5. Mr. TOMUSCHAT, recalling the comment by Mr. McCaffrey at the previous meeting, said that the word "population" should appear in the plural. As to subparagraph (d), he agreed with Mr. Barsegov that an act of deportation or forcible transfer of population was itself a systematic and large-scale violation of human rights. Hence, the *chapeau* of the article was not suited to subparagraph (d), but only to murder, torture, slavery and persecution. Subparagraph (d) should therefore be treated separately.

6. Mr. THIAM (Special Rapporteur) said he, too, agreed with Mr. Barsegov. To solve the difficulty, all the acts listed in subparagraphs (a), (b), (c) and (e) should be placed together in one paragraph. A second paragraph should then deal with deportation and forcible transfer of population.

7. Mr. EIRIKSSON said an alternative would be to make it clear that the acts referred to in subparagraph (d) constituted, by their very nature, systematic and mass violations of human rights, and therefore met the requirement stated in the *chapeau*. The point could be brought out in the commentary, without doing harm to the text.

8. Mr. NJENGA said he agreed with that suggestion and also with the point that the word "population" should appear in the plural. However, the wording of the new *chapeau* failed to convey the meaning properly. The words "shall, on conviction thereof, be sentenced [to . . .]" should be placed at the end of the article.

9. Mr. THIAM (Special Rapporteur) said that to single out one of the acts in the commentary as an exception from the clear rule stated in the *chapeau*, as suggested by Mr. Eiriksson, would conflict with the literal meaning of the text. A commentary could elucidate a text, but must not introduce new meanings. The only solution was to place the different categories of acts in two paragraphs; deportation and forcible transfer of population should feature in a separate second paragraph.

10. The CHAIRMAN said that the purpose of Mr. Eiriksson's proposal was simply to dispel doubt, not to alter the text. In his own view, the *chapeau* of the new version was awkwardly worded. The reference to con-

viction and sentencing should be placed at the end of the article.

11. Mr. RAZAFINDRALAMBO concurred with the Special Rapporteur that a commentary could not alter the meaning of articles which were already clear and precise. The intended meaning must be conveyed by the text itself. As the Special Rapporteur had suggested, the crimes should be grouped in separate paragraphs, deportation and forcible transfer of population having a paragraph to itself, to indicate the systematic and mass character of such crimes. The word "population" should be in the singular; in French the plural form would imply that the crime of forcible transfer must be committed against several populations.

12. The CHAIRMAN said that in his view, the objection voiced by Mr. Razafindralambo would apply equally to the English version.

13. Mr. PELLET said it was unclear whether the crime of persecution, referred to in subparagraph (e), was also inherently of a mass character. To solve the difficulty, he suggested transposing subparagraphs (d) and (e) and placing the word "or" before "deportation or forcible transfer of population". With regard to the Special Rapporteur's observation that the commentary could not be used to add meaning to the text, the problem with the present text lay in the choice between two possible meanings, and the commentary could make clear which meaning was intended.

14. Mr. THIAM (Special Rapporteur) said he would not object to the drafting change suggested by Mr. Pellet. A commentary could indicate the existence of a problem in a text; in no circumstances, however, could the commentary alter the meaning.

15. Mr. BARSEGOV said he could agree to Mr. Pellet's suggestion. However, adding the word "or" would imply some kind of choice or contradistinction, thereby creating further confusion. As to the term "population", the concept was a collective one and the singular must be used in Russian to refer to the inhabitants of a country or region, or a nationality. He was concerned that if the plural was used, the meaning would be that the populations of several places had to be deported before the crime constituted a mass violation of human rights.

16. Mr. GRAEFRATH proposed a rewording of article 21, to read:

"An individual who commits or orders the commission of any of the following violations of human rights:

"— murder

"— torture

"— establishing or maintaining over persons a status of slavery, servitude or forced labour

"— persecution on social, political, racial, religious or cultural grounds,

in a systematic manner or on a mass scale; or

"— deportation or forcible transfer of population

"shall, on conviction thereof, be sentenced [to . . .]."

17. That text would resolve the difficulty by keeping the reference to deportation separate.

18. Mr. EIRIKSSON, replying to the observations by the Special Rapporteur, said he was well aware that the meaning of the text could not be changed by the commentary. His only intention was to separate the acts which, if repeated, would be of a systematic or mass character, from those which, by their very nature, were of such a character. That was already the Commission's own understanding of article 21, and a commentary could clarify it. Splitting the text into two paragraphs might cause difficulty, because the title of the article required the presence of a systematic and large-scale element throughout. Perhaps a working group should be constituted to frame an acceptable version of the article.

19. Mr. TOMUSCHAT said he welcomed Mr. Graefrath's proposal. As the Special Rapporteur had rightly said, the text must be clear in itself. The need for interpretation must be avoided.

20. Mr. PAWLAK (Chairman of the Drafting Committee) said that the text proposed by Mr. Graefrath would be perfectly acceptable. None of the language descriptive of the crimes was lost, and it was certainly a more felicitous version than the previous one. As for the term "population", the plural could indeed denote the transfer of several populations; hence it would be best to retain the singular.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new version, proposed by Mr. Graefrath.

Article 21, as amended, was adopted.

ARTICLE 22 (Serious war crimes)

22. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 22, which read:

Article 22. Serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [in particular wilful killing, torture, mutilation, taking of hostages, deportation or transfer of civilian population and collective punishment];

(b) use of unlawful weapons;

(c) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(d) large-scale destruction of civilian property;

(e) wilful attacks on property of exceptional religious, historical or cultural value.

23. Mr. PAWLAK (Chairman of the Drafting Committee) said that, after some further discussion, the Drafting Committee had decided to make two changes to article 22. The title, "War crimes", had been altered to "Serious war crimes" in order to bring it more into line with the text of the article itself which referred to "an exceptionally serious war crime". The second change lay in the deletion of the words "by another individual"—a change which had been made already in previous articles.

24. It would be recalled that, in 1989, at the Commission's forty-first session, the Special Rapporteur had introduced in the seventh report³ an article on war crimes to be included among the crimes against peace. The Drafting Committee had discussed the article at the forty-second session in 1990, but had been unable to succeed in drafting a text acceptable to all members. At the present session, the Committee had spent a considerable amount of time in considering the text and had finally been able to propose an article on "Serious war crimes". He mentioned the article's odyssey simply to emphasize its complexity and the extensive discussion and redrafting that had been required in the Committee to reach the compromise formula now proposed.

25. The Drafting Committee had taken the view that an article on war crimes should select from among war crimes only those whose degree of seriousness would rank them as crimes against the peace and security of mankind. Therefore, article 22 was concerned not with the so-called "ordinary" war crimes nor with the so-called "grave breaches" described in the 1949 Geneva Conventions and Additional Protocol I thereto. For the purposes of the Code, the Committee felt that what would more closely approximate to its understanding of the kind of crime in question was "an exceptionally serious violation" of principles and rules of international law applicable in armed conflict, the formulation that appeared in the *chapeau* of paragraph 2.

26. Secondly, the Drafting Committee had considered that it was in the nature of a criminal code, such as the present one, to describe a crime rather than to give examples. Such a method of drafting was consistent with that used in the previous articles. The subparagraphs therefore described the categories of exceptionally serious violations that could constitute crimes under the Code. In selecting the categories of war crimes, the Committee had taken into account the Hague Rules, the four 1949 Geneva Conventions and Additional Protocol I thereto.

27. The article consisted of two paragraphs. Paragraph 1, as in other articles, tied the crime to an individual, and paragraph 2 defined the crime.

28. The *chapeau* of paragraph 2 set out the general rule for war crimes for the purposes of the draft Code, namely an "exceptionally serious violation of principles and rules of international law applicable in armed conflict". Hence, two criteria were identified: first, a violation of principles and rules of international law applicable in armed conflict, and second, a violation that must be exceptionally serious, something which could apply to the degree of violation of the rule or to the consequences of the violation. The words "exceptionally seri-

³ *Yearbook* ... 1989, vol. II (Part One), document A/CN.4/419 and Add.1, para. 3.

ous", though not entirely precise, conveyed some idea of the degree of gravity of the violation. The expression "principles and rules of international law applicable in armed conflict" was intended to include conventional and customary rules, such rules as might be agreed by the belligerents, as well as those that were universally recognized.

29. The Drafting Committee had also preferred to speak of "armed conflict", a term that was used in article 2 (b), of Additional Protocol I. Some constructive ambiguity was useful, particularly in view of the fact that common article 3 of the 1949 Geneva Conventions applied to non-international armed conflict. In any case, the wording of the *chapeau* did not in any way expand on or affect the scope of principles or rules of international law applicable in armed conflict.

30. Among the exhaustive categories of war crimes, subparagraph (a) included any act of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons. Many members of the Committee had thought that that general description included very many acts, such as wilful killing, torture, unjustifiable delay in repatriation of prisoners of war, and so on. Some members of the Committee, while not denying that understanding, insisted on listing some examples of specific acts and the examples appeared in square brackets in the proposed text. In their view, the listing could help the judge or the decision maker to grasp what the general description of the act was intended to include. Those who disagreed with the listing of examples felt that it was not exhaustive and there was no reason to single out certain acts; besides, non-exhaustive lists were contrary to the methods of drafting so far used in the Code. In their opinion, the list could be included in the commentary to the article. Since the two views could not be reconciled, the examples had been placed in square brackets, so as to leave the decision to the Commission.

31. Subparagraph (b) dealt with the use of unlawful weapons. Like the rest of the subparagraphs it should be read together with the *chapeau* of the paragraph. The Committee was of the opinion that the use of certain unlawful weapons could constitute a war crime if it was an exceptionally serious violation of principles and rules of international law applicable in armed conflict. Subparagraph (c) referred to methods or means of warfare which were either intended, or could be expected, to cause widespread, long-term and severe damage to the natural environment. The words "may be expected to cause" related to situations in which the user knew of the devastating effects on the environment, yet went ahead and used the methods or means in question. The category in subparagraph (d) was large-scale destruction of civilian property, when such destruction was considered an exceptionally serious violation of principles and rules of international law applicable in armed conflict. Subparagraph (e) mentioned wilful attacks on property of special religious, historical or cultural value—again, when they were considered exceptionally serious violations of principles and rules of international law applicable in armed conflict.

32. He wished to emphasize once more that the subparagraphs must all be read together with the *chapeau* of

the article in order to understand the real intention of the article and to avoid misinterpretation. Lastly the title, "Serious war crimes", indicated that the intention of the article was to cover such crimes for the particular purposes of the draft Code.

33. Mr. JACOVIDES suggested inserting two further examples in the passage between square brackets at the end of paragraph 2 (a), namely the establishment of settlers in an occupied territory, and changes to the demographic composition of a foreign territory.

34. Mr. NJENGA said that article 22 as proposed by the Drafting Committee was, on the whole, acceptable.

35. The two concepts of "serious war crimes" and "grave breaches" were very close and it was difficult to distinguish between them. He earnestly hoped that, by making that distinction, the Commission would not be seen as trying to diminish the principle of "grave breaches" as defined in article 147 of the fourth Geneva Convention of 1949. The text of the article under consideration was very similar to article 147, except that some crimes had been omitted, a fact that could give rise to problems of interpretation. Actually, two of the omissions were serious and could be included in paragraph 2 (a), namely biological experiments and compelling protected persons to serve in the armed forces of a hostile Power.

36. It was essential to give examples, which were very important for an understanding of the intention of article 22. They provided guidance for the court on the situations envisaged. Accordingly, he would urge that the examples in paragraph 2 (a) be retained without square brackets.

37. Lastly, the commentary must make it perfectly clear that there was no intention of diminishing in any way the provisions of the four Geneva Conventions of 1949.

38. Mr. PAWLAK (Chairman of the Drafting Committee) said that, personally, he would have preferred to have a full list of examples in paragraph 2, but the discussion in the Committee had led to the adoption of the text now being proposed.

39. The wording "acts of inhumanity, cruelty or barbarity . . .", in subparagraph (a) was very broad. Perhaps the square brackets around the examples in paragraph 2 (a) could be deleted, but it would be for the Commission to decide on that point. In any event, the two examples suggested by Mr. Jacovides, as well as the two mentioned by Mr. Njenga, could usefully be added.

40. On the question of terminology, he urged the Commission not to make any change but to retain the term "serious war crimes". Any attempt to introduce the concept of "grave breach" would complicate the situation by putting the draft Code in the straitjacket of the 1977 Additional Protocol.

41. Mr. EIRIKSSON said he had no objection to article 22, but a clear description was needed of the intention. The contents would be difficult to understand even for experts in the law of armed conflict. Hence it was important for the commentary to include all the explana-

tions given by the Chairman of the Drafting Committee. In particular, the Commission had to be careful not to prejudge in any way the existing body of law on war crimes and the law applicable to armed conflicts, which had so far proved satisfactory.

42. It was advisable to include some further examples in order to complete article 22. It covered most of the grave breaches dealt with in the Geneva Conventions, particularly in the case of paragraph 2 (*a*). The problem, however, was that some of the items listed in the passage in square brackets did not traditionally belong to the law of armed conflict.

43. He hoped that, between the first and second readings of the draft Code, suggestions would be forthcoming from competent outside bodies that would help to improve the text of article 22. A comprehensive commentary was essential.

44. The CHAIRMAN said it was clear that every effort would be made to ensure that the commentary was as comprehensive as possible. The proposed text for article 22 represented a policy decision, in particular with regard to the illustrations. He preferred to call them "illustrations", rather than "examples", since in criminal law it was not appropriate to legislate by analogy. All the offences mentioned in article 22, however, fell under the rubric of armed conflict. Members could, of course, propose additions to the list of illustrations.

45. Mr. THIAM (Special Rapporteur) suggested that the title should be reworded to read: "Extremely serious war crimes". It would thus be more in line with the text of the article. He would point out that the serious war crimes mentioned in article 22 covered less ground than the "grave breaches" of the Geneva Conventions.

46. Mr. PELLET said that the article was very unsatisfactory. He did not wish to call into question the compromise formulation adopted in the Drafting Committee, but did want to place on record the reasons for his strong reservations.

47. His first objection was that the proposed text was inconsistent. The article referred to the violation of principles and rules of international law "applicable in armed conflict". Nevertheless, both the title and the body of the article used the expression "war crimes", a term he himself would have preferred to eliminate, because article 22 covered both more than, and less than, the traditional concept of war crimes. Actually, it covered only some war crimes but also certain offences which fell outside the scope of war crimes.

48. The usual concept of a war crime was any violation of the rules and customs of war. As explained by the Chairman of the Drafting Committee, article 22, for its part, was intended to cover only exceptionally serious violations, and not all violations, of the laws of war. Traditionally, "war" designated a conflict between sovereign States and was only one of the forms of international armed conflict. Article 22, however, was intended to cover not just inter-State war but all forms of international armed conflict, in other words, armed struggle for national liberation as well.

49. Consequently, article 22 seemed illogical and inconsistent with developments in international law over the past 30 years. He was not opposed in substance to the principle that article 22 tried to embody. The most appropriate course would be to avoid using the term "war crimes" at all and to refer simply to exceptionally serious violations of the rules applicable in armed conflict.

50. His second objection concerned the list of examples in paragraph 2. There was, of course, always a danger in including a list, if only because it could never be exhaustive. In the present instance, the non-exhaustive character of the list was clear from the words "in particular". Indeed, the list itself appeared to have been drawn up somewhat haphazardly and without any obvious criterion for distinguishing the items it included from those covered by the concept of "grave breaches" of the Geneva Conventions and Additional Protocol I thereto. In the circumstances, his own suggestion would be to eliminate the whole list figuring in square brackets, and not the square brackets alone. A further reason for objection on that point was that article 22 demanded from a State at war a greater measure of respect for human rights than did article 21 from a State in time of peace. He found that approach quite extraordinary and altogether unacceptable. Both the title and text of article 21 referred clearly not to all violations of human rights but to "systematic or mass violations" of human rights. Article 22, on the other hand, made an isolated act of wilful killing or torture punishable as a war crime and thus covered a much wider area.

51. He was not opposed to the proposal by Mr. JACOVIDES to include serious violations of the law governing wartime occupation, but a provision on the subject could not possibly be added to the list in paragraph 2 (*a*); if accepted, it should constitute a separate subparagraph. He none the less reiterated his opposition to the inclusion of any list at all.

52. Lastly, he disagreed with the way in which subparagraphs (*c*) and (*d*) of paragraph 1 were taken from Additional Protocol I. The original provisions of the Protocol had to be construed in the light of the necessities of the laws of war in general. It was a very important proviso that had disappeared in the process of copying the provisions for the purposes of article 22. It was important to remember that the rules governing armed conflict formed a whole and were interdependent. Subparagraphs (*c*) and (*d*) repeated two of those rules, taking them out of their proper context. The subparagraphs had been hastily adopted in the Drafting Committee, without much thought as to the consequences.

53. Mr. OGISO said that he had a number of reservations with regard to article 22. The Chairman of the Drafting Committee had proposed adding the word "serious" to the title of the article. However, doing so implied that there were three categories of war crimes: (*a*) ordinary war crimes; (*b*) serious war crimes; and (*c*) exceptionally serious war crimes. He did not see the wisdom in having three categories of war crimes. In particular, the use of the expression "exceptionally serious war crimes" might raise questions as to whether or not a particular act was an exceptionally serious crime. The defi-

tion in paragraph 2 of an exceptionally serious war crime was mere tautology and did not clarify the matter. Furthermore, the descriptions of war crimes contained in paragraph 2 (a) to (e) made no distinction between serious and exceptionally serious war crimes. In all, the word “exceptionally” tended to confuse the issue and should be eliminated from the article, which would then encompass two categories—ordinary and serious war crimes—and would thus correspond to the 1949 Geneva Conventions.

54. He would add to the list in square brackets contained in paragraph 2 (a) an item on the unjustified detention of prisoners of war after the cessation of hostilities, a suggestion that he had already made in the Drafting Committee. He was making that suggestion not to criticize what had happened in the past, but to prevent such a crime from occurring in the future.

55. Paragraph 2 (b), on the use of unlawful weapons, was acceptable, on the understanding that the commentary would clarify the conditions under which weapons were considered unlawful and whether the prohibition would apply between the parties to the same convention forbidding the use of those particular weapons.

56. Mr. THIAM (Special Rapporteur) said that he appreciated the fact that his colleagues wished to make their reservations known on what was clearly a difficult and controversial matter. Mr. Pellet, in particular, had made a number of comments, vehemently at times. In that connection, he wished to point out that some of Mr. Pellet’s assertions were not entirely accurate. It was not true that the Drafting Committee had given only hasty consideration to article 22. In fact, it had begun its consideration of that article in 1990 and, in the absence of a satisfactory solution, had returned to it at the present session. Indeed, article 22 was the one on which the Committee had spent the most time.

57. In his report, he had raised the issue of whether the expression “war crimes” should be replaced by the wording “violations of the law applicable in armed conflict”. After extensive debate, the Commission had finally decided to keep the term “war crimes” since its usage was well established and it was employed in conventions that were still in force. At the same time, it was understood that reference would be made in the body of the article to serious violations of the law applicable in armed conflict. He agreed fully that article 22 should contain a reference to exceptionally serious violations. From the outset, the Commission had defined crimes against the peace and security of mankind as exceptionally serious crimes and there had been no objections to using that expression. In any case, that wording would demonstrate clearly that the crimes being dealt with in article 22 were not necessarily all the acts classified as “grave breaches” under the Geneva Conventions, but rather, crimes of an exceptionally serious nature.

58. The Commission could have avoided the enumeration of particular examples in paragraph 2 (a), but it had preferred by a large majority to keep that list in spite of the fact that it was not exhaustive.

59. Mr. Pellet had also observed that, by using the words “exceptionally serious”, the Code was more se-

vere in regard to the application of article 22 than of article 21. Personally, he saw no real problem in using that expression. The categories of war crimes and crimes against humanity often coincided in practice.

60. Mr. PAWLAK (Chairman of the Drafting Committee) said he wished to remind members that Mr. Pellet had been an active participant in the Drafting Committee’s work on article 22 and had contributed and agreed to the final compromise article it had adopted. While he could accept Mr. Pellet’s reservations, he could not accept the assertion that article 22 was of no value whatsoever.

61. In response to the observations of Mr. Ogiso, he would point out that article 22 did not refer to three categories of war crimes; it was limited to one category alone, namely, exceptionally serious war crimes. The definition provided under paragraph 2 was not really tautological since it was followed by several subparagraphs specifying the violations covered. Furthermore, the principles and rules of international law applicable in armed conflict were broadly understood and numerous references were made to them in existing conventions and customary international law. The Drafting Committee had considered the possibility of adding a reference to prisoners of war to the list in square brackets. However, it had decided that the matter was implicitly covered by the general description contained in paragraph 2 (a). In any case, he would not object if the Commission decided to add that item to the list.

62. Finally, in paragraph 2 (a), the word “the” should be inserted before the words “civilian population”.

63. Mr. GRAEFRATH said that the title of the article should remain as it stood. By adding the word “serious”, the Commission would simply be introducing an unnecessary new element, especially since the expression “serious war crimes” did not appear in the body of the text. “War crimes” was indeed the traditional wording. The Drafting Committee had decided to use it despite the fact that the international community now spoke not about rules of war but about rules applicable in armed conflict. He did not object to the use of the term “war crimes”, since it was being used in the article to refer exclusively to violations of the rules applicable in armed conflict.

64. At its previous session, the Commission had elaborated a detailed list of war crimes. However, the list had not found its way into article 22. Instead, the Drafting Committee had included in paragraph 2 (a) several examples of specific war crimes. In his view, such a non-exhaustive list simply urged members to suggest supplementary items and did harm to the entire article. He would therefore prefer to eliminate the list in square brackets in paragraph 2 (a) and incorporate the more detailed list from the previous session in the commentary. In paragraph 2, the word “exceptionally” which came before the words “serious war crime” should be eliminated. The references to “serious war crimes” and “exceptionally serious violations” were adequate for the purposes of that paragraph.

65. Mr. CALERO RODRIGUES said that he wished to associate himself with the comments made by the Spe-

cial Rapporteur and the Chairman of the Drafting Committee in response to Mr. Pellet, who had, to all intents and purposes, charged that the Drafting Committee worked in a haphazard and hasty fashion. That was not at all the case: while it made mistakes at times, the Drafting Committee applied itself very seriously to its work.

66. The issue of the three categories of war crimes, mentioned by Mr. Ogiso, probably arose from the fact that the Chairman of the Drafting Committee had proposed changing the title of article 22 to "Serious war crimes". He agreed with Mr. Graefrath that there was no need to add a new formulation. The title should either remain as it stood or be amended to read "Exceptionally serious war crimes".

67. He was not particularly in favour of keeping the list in square brackets under paragraph 2 (a). The list was not comprehensive and was not essential to paragraph 2, which already spelled out in its subparagraphs the parameters for the determination of violations of rules applicable in armed conflict. Nevertheless, if the Commission insisted on keeping the list in square brackets, it was free to add items to that list provided they corresponded to the definition contained in the *chapeau* of paragraph 2 (a), which had been carefully worked out by the Drafting Committee.

68. Mr. BEESLEY said that, in principle, he endorsed views expressed by Mr. Graefrath. He agreed that the article should not refer to three different categories of war crimes. As to paragraph 2, there was no need for the words "exceptionally serious" to be repeated and they could be deleted in the second instance. In general, paragraph 2 might benefit from further consideration. For example, the list of acts in paragraph 2 (a) to (e) was far from exhaustive. One item which might have been included was the forcible use of children in situations of armed conflict. He, too, shared the concerns expressed about the list in square brackets in paragraph 2 (a) and, while he was in favour of eliminating the list entirely, he would not block its inclusion. The wording of subparagraph (c) was also problematic. As it stood, the subparagraph was so restrictive in meaning that it could hardly apply to any real situations.

69. Lastly, article 22 was one of the most difficult in the draft Code and members should not be too concerned about the differences that emerged in the course of the discussion.

70. The CHAIRMAN assured Mr. Beesley that the Drafting Committee had given careful consideration to the wording of paragraph 2 (c).

71. Mr. EIRIKSSON said that the title of article 22 should be "Exceptionally serious war crimes" rather than "Serious war crimes".

72. The logic behind the drafting of paragraph 2 was that the inclusion of detailed descriptions of various acts and exhaustive lists of examples would have meant reproducing an enormous amount of legal material on armed conflict. The paragraph had therefore been elaborated so that, in the case of a particular act, it would first be determined whether the act could be considered a vio-

lation of rules applicable in armed conflict, as defined in paragraph 2 (a) to (e). Once the nature of the act had been established, it remained to determine whether the violation was an exceptionally serious one. For that reason, the wording "exceptionally serious violation" had to remain in paragraph 2.

73. Mr. PELLET said he agreed with Mr. Graefrath and Mr. Calero Rodrigues that it was more logical to refer in the title to "Exceptionally serious war crimes" than to "Serious war crimes". It was not permissible within the same article to treat one concept in two different ways. The article dealt with exceptionally serious crimes, as was clearly indicated in paragraphs 1 and 2, and therefore the title had to be in line with the content of the article. He also agreed with the view that the entire list in square brackets should be eliminated from paragraph 2 (a). If the list was to be incorporated in the commentary, it should be made very clear that the acts in question only constituted crimes against the peace and security of mankind if they were exceptionally serious violations.

74. He had been misunderstood if he had given the impression that he was engaging in overall criticism of the Drafting Committee's work, including its work on article 22. He was not calling into question the compromise solution that had been adopted. On the contrary, he wished to pay tribute to the Committee's conscientious and intensive efforts under the guidance of its Chairman. Nevertheless, he had always had and continued to have enormous reservations with regard to paragraph 2 (c). His doubts might have been allayed had he received a response to the issue he had raised in the Drafting Committee about the way in which paragraph 2 (c) had been taken from Additional Protocol I. He was still waiting for a reply.

75. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to amend the title of the article to read "Exceptionally serious war crimes" and to delete the words "by another individual" from paragraph 1.

It was so agreed.

76. Mr. THIAM (Special Rapporteur), referring to subparagraph 2 (a), suggested that the list of crimes which appeared between square brackets should be deleted and referred to instead in the commentary, along with the crimes mentioned by Mr. Jacovides, Mr. Njenga and Mr. Ogiso.

77. Mr. BARSEGOV said he could not agree to that suggestion. In his view, the list of crimes should remain in the body of the article and it should be left to the Sixth Committee to decide whether such a list was necessary, and also whether it was satisfied with the general concept of barbarity or whether it wished to define that term. In addition, the article should be expanded and made more specific. In particular, it should contain the fullest possible description of the acts that constituted war crimes and the list that appeared between square brackets should include the two crimes mentioned by Mr. Jacovides and Mr. Njenga. He would not object to the inclusion of the unjustified detention of prisoners of war after the cessation of hostilities, but a time limit

should be specified beyond which such detention would become unlawful. A reference in the commentary to the crimes in question would be inappropriate, since the commentary was not binding.

78. Mr. CALERO RODRIGUES said that the list which appeared between square brackets could be deleted and transferred to the commentary. After all, there was nothing unusual, on first reading, about indicating the Commission's disagreement on a particular point. However, inclusion of the list in the body of the article would draw the attention of Governments to the matter. On balance, therefore, it would perhaps be best to follow the line suggested by Mr. Barsegov.

79. Mr. EIRIKSSON said that he would be reluctant to adopt subparagraph 2 (a) in the form in which it was drafted. He therefore proposed that, to cover Mr. Njenga's point, the words "biological experiments" should be added and, to cover Mr. Barsegov's point, the words "unjustifiable delay in the repatriation of prisoners of war" should be added.

80. The CHAIRMAN, appealing to members not to delay the adoption of the report of the Drafting Committee any further, said that members would have an opportunity to comment further on the points raised when the Commission came to consider its report to the General Assembly.

81. Mr. CALERO RODRIGUES suggested that paragraph 2 (a) should be adopted as drafted, on the understanding that a suitable form of wording would be worked out later to take account of the points raised during the discussion.

82. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 22, as amended, on the understanding expressed by Mr. Calero Rodrigues.

Article 22, as amended, was adopted.

ARTICLE 23 (Recruitment, use, financing and training of mercenaries)

ARTICLE 24 (International terrorism)

83. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts proposed by the Drafting Committee for articles 23 and 24, which read:

Article 23. Recruitment, use, financing and training of mercenaries

1. An individual who as an agent or representative of a State commits or orders the commission by another individual of any of the following, shall, on conviction thereof, be sentenced [to . . .]:

— recruitment, use, financing or training of mercenaries 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.

2. A mercenary is any individual 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 ex-

cess 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 individual 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 in whose territory the act is undertaken.

Article 24. International terrorism

An individual who as an agent or representative of a State commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to . . .]:

— undertaking, organizing, assisting, financing, encouraging or tolerating 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.

84. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as previously adopted, under articles 23 and 24, on mercenaries and on international terrorism, the crimes in question came within the terms of the Code if they were committed by agents or representatives of States. The Drafting Committee was aware that some members of the Commission and even members of the Sixth Committee could make a case for extending the scope *ratione personae* of the two articles to persons or groups unconnected with the State. The Committee had, however, thought that it should not depart from the approach taken by the Commission to the two articles in 1990. He therefore suggested that the articles should be retained as drafted.

85. With regard to article 23, the Committee had inserted the standard opening clause before the definition of the crime as initially adopted. Paragraphs 2 and 3 were unchanged except that the word "person", in the first line of each paragraph, had been replaced by the word "individual", for reasons of consistency. The semicolon at the end of paragraph 2 (e) of the article should be replaced by a full stop.

86. Mr. CALERO RODRIGUES proposed that the words "by another individual", in paragraph 1, should be deleted.

87. Mr. TOMUSCHAT proposed that, to bring the article into line with previous articles, the word "acts" should be added after the words "the following", in paragraph 1.

88. Mr. CALERO RODRIGUES, supported by the Special Rapporteur and Mr. TOMUSCHAT, suggested

that the words “shall, on conviction thereof, be sentenced [to . . .]” should be transferred to the end of paragraph 1.

89. Prince AJIBOLA said that he would prefer a shorter, tidier definition of mercenaries. In particular, paragraph 2 (b) should end at the words “private gain”; otherwise the provision it embodied would be far too long and vague.

90. Mr. PAWLAK (Chairman of the Drafting Committee) said that he, too, would have liked a shorter definition. However, the text had been taken from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries as elaborated by the Sixth Committee and it had been felt that to adopt a different text would be tantamount to criticizing what had been worked out in a lengthy process. Accordingly, he would advise that, for the first reading of the Code, the text of the article should be retained as drafted, with any minor editing changes needed to bring it into line with other provisions of the Code. It could then probably be shortened, and adapted to the special needs of the Code, on second reading.

91. Mr. PELLET said that he wished to enter a general reservation to article 23.

92. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 23 as amended by Mr. Calero Rodrigues, Mr. Thiam and Mr. Tomuschat.

Article 23, as amended, was adopted.

93. Mr. PAWLAK (Chairman of the Drafting Committee) said that the standard opening clause of article 24 had been inserted before the definition of the crime as adopted in 1990. In addition, the Drafting Committee suggested that paragraph 2 of the text as initially adopted should be deleted in the light of article 3, which covered participation and complicity. Once again, the words “by another individual”, in the second line of the article, should be deleted.

94. Mr. TOMUSCHAT proposed that the general structure of the article should follow that of article 23.

95. Prince AJIBOLA said it was gratifying to note that, rather than speak simply of “individuals”, the article referred to an individual “as an agent or representative of a State”, which was the proper language to adopt.

96. Mr. NJENGA asked whether, under the terms of the article, terrorism was confined to State terrorism.

97. Mr. THIAM (Special Rapporteur) said that Mr. Njenga had raised a pertinent question. It would be inadvisable at that stage, however, to alter a text that had already been adopted. Of course, on second reading, a reference to individuals *per se* should be introduced and the whole question of the participation of individuals in terrorism should be considered very carefully, with special reference to the fact that they might, for instance, be members of groups or associations that had an interest in committing acts of terrorism. Nevertheless, it was a difficult issue, since bodies such as political parties and liberation movements might be involved. For the time being, therefore, it would suffice simply to note that there

was a problem, on the understanding that the matter would be dealt with in more detail on second reading.

98. Mr. NJENGA said that a definition of terrorism which was confined to the agents or representatives of States would be very narrow. The attention of the Sixth Committee should be drawn to the matter.

99. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 23 reflected the position taken by the Commission and the Drafting Committee in 1990, though he himself had in fact spoken at that time of the need to cover a broader spectrum of individuals. The Commission could, as had been suggested, always revert to the matter on second reading.

100. Mr. SOLARI TUDELA, agreeing that international terrorism could not be confined to State agents said that was why, in the Drafting Committee, he had entered a reservation to the article. True, the Convention for the Prevention and Punishment of Terrorism and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment both contained such a limitation, but that had been as a result of a policy decision. Such a limitation might be appropriate for a political document but it had no place in a legal code.

101. Prince AJIBOLA said that Mr. Njenga had raised a very serious point but one that could easily be dealt with by simply removing a few words.

102. Mr. PELLET said he, too, had always felt that the limitation in article 24 to agents and representatives of the State was unfortunate. The solution was not as easy as Prince Ajibola had suggested, however, for the removal of a few words might solve the problem with regard to paragraph 1, but not in the case of paragraph 2. In the time that remained to the Commission it would be very difficult to find an appropriate solution, in his view.

103. The CHAIRMAN said that the report of the Commission to the General Assembly would contain an explanation of the reasons why it was considered that the article should not be confined to State terrorism. If he heard no objection, he would take it that the Commission agreed to adopt article 24 with the transposition of the wording suggested by Mr. Calero Rodrigues.

Article 24, as amended, was adopted.

The meeting rose at 6.10 p.m.

2241st MEETING

Friday, 12 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov,

Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, 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. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

**SEVENTH REPORT OF THE SPECIAL RAPPORTEUR²
(concluded)**

1. The CHAIRMAN said that Mr. Al-Baharna had requested to be allowed to address the Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. His absence from Geneva had prevented him from doing so before the closure of the debate on that item. If he heard no objection, he would take it that the Commission agreed to Mr. Al-Baharna's request.
2. Mr. AL-BAHARNA thanked the Commission for allowing him to make his comments after the Special Rapporteur had summed up the discussion on the topic.
3. He said that as he had already commented on the articles in chapters I to III³ he would refer to them only to the extent required by the changes proposed by the Special Rapporteur in the seventh report. He would, however, comment in detail on chapter IV, on liability.
4. He wished first to make a general observation regarding methodology. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was quite unlike others on the agenda and, indeed, it differed from every other topic the Commission had considered so far. International law, as traditionally understood and applied in inter-State relations, probably offered little assistance to the Commission in expounding the principles and norms governing the topic. The Commission therefore had to adopt a non-traditional approach. It was authorized to do so by its Statute, under the terms of which its function was not solely the codification but also the development of international law, something which required it to be innovative and bold in enunciating the applicable principles and norms.
5. With regard to the issues discussed in the seventh report, the Special Rapporteur first raised the question of the nature of the instrument to be formulated, namely

whether the rules should be mere guidelines or mandatory. The Commission had had to tackle a similar problem in regard to the topic of the law of treaties and had rightly decided in favour of the convention approach. That approach applied equally to the topic under consideration.

6. The Special Rapporteur considered that the time had perhaps come to change the title of the topic since replacement of the word "acts" by "activities" would broaden the scope considerably. His own view was that the title was somewhat abstract, because the phrase "acts not prohibited by international law" did not pinpoint the subject-matter of the topic. It was restrictive too because the topic went beyond enunciation of the principle of liability. The Commission should therefore examine the question of the title with a view to making it less abstract and broader in scope.

7. The Special Rapporteur then went on to consider whether the two types of activities covered by article 1—activities involving risk and activities with harmful effects—should be treated separately or together, suggesting that for the time being they should be treated together but that the option of separate treatment should be kept open. That suggestion seemed reasonable.

8. As to whether article 1 should refer only to new activities, namely, to those to be undertaken in the future, he believed that the exclusion of current activities from the purview of the draft would be a step backward for it would reduce the operational significance of the draft articles and leave the innocent victim without an effective remedy. He trusted, therefore, that ongoing activities would be brought within the scope of article 1.

9. With regard to article 9, on reparation, the Special Rapporteur raised the question of the relationship between the liability of the State and the liability of private operators under the regime of civil liability. He would revert to that point when he came to chapter IV, but, for the present, he expressed his agreement with the suggestion made in the report that article 9 should be retained and a new article should be added to explain the interrelationship between the liability of the State and that of private operators.

10. The principle of non-discrimination, laid down in article 10, was probably the most innovative in the draft articles. Although he had been somewhat sceptical in that regard at the Commission's previous session, upon reflection he had come to the view that it might be desirable to include the principle in the draft, for it could contribute to the development of international law.

11. The Special Rapporteur had proposed in his sixth report⁴ that subparagraphs (a) to (d) should be added to article 2 (Use of terms) with a view to explaining the scope of the draft articles. While he supported the proposal in principle, he had expressed the view at the previous session that the matter was too important to be dealt with in the general article on use of terms and suggested that the substance of the subparagraphs should be

* Resumed from the 2228th meeting.

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

² For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

³ *Yearbook . . . 1990*, vol. I, 2183rd meeting, paras. 3-21.

⁴ *Yearbook . . . 1990*, vol. II (Part One), document A/CN.4/428 and Add.1.

embodied in a separate article which would come immediately after article 1. He had not changed his view on that point and the same criticism applied, *mutatis mutandis*, to subparagraph (g), which laid down the definition of transboundary harm. The best place for that provision was probably as a new subparagraph in article 1.

12. He agreed with the Special Rapporteur's approach in the seventh report regarding the definition of "appreciable" or "significant" harm as laid down in article 2, subparagraph (h), submitted by the Special Rapporteur in his sixth report. With respect to the provisions on prevention, discussed in chapter III, he was likewise in general agreement with the recommendation that article 18 should be deleted.

13. With regard to article 20 (Prohibition of the activity), the Special Rapporteur stated in his report that:

This question is similar to that of significant harm or risk; unfortunately, such thresholds are not a priori quantifiable.

It was an explanation that provided only part of the answer, the other part being provided by the definition of the terms "activities involving risk" and "transboundary harm" laid down in article 2, subparagraphs (a) and (g), respectively. Those definitions could probably be further streamlined to allay the concerns of States so far as the thresholds of harm or risk were concerned.

14. He shared the Special Rapporteur's view that the liability of the State should be residual and that the chapter should be entitled "State liability".

15. In the draft articles, the concept of liability was divided into civil liability, on the one hand, and State liability, on the other. While he agreed with that division, a question arose as to the scope of civil liability and State liability and the relationship between the two. State liability was in fact international responsibility incurred directly or indirectly by the State for transboundary harm caused by the activities in question. A State would be directly liable for the harm caused where it operated directly or where the activity was carried out in its name. Indirect State liability would then be liability that it incurred on a residual basis in certain circumstances where the harm was caused by agencies other than the State, in other words, where the private operator was unable to satisfy the injured party in full with regard to the harm caused or where the private parties could not be identified. In that respect, three points had to be considered. First, the Commission should formulate precise criteria to be used to determine the status of the operator, in other words, to determine whether the activities could be regarded as those of a private venture or a public operation. Secondly, although the Special Rapporteur had referred in the report to the need to specify the cases in which the State would incur residual liability it was far from clear what precisely was meant by residual liability. He said that civil liability could be supplemented by State liability and then spoke of the assumption of responsibility by the State for reparation. In his own view, it should be made clear whether residual liability was to be regarded as a legal guarantee requiring the State of origin to pay reparation or compensation, where the private operator was unable to do so, or whether it was a legal consequence arising out of activities conducted on the State's territory. In the former case, it would be in-

voked only in specified and exceptional cases, and in the latter case, residual liability would at all times be co-existent with the civil liability of the operator, in which event the State would necessarily be a party to any judicial proceedings and not merely the guarantor of reparation on a residual basis. Of course, if the private operator satisfied the claim for compensation in full, State liability would not be relevant for that specific claim, although it would in theory always arise.

16. Furthermore, greater clarification was required in connection with the subject-matter of the negotiations between the States concerned. It might not be sufficient to provide that States should negotiate on matters regarding the determination of the legal consequences of the harm. The factual causes, the author and the consequences of the harm were matters which States would have to settle by negotiation before the question of reparation could be dealt with in a realistic manner. Thus, the statement in the report to the effect that negotiations should not be concerned with the question of whether or not reparation should be paid but rather with the kind of reparation to be made was in effect yielding to a demand without negotiation on issues of paramount importance: the possibility that a State might deny having caused harm could not be entirely ruled out.

17. He also wished to invite attention to that part of the report where the Special Rapporteur confirmed the right of the injured parties, including the affected State, to institute proceedings before the courts of the State of origin or the affected State and proposed that in the event that either of the States concerned refused to negotiate compensation. To his mind, the right to use what the Special Rapporteur termed "the other channel", namely, domestic court procedures, should be regarded as the primary right and not as a right which arose only if the State refused to negotiate. His preference for that initial recourse to the domestic courts was based upon consideration of convenience of access and utility, especially where private operators were concerned.

18. With regard to the establishment of an internationalized approach for damage caused to the environment, he was in agreement with the Special Rapporteur's suggestion that the Commission should investigate the possibility of establishing international tribunals and commissions as provided for in the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and the report of the 1991 Intersessional Working Group of Experts of the Standing Committee on Civil Liability for Nuclear Damage under article XI of the 1963 Vienna Convention on Civil Liability for Nuclear Damage.

19. Both the substance and the drafting of article 22 might have to be modified. In the first place, if the organization was empowered to take action, as suggested in the report, it would be necessary to describe and define its powers. Secondly, it might not be necessary to confine the taking of action by international organizations to cases where there was a plurality of States, and the scope and role of such organizations should perhaps be enhanced, especially where environmental damage had resulted.

20. Concerning article 23, on reduction of compensation, the Special Rapporteur was suggesting that the pas-

sage in square brackets should be transferred to the commentary, a suggestion he supported. However, the question of whether article 23 should be limited to State liability, as the Special Rapporteur proposed, was debatable. The principle underlying article 23 could apply equally to cases of civil liability.

21. The Special Rapporteur suggested that the provisions of article 24 could be transferred to form part of the article on harm in general. For his own part, he was a little sceptical about that suggestion, for harm to the environment should be treated separately from other types of harm. With regard to article 25, he was inclined to agree with the view that the article could be divided into two parts to provide for the joint and several liability of private operators. As to the alternatives, alternative B appeared to be more acceptable than alternative A.

22. The limitation clause laid down in article 27 might require some revision, in view of some of its difficulties, and the Commission might wish to strike a balance between the 5-year and 30-year periods.

23. Chapter V, which dealt with civil liability, continued to be the most controversial part of the draft. The Special Rapporteur's comments and suggestions represented the core of the idea behind civil liability and, although it was difficult to accept wholeheartedly the comments made, they did reflect a keener understanding of the norms required for the development of international law with regard to the topic under consideration. The Special Rapporteur stressed that the affected State could decide to represent the individuals injured without waiting for them to initiate, much less exhaust, the local remedies. It should none the less be noted that legislation to that effect would have to be adopted; articles 28 and 29 did not, however, address the issue squarely.

24. The observations made in the report about identification of the persons responsible did not appear to be adequately reflected in article 30, which was a general provision on the application of national law rather than on the channelling of responsibility, and still less a criterion of control, as mentioned by the Special Rapporteur.

25. As to the "Miscellaneous" section, he agreed with the essential notions behind the supplementary provisions. Article 31 would have to be harmonized with the corresponding provisions of the draft on jurisdictional immunities of States and their property. Article 32 appeared to deal satisfactorily with the more important criteria governing the enforcement of foreign judgements, especially those relating to jurisdictional competence, finality and advance notice.

Draft Code of Crimes against the Peace and Security of Mankind⁵ (concluded) (A/CN.4/435 and Add.1,⁶ A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

⁵ 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.

⁶ Reproduced in *Yearbook... 1991*, vol. II (Part One).

[Agenda item 4]

**DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE (concluded)**

ARTICLE 25 (Illicit traffic in narcotic drugs)

26. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 25, which read:

Article 25. Illicit traffic in narcotic drugs

1. An individual who commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to . . .]:

—undertaking, organizing, facilitating, financing or encouraging 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 includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this 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.

27. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 25 opened with the standard clause used in other articles. He proposed that paragraph 1 should be reworded to take account of the discussion which had taken place at the previous meeting on the deletion of the words "by another individual". The word "of", after the word "encouraging", should also be deleted. Several solutions were, of course, possible but the best course would probably be to follow as closely as possible the presentation adopted the previous day with respect to the other articles. Paragraph 1 would then read:

"An individual who commits or orders the commission of any of the following shall, on conviction thereof, be sentenced [to . . .]:

"—undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context."

Paragraphs 2 and 3 would remain unchanged.

28. In the form in which it had initially been adopted, the scope *ratione personae* of the article had extended to "agents or representatives of a State and other individuals". The Drafting Committee had noted that, since the reference to "other individuals" was all-embracing, it was superfluous to mention the agents or representatives of a State. The Drafting Committee therefore suggested that the words "agents or representatives of a State", should be deleted from the text adopted by the Commission in 1990.

29. Prince AJIBOLA said that the definition of illicit traffic contained in paragraph 3 was too broad. It did not cover, for instance, the production, manufacture, extrac-

tion and preparation of drugs, which should be the subject of another paragraph. All activities connected with drugs were, of course, offences, which was why paragraph 1 referred to the undertaking, organizing, facilitating, financing or encouraging of such traffic, but not all of them amounted to illicit traffic.

30. The words “whether within the confines of a State or”, in paragraph 1, and the words “internal or”, in paragraph 3, should be deleted, since it was for States to punish acts committed within the confines of their territory or in violation of their internal law.

31. Mr. PAWLAK (Chairman of the Drafting Committee) pointed out that article 25 had already been adopted at the previous session. Only the introductory clause had been changed to bring it into line with the other articles. It had perhaps not been necessary to define the various acts listed in that clause but it had seemed advisable, for the purposes of the Code and to facilitate the task of any future international court, to provide two definitions, in paragraphs 2 and 3, which were borrowed from the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. He would point out that the Commission was at that stage considering the draft article on first reading; if the Sixth Committee or Governments considered that the definition was too broad, the Commission could revert to the matter on second reading.

32. Personally, he considered that what was most important was the scope *ratione personae* of the draft article. In his view, the words “An individual . . .” gave the article broader scope than did the wording used by the Special Rapporteur in former article X.⁷

33. Prince AJIBOLA said that, without wishing to stand in the way of adoption of the article, he thought it necessary to be clear about the meaning to be given to the word “traffic”, in the title. Everybody knew what traffic was, but that word should not be given other connotations by including in it, for instance, as did paragraph 3, production and manufacture, which were very different matters. Furthermore, domestic law generally provided for a scale of penalties according to whether the convicted person had engaged in drug trafficking or was a producer or manufacturer. Even if there were already conventions on the matter, there was no need to feel bound by them. The duty of a lawyer was to strive ceaselessly to improve on the law. He trusted that the article would be the subject of a closer analysis of the various offences and would take account of their nature and gravity. It was inconceivable that an international criminal court would concern itself with, for instance, the sale of an infinitesimal amount of drugs.

34. Mr. PAWLAK (Chairman of the Drafting Committee) pointed out that the Code provided only for illicit traffic in narcotic drugs on a large scale.

35. The CHAIRMAN said that the views of Prince Ajibola, who had been personally involved in the drafting of legislation on traffic in narcotic drugs in his own

country, were very important, and his remarks were highly relevant. It would, however, be difficult for the Commission to depart from existing conventions, for it would look as if it was amending those conventions. The international criminal court would, of course, have discretion to interpret the article and all would depend on how the indictment was drawn. He would also call Prince Ajibola's attention to the fact that the domestic law of some countries drew no distinction between the different types of drug offences, all being treated equally. The Commission might, however, wish to revert to the wording of the article on second reading with a view to making it clearer.

36. Mr. EIRIKSSON said that wording very similar to that used in article 18 could be adopted for paragraph 1 of article 25, since the description of the crime was fairly short, as it was in article 18. He therefore proposed that paragraph 1 of article 25 should be reworded to read:

“An individual who undertakes, organizes, facilitates, finances, encourages or orders 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 trans-boundary context, shall, on conviction thereof, be sentenced [to . . .].”

37. Mr. GRAEFRATH, supported by Mr. NJENGA and Mr. BEESLEY, expressed agreement with Mr. Eiriksson's proposed amendment to paragraph 1 of article 25.

38. Mr. PAWLAK (Chairman of the Drafting Committee) reminded members that, when he had introduced the article, he had pointed out that the introductory clause could be worded in a number of ways. It should be realized that Mr. Eiriksson's proposal, if adopted, would add several words to the formulation adopted in previous articles.

39. Mr. THIAM (Special Rapporteur) said that he could support the new wording, which, in his view, made the paragraph less cumbersome and more understandable.

40. Mr. ROUCOUNAS said that Mr. Eiriksson's proposed text was too repetitious. Some more concise and elegant form of wording should be found.

41. Mr. TOMUSCHAT said that article 25 raised another problem which should perhaps be considered on second reading. The article, which was based on the relevant clauses of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, dealt with the undertaking and organizing of illicit traffic in narcotic drugs and also with facilitating, financing or encouraging such traffic. The latter were, however, forms of assistance. A general provision on assistance was already contained in article 3 so that, if article 25 was read in the context of that article, there would in effect be two levels of assistance (helping to facilitate, finance or encourage illicit traffic) which would be tantamount to enlarging the scope of article 25 significantly.

42. Mr. THIAM (Special Rapporteur) said that, while he was sympathetic to Mr. Tomuschat's views, he would

⁷ Adopted at the forty-second session, see *Yearbook . . . 1990*, vol. II (Part Two) for text and commentary.

point out that the article had already been adopted except for the *chapeau*, which was all that could be changed. In that connection, he had taken due note of Mr. Roucounas' remark and therefore proposed wording to read:

“An individual who undertakes, organizes, facilitates or finances illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context, or who encourages or orders the commission of such acts, shall . . .”

43. Mr. EIRIKSSON said that the Special Rapporteur's proposal was excellent and considered that it could also be used for articles 23 and 24. The indented paragraph in paragraph 1 could then be deleted, which was an undoubted improvement and simplification so far as presentation was concerned and also introduced greater clarity into the provision.

44. Mr. MAHIU said he supported Mr. Eiriksson's proposal as amended by the Special Rapporteur.

45. Mr. PAWLAK (Chairman of the Drafting Committee) said that he found the Special Rapporteur's proposal difficult to accept in view of the introduction of the words “of such acts”, at the end of the sentence. Was the noun “acts”, coming after a series of verbs—“undertakes, organizes, facilitates, and . . .”, really appropriate? Would it not be better to speak of “actions”?

46. Mr. THIAM (Special Rapporteur) said he did not think that the word “acts” posed a problem in that context. It was indeed “acts” that were involved.

47. Mr. CALERO RODRIGUES said that, while he recognized the merits of Mr. Eiriksson's proposal, he would suggest, given the drafting problems to which it apparently gave rise, for instance, the repetition or use of the word “acts”, that the discussion on the article should not be prolonged any further and that the wording proposed by the Chairman of the Drafting Committee should be adopted.

48. Mr. RAZAFINDRALAMBO pointed out that, in the French version, too, the Special Rapporteur's proposal would involve a repetition of the word *acte*, which already appeared at the end of paragraph 1. He would therefore prefer to revert to the original wording.

49. Mr. GRAEFRATH said he, too, considered that details of a drafting nature could be resolved when the articles were considered on second reading.

50. Mr. NJENGA said he, too, considered that the wisest course would be to retain the existing wording and to return to the provision, if necessary, when the draft article was considered on second reading. He would point out that the wording of paragraph 1 which formed the opening clause of the article was modelled on the wording of articles 23 and 24, which had already been adopted by the Commission.

51. Mr. BEESLEY suggested that the text proposed by the Chairman of the Drafting Committee should be adopted and that the various observations made in connection with the article should be reflected in the commentary.

52. Prince AJIBOLA said that the Commission had two choices: either it could leave the wording of paragraph 1 as it stood and return to the article when the draft was considered on second reading, or it could ask for a new draft provision to be prepared in writing, before the end of the meeting, on which it could take a decision.

53. Mr. PAWLAK (Chairman of the Drafting Committee) said that it would be difficult to prepare a new draft text in a few minutes when the article had already been considered by the Drafting Committee at length.

54. Furthermore, he noted that most of the remarks made on the article came from members of the Drafting Committee, who had had an opportunity to express their views in the Committee.

55. Mr. EIRIKSSON observed that, as a member of the Drafting Committee, he had approved the text originally drafted. Since that text had now been amended, however, he felt fully entitled to put forward new suggestions.

56. Mr. THIAM (Special Rapporteur) suggested, in a spirit of compromise, that the Commission should leave the text proposed by the Chairman of the Drafting Committee as drafted and return to it, if necessary, on second reading.

57. The CHAIRMAN, noting that the Commission was unable to reach agreement, suggested that members' views should be reflected in the report and in the commentary to the article, and that the various proposals should be noted so that they could be taken into account on second reading. If he heard no objection, he would take it that the Commission wished to adopt article 25 as amended by the Chairman of the Drafting Committee (para. 27 above).

Article 25 was adopted.

ARTICLE 26 (Wilful and severe damage to the environment)

58. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 26, which read:

Article 26. Wilful and severe damage to the environment

An individual who wilfully causes or orders another individual to cause widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to . . .].

59. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in his seventh report,⁸ the Special Rapporteur had proposed that the Code should cover “any serious and intentional harm to a vital human asset such as the human environment”. The proposal had met with a favourable response in the Commission, although some members had suggested that, in working out an article on the subject, account should be taken of article 19 of part 1 of the draft articles on State responsibility, while

⁸ *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/419 and Add. 1, para. 30.

others had felt that it should be based on article 55 of Additional Protocol I to the 1949 Geneva Conventions.

60. In formulating the article, the Drafting Committee had borne in mind that the Code was intended to cover only the most serious forms of criminal behaviour. To that end, the Special Rapporteur had proposed that the article should be confined to the causing of serious harm to the environment. The text proposed by the Drafting Committee reinforced the criterion of seriousness by requiring that the damage caused should be “widespread, long-term and severe”, a form of wording borrowed from article 55 of Additional Protocol I. The Drafting Committee had queried the exact purport of the word “long-term”, which appeared in the English version of article 55. It had finally been interpreted to mean “lasting”, as was confirmed by the French version of article 55, which used the word *durable*.

61. The scope of the article was further limited by the requirement that the causing of the damage must be wilful. There had been general agreement in the Drafting Committee that the causing of accidental damage, even as a result of negligence, should not come within the terms of the article. On the other hand, the concept of intent proposed by the Special Rapporteur had been deemed to be too broad and difficult to interpret. In the view of the Drafting Committee, the causing of damage that was a likely consequence of an act committed for a different purpose should not fall within the ambit of the Code, and only such harm as was the direct consequence of a deliberate act should be covered. That notion was conveyed by the word “wilful”.

62. The Drafting Committee, having noted that, in plenary, the concept of vital human asset had been considered to be vague and likely to cause difficulties of interpretation, had limited the scope of the article to the “natural environment”, which also borrowed from article 55 of Additional Protocol I.

63. The title of the article followed the wording of the article and was self-explanatory.

64. One member of the Drafting Committee had reserved his position on the article.

65. For the sake of harmonization with the other articles which had been adopted, he proposed that the words “another individual” should be deleted.

66. Prince AJIBOLA proposed that the Commission should adopt the article as drafted on the understanding that it would be refined on second reading.

67. Mr. BEESLEY said that he was not opposed to adoption of the article although he had certain reservations in that regard. They arose from the fear that, probably inevitably, a lengthy investigation would be necessary before it was possible to determine accurately whether or not the harm caused to the natural environment was widespread, long-term and severe, and that might divest the article of its substance. The Drafting Committee’s proposed text was, however, the best possible one in the circumstances.

68. Mr. JACOVIDES said that he shared Mr. Beesley’s reservations. He also supported Prince

Ajibola’s proposal that, at that late stage in its work, the Commission should adopt article 26 as drafted, on the understanding that it would endeavour to improve it on second reading.

69. Mr. NJENGA, supported by Mr. McCAFFREY, said that he was prepared to accept the article, which should certainly be included in the Code, provided it was reconsidered carefully on second reading. Like Mr. Beesley, he was afraid, in particular, that the requirement that the harm must be, *inter alia*, long-term in order for it to fall within the ambit of the Code might preclude any likelihood of the article being applied.

70. Mr. PAWLAK (Chairman of the Drafting Committee) reiterated that the word “long-term” was taken from article 55 of Additional Protocol I to the 1949 Geneva Conventions, which the Commission was not, however, obliged to follow.

71. Mr. BARSEGOV said that, as a member of the Drafting Committee, he had supported the article; he was opposed to its being shortened and particularly to deletion of the concept of the long-term nature of the harm. For damage wilfully caused to the environment to fall under the Code, it must be widespread, long-term and severe.

72. Mr. GRAEFRATH observed that no text would ever be entirely satisfactory: the more it was studied, the more it was likely to be changed.

73. The wording of article 26 was taken from article 55 of Additional Protocol I to the 1949 Geneva Conventions. That instrument, however, dealt with the situation in wartime whereas the Code dealt with the situation in peacetime. It was, therefore, only reasonable to ask whether the Commission should reproduce its provisions as they stood. In the light of the reservations that had been expressed, he would propose that the words “long-term” should be placed between square brackets to draw the General Assembly’s attention to the problem and elicit a reaction.

74. Mr. BEESLEY said that was a very sound suggestion which he strongly supported.

75. Mr. NJENGA said that he would have preferred to delete the words “long-term” but could agree to their being placed between square brackets.

76. Mr. TOMUSCHAT, supporting Mr. Graefrath’s proposal, said that the choice was a political one and it was for the Member States of the United Nations to take a clear stand on the matter. The Commission could only draw their attention to it.

77. Prince AJIBOLA urged members to adopt the article as submitted by the Chairman of the Drafting Committee. Personally, he considered that there was more than one word or expression that needed to be shown in square brackets; indeed, some even called for a question mark. The Commission would have all the time it needed to consider the text carefully and to refine it on second reading.

78. Mr. BARSEGOV said he did not see why a provision that would be valid in wartime would not be valid

in peacetime. The article was an innovation in international law. It could have very important consequences for States and should therefore be as specific as possible. To call into question any one of the conditions that had to be met in order for the damage to fall within the ambit of the Code would be to call into question the article as a whole. Perhaps, however, the article was not necessary in that form; perhaps the time was not ripe. In that case, the possibility of placing the whole article between square brackets could be envisaged.

79. Mr. ROUCOUNAS said he was not at all persuaded by the argument that the text should be shortened because it was taken from an instrument that applied in times of armed conflict and hence was not valid in peacetime. There was no reason why provisions designed to protect the environment in times of armed conflict should not be extended to situations that could occur in peacetime. Accordingly, the harmonization with article 55 of Additional Protocol I should be maintained, unless some other form of wording was used in part 1 of the draft articles on State responsibility.

80. He saw no point in placing a particular word between square brackets. On the other hand, the problems to which the drafting of the article had given rise should be clearly explained in the Commission's report to the General Assembly and in the commentary to the article.

81. The CHAIRMAN pointed out that the concept of "widespread, long-term and severe damage" was a matter of scientific evidence, on which scientists would be invited to give their opinion to the court.

82. Mr. THIAM (Special Rapporteur) said that all the arguments, both for and against, had been considered at length. The damage had been qualified precisely in such a way as to provide safeguards. For instance, the word "long-term" was necessary because, if the damage was not long-term, it could not be serious; and, for the damage to be serious, it had to be long-term. He therefore proposed that the text should be retained in the form in which it had been introduced by the Chairman of the Drafting Committee.

83. The text he himself had originally proposed had been based on article 19 of part 1 of the draft articles on State responsibility. The Drafting Committee had none the less taken the view that, in the case of a crime, it was not possible to adopt the expression used in article 19, "on a large scale". It had therefore endeavoured to characterize the crime in question by referring to existing international instruments on criminal law, namely, Additional Protocol I to the 1949 Geneva Conventions.

84. In the circumstances, it was not possible to do better. The objections and reservations which had been expressed would, of course, be reflected in the commentary. Accordingly, there was no need to have resort to square brackets.

85. Mr. PELLET said that he was not at all enthusiastic about article 26, but he unreservedly endorsed Mr. Barsegov's comments, as well as, in the main, those of Mr. Roucounas.

86. Mr. BEESLEY said that, if he had understood correctly, Mr. Barsegov's suggestion was that the whole article should be placed between square brackets, something to which he was strongly opposed. There was a difference between placing a particular word or phrase between square brackets—which was regular practice in the Commission in order to draw attention to a difference of views—and placing a whole article between square brackets. In the present instance, the Commission was agreed on the need for the article, which, though it had given rise to reservations, had not met with any objections.

87. The CHAIRMAN said he believed that Mr. Barsegov's proposal was conditional.

88. Mr. OGISO asked whether damage would be deemed to be "wilful" if, for instance, in spite of warnings by scientists, a State or an operator continued to operate a defective nuclear reactor, with consequential widespread, long-term and severe damage.

89. Mr. SHI said that he supported the Special Rapporteur's proposal to maintain the article as drafted. Also, for the reasons given by Mr. Barsegov, if it was agreed that the word "long-term" should be placed between square brackets he would propose that the entire article should be placed between square brackets.

90. Mr. BARSEGOV said that the Chairman and Mr. Shi had correctly interpreted his idea.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said his personal opinion was that the example of damage to which Mr. Ogiso had referred would fall within the ambit of the Code inasmuch as it would be damage caused wilfully. He reiterated that the Drafting Committee had wanted to limit the article to widespread, long-term and severe damage wilfully caused to the environment.

92. The CHAIRMAN, agreeing with Mr. Pawlak, said that there was no question in that case of strict liability. The discussion would be reflected in detail in the summary records of the meeting, in the commentary to the article, in the Commission's report to the General Assembly, and in his own verbal report to the Sixth Committee. The Commission would also have an opportunity to reconsider the article on second reading in the light of the observations made.

93. If he heard no objection, therefore, he would take it that the Commission agreed to adopt article 26 as proposed by the Drafting Committee with the deletion of the words "another individual".

Article 26, as amended, was adopted.

ARTICLE 22 (Serious war crimes) (*concluded*)

94. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the Commission had adopted article 22 at its previous meeting on the understanding that further examples would be added to those listed between square brackets in subparagraph (a) of paragraph 2 of the article. He suggested that the Commission should consider the text drafted in cooperation with interested members, taking each example in turn. The first example proposed

was “unjustifiable delay in the repatriation of prisoners of war after the cessation of hostilities”.

95. Mr. BARSEGOV said that he had already had occasion to support Mr. Ogiso’s proposal to include a reference in paragraph 2 (a) of article 22 to “unjustifiable delay in the repatriation of prisoners of war”. However, the addition of the words “after the cessation of hostilities” significantly altered the sense of the proposal. How could something which was not a violation of international law be characterized as a crime? Under international law, acts of war could cease either *de facto* or by virtue of a truce but without the state of war having ended. Consequently, if the Commission wanted to make the proposed form of wording clearer, it should add the words “after the conclusion of a peace treaty or any other form of cessation of the state of war”; otherwise it might be inferred that prisoners should be repatriated immediately after a truce. It was no mere chance that the text the Commission wished to quote, paragraph 4 (b) of article 85 of Additional Protocol I to the 1949 Geneva Conventions, did not contain the words “after the cessation of hostilities”. Under the terms of that provision, only when a peace treaty was concluded, the parties to the conflict had agreed on the repatriation of prisoners of war, and the state of war had come to an end *de jure*, would a delay in the repatriation operations be contrary to international law.

96. Mr. OGISO said he felt bound to explain why he had proposed the addition of the words “after the cessation of hostilities”. At the end of the Second World War, Japanese prisoners of war, numbering over 600,000, had been held in very difficult conditions while the peace treaty between Japan and the country holding them had still not been signed. If the release of prisoners of war was conditional on the conclusion of a peace treaty, the same situation could recur, and he considered it unacceptable. In the light of that experience, the addition of the words “after the cessation of hostilities” was absolutely essential.

97. Mr. TOMUSCHAT, referring to article 118 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War, whereby “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities” said that Mr. Barsegov’s proposal was unacceptable. It was only very recently that Germany had signed a peace treaty with the Allies in the Second World War. The Commission should abide by the very clear rule enunciated in the third Geneva Convention and should not attempt to change the law, particularly since the Convention had been accepted by the entire community of nations and in particular by the States which had been at war with the Axis Powers.

98. Mr. ROUCOUNAS said that the question had arisen at the end of the Second World War of the application of the 1949 Convention relative to the Treatment of Prisoners of War which was silent as to the conditions of repatriation and certain provisions of which had been circumvented. That was what lay at the root of article 118 of the third Geneva Convention. To bring the Code into line with existing international law, the Commission could perhaps reproduce word for word the terms used in that Convention.

99. The examples referred to in paragraph 2 (a) of article 22 should not appear between square brackets, since that might arouse doubts in the reader’s mind as to the rules of international law in force. Furthermore, in addition to unjustifiable delay in the repatriation of prisoners of war, changes to the demographic composition of a territory and other acts should be added to those crimes. He realized, however, that the Commission could only consider including in the Code those war crimes and grave breaches of humanitarian law which, by their very nature, were also included among the crimes against the peace and security of mankind. Such crimes could not be the subject simply of a footnote or of a reference between square brackets.

100. Mr. BARSEGOV said that Mr. Ogiso had referred to sad events connected with the Second World War. However sad war and its consequences might be, that was not the point. The aim was to draft legal norms for the future, not to make political statements on the past. He was not opposed to the idea of quoting existing texts, but he proposed that the words “after the conclusion of a peace treaty or any other form of cessation of the state of war” should be added at the end of the first proposed addition to paragraph 2 (a). Post-war political realities had shown that it had not always been possible to conclude a peace agreement immediately, although the Governments of the countries concerned had put an end to the state of war. Hence, even before a peace treaty was signed, prisoners of war had been exchanged under agreements reached between the States concerned. If a party to a conflict did not announce that it was ending the state of war and simply re-established peace discreetly, no enemy country that considered itself to be still at war would release its prisoners of war. It was necessary, therefore, either to quote the texts in force or to explain matters.

101. The CHAIRMAN suggested that the words “in accordance with the 1949 Geneva Convention relative to the Treatment of Prisoners of War” should be added to the words “any unjustifiable delay in the repatriation of prisoners of war”.

102. Mr. OGISO said he could accept that suggestion if the words in question were added after the phrase “after the cessation of hostilities”.

103. Mr. PELLET expressed strong opposition to such a solution, which would reintroduce the Geneva Conventions into the Code when the Commission had thus far taken care to avoid referring to them. Such a reference would call into question the delicate balance the Commission had managed to achieve. He would also point out that unjustifiable delay in the repatriation of prisoners of war was not included among the grave breaches of the Geneva Conventions: the Commission was therefore adding new crimes to the list of grave breaches, a course he could certainly not support.

104. Mr. ROUCOUNAS said that the Commission and Drafting Committee had indeed decided not to refer to the Geneva Conventions and Additional Protocols in the *chapeau* to the articles, and, so, it was not possible to refer to them in that particular instance. It would be better to adopt the wording used in article 118 of the third Ge-

neva Convention. He also noted that, under paragraph 4 (b) of article 85 of Additional Protocol I, any unjustifiable delay in the repatriation of prisoners of war did indeed amount to a grave breach under the Protocol.

105. Mr. NJENGA said that, prisoners of war should not be used after the cessation of hostilities as leverage to expedite the conclusion of a peace treaty. In his view, the words "after the cessation of hostilities" meant the end of a conflict and not just a suspension of hostilities, as was being suggested. Mr. Ogiso's proposal was perfectly acceptable.

106. Mr. EIRIKSSON said that an act could not be criminalized unless it violated in an exceptionally serious manner the principles and rules of international law applicable in armed conflict, which was why it was always necessary to refer to the characterizations found in that body of laws. The more the Commission stayed within the context of established norms and the more accurate it was, the less likely it was to prejudice the principles and rules of international law applicable in armed conflict. To take the repatriation of prisoners of war, for example, there was a difference between the proposal to add the words "after the cessation of hostilities" and article 118 of the third Geneva Convention, which referred to "the cessation of active hostilities". The reference to the principles and rules of international law presupposed, however, that the Code would adopt as its own all the restrictions and exceptions recognized under that body of law. In adding examples of war crimes to the list already contained in article 22, the Commission should take care not to include crimes that would not come within the ambit of the 1949 Geneva Conventions and the 1977 Additional Protocols.

107. Mr. PAWLAK (Chairman of the Drafting Committee) said he would point out, in regard to Mr. Roucounas' comment, that in the absence of a consensus the purpose of the square brackets in paragraph 2 (a) was to inform the Sixth Committee that some members of the Commission wished to refer to a particular crime. The Commission had also agreed to add other examples of war crimes, and the wording used should follow as closely as possible that of the rules and principles of international law. Since Mr. Ogiso's proposal was very similar to article 85 of Additional Protocol I it could very well be incorporated in article 22 with the addition of the words "after the end of active hostilities". If that proposal was accepted, it would not bind the Commission but it would reflect the views that had been expressed.

108. The CHAIRMAN said that, as the Commission had decided earlier, the examples mentioned in square brackets did not bind the Commission. Members were free to propose the inclusion in paragraph 2 (a) of a particular act which they considered fell within the category of war crimes, provided they kept to examples taken from existing instruments.

109. On the understanding that the necessary explanations would be given in the commentary to article 22 and in the Commission's report to the General Assembly, he would take it, if he heard no objection, that the Commission agreed to adopt the first proposal to add the phrase

"any unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities".

It was so agreed.

110. Mr. EIRIKSSON said it should be noted that many members of the Drafting Committee saw no need to give examples after the general clause in paragraph 2 (a).

111. Mr. PAWLAK (Chairman of the Drafting Committee) said the second proposal was that reference should be made to "biological experiments".

112. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the second proposal, namely, that the words "biological experiments" should be added to paragraph 2 (a).

It was so agreed.

113. Mr. PAWLAK (Chairman of the Drafting Committee) said the third proposal was that the words "compelling a protected person to serve in the forces of a hostile power" should be added to paragraph 2 (a).

114. Mr. EIRIKSSON said that he would have liked to identify the source of the proposal. The main difficulty was that the Code did not define what was meant by "protected person", nor did it refer at any point to "power". Since the proposed phrase was to appear between square brackets, however, he would not raise any objection to its adoption.

115. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the third proposal, namely, that the words "compelling a protected person to serve in the forces of a hostile power" should be added to the list in paragraph 2 (a) of article 22.

It was so agreed.

116. Mr. PAWLAK (Chairman of the Drafting Committee) said the fourth proposal was that the words "establishment of settlers in an occupied territory" should be added to paragraph 2 (a).

117. Mr. PELLET, supported by Mr. MAHIOU, Mr. CALERO RODRIGUES and Mr. NJENGA, said that, though he was not very enthusiastic about the exercise in which the Commission was engaged, he was bound to recognize that the proposal filled a gap in article 22. He wondered, however, whether the right place for it was in subparagraph (a). In fact, occupation in wartime did not necessarily involve "acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons". Some acts were directed against the dignity of occupied peoples, as was the case with the establishment of settlers. Pending a final decision in the matter, the proposed addition should form the subject of a separate subparagraph and should also be placed between square brackets.

118. Mr. EIRIKSSON, said that, bearing in mind humanitarian law, which had been constantly referred to during the discussion, he wondered whether it would not be advisable to merge the proposal under consideration,

and the following proposal, concerning changes to the demographic composition of a foreign territory, with the wording used in paragraph 2 (a) (“Deportation or transfer of civilian population”) and with paragraph 4 (a) of article 85 of Additional Protocol I which read:

The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

119. Mr. BARSEGOV said that he supported the proposed addition. The establishment of settlers often went hand in hand with forcible emigration of the local population, and such actions lay at the root of massive human rights violations. Illegal expulsion of one people by another by force nullified the right to self-determination.

120. Mr. JACOVIDES said that his own preference would have been to have the three elements together under article 21 as originally provided for in paragraph 4 of draft article 14 proposed by the Special Rapporteur namely, “(a) expulsion or forcible transfer of populations from their territory; (b) establishment of settlers in an occupied territory; (c) changes to the demographic composition of a foreign territory”. Since that was not possible, however, he was willing to accept Mr. Pellet’s suggestion. Perhaps another separate subparagraph for (c) could be envisaged.

121. Mr. ROUCOUNAS said he agreed that there should be a separate subparagraph for the proposed addition, but the use of square brackets should be avoided.

122. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the fourth proposal, namely, to add the words “establishment of settlers in an occupied territory”, as a new subparagraph (b), the following subparagraphs being renumbered accordingly.

It was so agreed.

123. Mr. PAWLAK (Chairman of the Drafting Committee) said the fifth proposal was that the words “changes to the demographic composition of a foreign territory” should be added to paragraph 2 (a) of article 22.

124. Mr. PELLET said that, since that addition concerned article 22, it would be better to speak of “occupied territory” rather than “foreign territory”. Furthermore, since an occupied territory was concerned, the proposal should be incorporated in the new subparagraph (b).

125. Mr. EIRIKSSON said that it would be advisable to identify the body of law referred to in the paragraph. Not only the deportation and transfer of the civilian population, referred to in paragraph 2 (a) of article 22, but also the acts covered by paragraph 4 (a) of article 85 of Additional Protocol I, as well as genocide and wilful killing, had an effect on the demographic composition of a territory.

126. Mr. JACOVIDES, supported by Mr. THIAM (Special Rapporteur), said that his proposal used the actual words of paragraph 4 of article 14 submitted by the

Special Rapporteur, but he had no objection to Mr. Pellet’s suggestion, which was logical.

127. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the proposed addition should be included in new subparagraph (b), with or without square brackets.

128. Mr. JACOVIDES agreed with the suggestion that the proposed addition should be included in subparagraph (b) but considered that it should be without square brackets.

129. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the fifth proposal, namely, to add to paragraph 2 (b), without square brackets, the words “changes to the demographic composition of an occupied territory”.

It was so agreed.

130. Mr. TOMUSCHAT said he was surprised that the last two additions could appear without square brackets whereas a crime as serious as deportation remained between square brackets.

131. Mr. PELLET said that, as he understood the position, no member was opposed to the newly adopted subparagraph (b) appearing without square brackets, but there was no apparent agreement to delete the square brackets around paragraph 2 (a).

132. Once again he felt bound, at that stage of the proceedings, to stress that neither the Drafting Committee nor the Commission had proceeded in an acceptable manner in establishing the list. The Commission had begun by laying down a principle but had then decided to draw up a non-exhaustive list, as was apparent from the words “in particular”. How had that list been drawn up? The Commission had taken as its starting point the list of grave breaches in the 1949 Geneva Conventions, adding to it, and then removing from it, the grave breaches listed in Additional Protocol I of 1977. The list had then been shortened, which was logical, in view of the wording of the *chapeau* and of the expression “exceptionally serious”. The short list had been drawn up on the basis of impressions and feelings, and was certainly not the result of objective legal thinking. Next, each member of the Commission had added this or that crime to the list, according to his own feelings and experience, without the precautions that were normal when adopting instruments that dealt with international armed conflict being taken. Crimes had been listed without being accompanied by the carefully thought-out qualifying elements that appeared in the relevant conventions. He much regretted that way of going about things. However, given the working methods adopted, Mr. Jacovides had been right to make his proposals, which filled a gap. The list which appeared between square brackets in paragraph 2 (a), however, caused him great concern.

133. Mr. THIAM (Special Rapporteur) said that the problem of the definition of war crimes had always been a difficult one from the point of view of method, since opinions were divided between the general criterion system and the list system, as was evident in practice and in doctrine. That was why he had proposed two alternatives

for the article on war crimes, one global, based on a general definition, and the other drawn up on the basis of a list, with the choice being left to the Commission. The Commission, however, had been unable to decide in favour of either alternative and had in fact merged them. In any event, the definition of crimes was always rooted in feeling. Making a particular act a crime was not the outcome of legal thinking but a reflection of general opprobrium.

134. Mr. GRAEFRATH said it was regrettable that the list of crimes in paragraph 2 (a) appeared between square brackets: it was selective and arbitrary, and contained only a certain number of examples of crimes defined in the draft. There were certainly other serious war crimes which fell within the terms of the provision, and reference should be made to all of those crimes in the commentary but not in article 22.

135. Mr. EIRIKSSON said he regretted that, in order not to waste the Commission's time, he had been obliged to accept last-minute additions in a rush, without having been able to consult members properly. Had the Commission had time to consider it, he would have liked to make a proposal that the new subparagraph (b) should be replaced by a provision quoting paragraph 4 (a) of article 85 of Additional Protocol I; that would have avoided any overlap between subparagraph (a) and new subparagraph (b). As the provision would certainly not have been controversial, there would have been no need for it to be placed between square brackets.

136. The CHAIRMAN said it was unfair to say that the Commission had worked in a rush: the first proposal, for instance, had already been submitted by Mr. Ogiso to the Drafting Committee, where it had been discussed at great length. Other proposals had appeared in earlier reports of the Special Rapporteur and had been duly considered at the appropriate time.

137. Mr. NJENGA said that there should be no objection to any changes the Commission wished to make to texts submitted to it by the Drafting Committee. He, too, agreed that paragraph 2 (b) should not be in square brackets.

138. The CHAIRMAN said that the five amendments proposed by the Chairman of the Drafting Committee would be incorporated into the text of article 22, as previously adopted.

139. Mr. TOMUSCHAT said that as the Commission had come to the end of its consideration of the draft Code on first reading, he wished to commend the Special Rapporteur who, by his untiring efforts, had successfully concluded the drafting of a set of articles. It now remained to be seen how States would respond to that work. They should take a clear stand on whether or not they really wanted a Code. For his own part, he would have preferred a leaner Code. In general, States considered that only a hard core of crimes should be prosecuted at the international level: opinions were, for instance, divided on intervention, other than armed intervention.

140. For those reasons he wished to enter a general reservation with respect to paragraph 2 of article 3. The Commission had been very careful in defining the author

of a crime. In the case of aggression in particular, the Code provided expressly that an individual must act as leader or organizer. On the other hand, if the Commission made any act of assistance a punishable crime, the distinction drawn in the *chapeau* to the article on aggression fell away. Thus any person serving in an army would "assist" in the act of aggression. The effect of paragraph 2 of article 3 would therefore be to enlarge significantly the potential group of authors of crimes against the peace and security of mankind. He suggested that the Commission should examine the provision very carefully on second reading in the light of the replies it received from Governments.

141. Mr. EIRIKSSON pointed out that he had entered a general reservation to each article of the draft Code, the reason being that it was difficult to comment on a particular article until the total package was complete. The same problem had arisen for Governments. They now had an opportunity to make a political assessment of the Commission's work in that regard.

142. Mr. ROUCOUNAS expressed his satisfaction at the conclusion of the consideration of the draft Code on first reading. He congratulated the Special Rapporteur, the Chairman and the other members of the Drafting Committee.

143. Mr. BEESLEY said that he had already made clear his reservations on a number of articles and also his support for the draft. The draft Code was a respectable contribution to the progressive development of international law.

ADOPTION OF THE DRAFT CODE ON FIRST READING

144. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Sixth Committee would undoubtedly provide the Commission with the guidance that would enable it to resolve on second reading any outstanding issues and in particular those relating to the establishment of an international criminal court. The Drafting Committee suggested that the Commission should adopt the draft Code as a whole on first reading.

145. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the proposal by the Chairman of the Drafting Committee that the draft articles, as amended, as a whole, should be provisionally adopted on first reading, on the understanding that the comments made by members during the consideration of the articles submitted by the Drafting Committee would be duly reflected in the summary records.

The draft Code of Crimes against the Peace and Security of Mankind, as a whole, was adopted on first reading.

146. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed, in accordance with articles 16 and 21 of its Statute, that the draft Code of Crimes against the Peace and Security of Mankind should be transmitted, through the Secretary-General, to Governments and that they should be re-

requested to submit their comments and observations to the Secretary-General by 1 January 1993.

It was so agreed.

147. The CHAIRMAN said that the Chairman of the Drafting Committee had indicated, on several occasions, during the presentation of his report, that the views of Governments would be particularly welcome on specific points that remained to be resolved. He suggested that the Special Rapporteur should, in cooperation with the Commission's Rapporteur, highlight those points in its report to the General Assembly, in accordance with the request contained in paragraph 5 (b) of General Assembly resolution 45/41 of 28 November 1990.

TRIBUTE TO THE SPECIAL RAPPORTEUR

148. The CHAIRMAN said that the Commission, its successive Drafting Committees and their Chairmen could be proud of having achieved one of the goals the Commission had set itself at the beginning of the current quinquennium. The Special Rapporteur had played an important role in the achievement of what at times had appeared to be an unattainable goal. He therefore proposed that the Commission should adopt a draft resolution that read:

“The International Law Commission,

“Having adopted provisionally the draft Code of Crimes against the Peace and Security of Mankind,

“Expresses to the Special Rapporteur, Mr. Doudou Thiam, its deep appreciation for the outstanding contribution he has made to the preparation of the draft by his untiring dedication and his professional abilities, which have enabled the Commission to bring to a successful conclusion its first reading of the draft Code of Crimes against the Peace and Security of Mankind.”

The draft resolution was adopted.

149. Mr. THIAM (Special Rapporteur) thanked members of the Commission for their support, encouragement and advice and in particular the members and Chairmen of the successive Drafting Committees. He also expressed appreciation for the valuable assistance he had always received from the secretariat.

The meeting rose at 1.25 p.m

2242nd MEETING

Monday, 15 July 1991, at 10.50 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson,

son, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter IV.

CHAPTER IV. *Draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.464 and Add.1-4)

B. *Consideration of the topic at the present session* (A/CN.4/L.464 and Add.1-3)

1. CONSIDERATION OF THE NINTH REPORT OF THE SPECIAL RAPPORTEUR (A/CN.4/L.464 and Add.1-3)

(a) *Penalties applicable to crimes against the peace and security of mankind* (A/CN.4/L.464/Add.1)

Paragraph 1

2. Mr. NJENGA suggested that the word “moreover” should be deleted from the second sentence.

It was so agreed.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 6

Paragraphs 2 to 6 were adopted.

Paragraph 7

3. Mr. RAZAFINDRALAMBO said that the words “draft provision prepared and then withdrawn” in the first sentence should be replaced by the words “draft provision subsequently withdrawn”. In the third sentence of the French text, the words *des biens* should be replaced by the words *de biens*, since paragraph 7 dealt with some rather than all property belonging to private individuals.

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

4. Mr. SHI said that he had a general comment to make on paragraphs 9 to 35 which reflected the debate on penalties that had taken place in plenary. The Commission had already adopted all the draft articles on first reading, including those on penalties. He therefore doubted whether opinions expressed during the general debate should be included in the draft report. In his view, para-

graphs 9 to 35 should be deleted. The Commission should retain what was now paragraph 36 and add the following sentence to it: "The Commission decided to refer the proposed article to the Drafting Committee."

5. Mr. THIAM (Special Rapporteur) said that, during the general debate, members had been divided as to whether the draft Code should contain a single penalty or a penalty for each crime. The Commission wished to hear the comments of Governments on that matter before taking a final decision. The entire debate should be reflected in the report so that States could choose from the full range of possible solutions. Paragraphs 9 to 35 should therefore be included in the draft report.

6. Mr. MAHIOU said that he understood Mr. Shi's desire to eliminate non-essential paragraphs from the report. The Commission could in fact have tried to summarize its view on penalties more succinctly. At the same time, the extensive coverage of penalties in the draft report reflected both the length of the debate in plenary and the differences of opinion which had arisen. In the final analysis, the Commission would look to States for guidance on the issues dealt with in paragraphs 9 to 35. It was therefore important that States should be fully aware of those issues. As it was too late for any further revision of chapter IV, section B, of the draft report, he was in favour of retaining paragraphs 9 to 35 as they stood.

7. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in formulating the draft articles, the Drafting Committee had not tried to reconcile the differences of opinion in respect of penalties. It had chosen instead to highlight the issue by including the words "be sentenced [to . . .]" in the introductory paragraph of each article dealing with crimes. That indicated that there had been a difference of opinion and drew the attention of the General Assembly to the fact that the views of States on that matter were of particular interest. For those reasons, he was in favour of including paragraphs 9 to 35 in the draft report.

8. Mr. JACOVIDES said he was now convinced that it would be useful for the General Assembly to have full knowledge of the differences of opinion in respect of penalties. Therefore, if Mr. Shi did not insist, paragraphs 9 to 35 should be retained as they stood.

9. Mr. SHI said that, in view of the comments made, he would not insist on the deletion of paragraphs 9 to 35.

10. The CHAIRMAN, speaking as a member of the Commission, said that, while he shared the concerns expressed by Mr. Shi, he felt that the Commission could not start revising an entire section of the draft report at the current stage. Mr. Shi's comments were also relevant to the question of the preparation and presentation of the Commission's report. The Commission should therefore give some consideration, early in the next quinquennium, to the way in which its report was prepared.

11. Mr. CALERO RODRIGUES said he shared the Chairman's view that during its next mandate the Commission should consider the issue of the preparation of its report. The current format could certainly be im-

proved. For example, he agreed that the debate on penalties in plenary had to be reflected in the draft report. However, paragraphs 9 to 35 simply gave examples of the various views that had been expressed. No attempt had been made to summarize the main trends that had emerged during the debate.

12. Mr. BARSEGOV said that he personally would find it difficult to describe the Commission's overall decision on the inclusion of penalties in the draft Code. Because a number of divergent opinions had been expressed on that matter, the Sixth Committee should have full knowledge of the possible alternatives. He therefore thought that the text under consideration should be adopted as it stood.

Paragraph 9 was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

13. Mr. THIAM (Special Rapporteur) said that one member of the Commission had just requested that the following sentence should be added at the end of paragraph 11: "However, one member was of the opinion that it would be best not to set a minimum for the applicable penalties in the draft Code so that, at the time of sentencing, the court would be in a better position to take account of the particular circumstances of each case."

14. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to add the sentence proposed by the Special Rapporteur to paragraph 11.

It was so agreed.

15. Mr. MAHIOU pointed out to the Special Rapporteur that, in the French text, the phrases following the words *en deux tendances* could be drafted in a more elegant manner.

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Paragraph 17

16. Mr. MAHIOU said that, in the fourth sentence, it would be best to omit the specific historical reference to dictators. There had been dictators before the 1930s and, unfortunately, there had been dictators after that period. He therefore suggested that the words "of the type common in the 1930s" should be deleted.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 27

Paragraphs 18 to 27 were adopted.

Paragraph 28

17. Mr. JACOVIDES proposed that the word "should" should be replaced by the word "could" in the fourth sentence.

18. Mr. NJENGA proposed that a new sentence should be inserted between the third and fourth sentences, to read: "One member suggested that such property, if not returned to the rightful owners, in the event that they could not be traced, should be turned over to the State as property *bona vacantia* to be allocated to such charities as the State may determine."

19. The CHAIRMAN said that he had no objection to the insertion of that sentence. However, he was not sure whether the term *bona vacantia* was appropriate.

20. Mr. PAWLAK said that, in the second sentence, the words "or by injured States" should be added after the words "of the crimes in question".

21. Mr. BARSEGOV said that, in his view, the expression "stolen goods", which appeared in the first sentence, was not altogether appropriate, since what was at issue was not just theft by stealth, but theft involving an element of force which could even result in injury or death. In the French version, the word *pillés* would be preferable to the word *volés*.

22. Mr. THIAM (Special Rapporteur) said that the expression "stolen goods" had been borrowed from conventions drawn up after the Second World War and it referred to property appropriated in an unlawful or unjust manner. Possibly, therefore, the word "stolen" could be replaced by the words "unlawfully appropriated" or some similar term. The matter called for reflection, however.

23. Mr. RAZAFINDRALAMBO said that, in his view, the expression "stolen goods" was perfectly satisfactory, for theft did not exclude violence. The expression *biens pillés* would not be appropriate, as it presupposed a degree of disorder and participation on a wide scale by a number of persons. The persons who perpetrated the crime under consideration were indeed thieves inasmuch as they were leaders of countries who had appropriated property belonging to others.

24. Mr. NJENGA said that, in English, the correct word which would most closely reflect what was at issue was "pillaged".

25. Mr. ARANGIO-RUIZ said that the Italian term *appropriazione indebita* would cover the case, but he did not think that there was any equivalent in English or French. Perhaps, however, some expression could be found that was a little stronger than "stolen".

26. Mr. MAHIOU said that, in his view, the expression "stolen goods" was appropriate because internal law provided for several categories of theft, including armed robbery, which could result in death. What characterized the property in question was the fact that it was stolen and it did not matter whether that property was stolen in a gentle or in a violent manner. The use of force simply meant that the guilty person would receive a harsher sentence. The main point therefore was to qualify the prop-

erty in law as stolen property and, on that basis, to decide on the consequences so far as the status of the property was concerned.

27. On reflection, however, the word *spoliés* might meet Mr. Barsegov's point.

28. Mr. THIAM (Special Rapporteur) said that he could agree to Mr. Mahiou's suggestion provided that the sentence was rephrased, in the interests of correct syntax, to refer to property of which the victims had been robbed.

29. Mr. CALERO RODRIGUES pointed out that paragraph 24 referred to stolen property and paragraph 26 to misappropriated property which "appeared to include 'stolen property'". The use of the expression "stolen property" in paragraph 28 therefore seemed to follow on from previous paragraphs.

30. The CHAIRMAN suggested that the question of a suitable form of wording to replace the expression "stolen goods" should be considered further by interested members in the light of the comments made.

It was so agreed.

Paragraph 28 was adopted on that understanding.

Paragraph 29

Paragraph 29 was adopted.

Paragraphs 30 to 36

31. Mr. RAZAFINDRALAMBO, noting that paragraphs 30 to 35 referred to the Special Rapporteur's conclusions, proposed that, for the sake of clarity, a new subheading entitled "Conclusions of the Special Rapporteur" should be introduced at the beginning of those paragraphs.

32. Mr. THIAM (Special Rapporteur) said he did not think that it was absolutely necessary to have a subtitle for the conclusions of the Special Rapporteur. He would, however, have no objection if that were the wish of the Commission.

33. Mr. CALERO RODRIGUES said that, in his view, Mr. Razafindralambo had made a most useful suggestion.

34. Mr. PAWLAK said he too agreed that it would be useful to introduce a subheading on the conclusions of the Special Rapporteur.

35. The CHAIRMAN said that the secretariat wished to know whether members considered that there should be a separate subheading on the conclusions of the Special Rapporteur for each topic dealt with in the Commission's report.

36. Mr. THIAM (Special Rapporteur) said that that would certainly be an innovation, for there had been nothing of the kind in previous reports. Again, however, he would have no objection if that were the wish of the Commission.

37. Mr. RAZAFINDRALAMBO said he did not think that it was necessary to include a separate subheading in all the chapters of the report.

38. The CHAIRMAN, noting that Mr. Razafindralambo's proposal would make the text more readable without creating a precedent, said that, if he heard no objection, he would take it that the Commission wished to add a new subheading reading "Conclusions by the Special Rapporteur" before paragraph 30.

It was so agreed.

The new subheading was adopted.

Paragraphs 30 to 36 were adopted.

Section B 1(a), as amended, was adopted.

(b) *The jurisdiction of an international criminal court (A/CN.4/L.464/Add.2)*

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

39. Mr. THIAM (Special Rapporteur), referring to the French text, proposed that the word *s'embarquer*, in the third sentence, should be replaced by the word *s'engager*.

It was so agreed.

Paragraph 5, as amended, was adopted.

Paragraph 6

40. Mr. PAWLAK said that the words "a minimum of", in the second sentence, would, in his view, detract from the standing of the court and other institutions of a similar type. He therefore proposed that they should be deleted.

41. Mr. BARSEGOV supported that proposal.

42. The CHAIRMAN said that, on the advice of the secretariat, he would suggest that the words "provide a minimum" should be replaced by the words "guarantee the requirement".

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

43. Mr. RAZAFINDRALAMBO proposed the addition, at the end of the paragraph, of the following sentence: "One member recommended that an international criminal court should be set up on a provisional basis to fill the existing gap caused by the lack of an international criminal jurisdiction."

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

44. Mr. NJENGA said that he had some difficulty in understanding the thrust of the fourth sentence. He therefore proposed that the dashes should be replaced by commas and that the words between the dashes should be amended to read "particularly if it meant confining such jurisdiction to an international court on a case-by-case basis as and when they wished".

45. Prince AJIBOLA proposed that the words "including the gravest", in the same sentence, should be replaced by the words "however grave".

It was so agreed.

46. Mr. CALERO RODRIGUES said that, if the words "was not certain" were deleted, the whole meaning of the sentence would be altered.

47. Mr. McCAFFREY said that he did not understand whether the words "... the argument ... was not certain" were intended to mean that the argument was not persuasive.

48. The CHAIRMAN suggested that the sentence should be redrafted in the light of the comments made.

It was so agreed.

49. Mr. PAWLAK said that, if the first sentence had reflected the views of one member rather than "other members", he could have accepted it. As it was, the words "or even between national courts themselves", which appeared at the end of that sentence, would preclude the exercise of international jurisdiction by national courts. He therefore proposed that the sentence should end with the words "between the court and national courts".

It was so agreed.

50. Mr. PAWLAK said that the last three sentences of paragraph 10 should be deleted. If they were left in the text, they would create considerable perplexity among legal advisers of Ministries of Foreign Affairs. For example, the statement in the antepenultimate sentence of paragraph 10 that "it should be realized that the principle of sovereignty was no longer what it used to be" was much too sweeping and inaccurate in any case.

51. Mr. CALERO RODRIGUES pointed out that those three sentences reflected the views of some members only; the first one actually began with the words "In the opinion of those members". He did not agree with that way of summarizing the views of individual members or groups of members, but, since the Commission had decided to adopt that system, it should be followed consistently. There should be no question of censoring some members' views simply because other members did not endorse them.

52. Mr. RAZAFINDRALAMBO said that he fully shared Mr. Calero Rodrigues' opinion.

53. Mr. NJENGA said that he was not satisfied with the wording of the seventh sentence. The problem was

not one of censorship, particularly since the views of members were adequately reflected in the summary records. The best solution would probably be to replace the words “the principle of sovereignty was no longer what it used to be” by more suitable wording.

54. Mr. MAHIU said that he agreed with that suggestion and proposed that those words should be amended to read: “the principle of sovereignty has evolved”.

55. Mr. BARSEGOV said that the members whose views were reflected in the sentence should be consulted on how it should be amended.

56. Mr. THIAM (Special Rapporteur) suggested that the sentence should be amended to read: “In the opinion of those members, the principle of sovereignty was not as absolute as it had been in the past.”

Paragraph 10, as amended, was adopted.

Paragraph 11

57. Mr. THIAM (Special Rapporteur), referring to the penultimate sentence of the English text, said that the words “in the case of the prosecution of war crimes and crimes against humanity” should be replaced by the words “for all crimes against the peace and security of mankind”.

Paragraph 11, as amended, was adopted.

Paragraph 12

58. Mr. THIAM (Special Rapporteur) said that, in the fifth sentence of the French text, the words *au sujet de savoir* should be amended to read: *sur le point de savoir*.

Paragraph 12, as amended, was adopted.

Paragraph 13

59. Mr. NJENGA suggested that the words “Regardless of the question . . .” at the beginning of the paragraph should be amended to read: “Besides the question . . .”.

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraphs 15 and 16

60. Mr. PAWLAK said it was not correct to say in paragraph 15 that “One member advocated a maximalist position . . .”. As he recalled it, more than one member had advocated such a position.

61. Mr. THIAM (Special Rapporteur) said that the attribution of the position in question to one member was based on information supplied by the secretariat.

62. Mr. CALERO RODRIGUES pointed out that the position referred to in paragraph 15 was only one of the “maximalist” positions stated during the discussion.

Paragraph 16 referred to another maximalist position, as well as to a minimalist position.

63. Mr. BARSEGOV, supported by Mr. BEESLEY and Mr. THIAM (Special Rapporteur), proposed that the words “maximalist” and “minimalist” should be deleted throughout paragraphs 15 and 16.

It was so agreed.

64. Mr. NJENGA proposed that, in the first sentence of paragraph 16, the words “should cover all of the crimes” should be amended to read “should cover only the crimes . . .”.

It was so agreed.

65. Mr. MAHIU said that the second sentence required clarification.

66. The CHAIRMAN suggested that the exact wording of the amendment should be left to the Special Rapporteur.

Paragraphs 15 and 16, as amended, were adopted on that understanding.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

67. Mr. PAWLAK said that, in the sixth sentence, the words “combining the principles of territoriality, active and passive personality and real protection, with priority on the principle of territoriality” were difficult to understand and should be made clearer.

68. Mr. THIAM (Special Rapporteur) said that that sentence referred to the fact that there were three principles for determining criminal jurisdiction: the principle of territoriality, the principle of active and passive personality and the principle which was known in French as *protection réelle* and under which jurisdiction was attributed to the State that had been the victim of the crime. Priority must, however, be given to the principle of territoriality.

69. Mr. NJENGA said that, in English, the term “real protection” did not mean anything.

70. Mr. TOMUSCHAT proposed that the word “real” should be deleted.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

71. Mr. PAWLAK, referring to the fourth sentence, said that the parties to the Code did not have jurisdiction.

72. Mr. THIAM (Special Rapporteur) said that universal jurisdiction was not conferred on the court by virtue of the fact of dealing with a crime committed in the territory of a State party. The fourth sentence therefore seemed to be meaningless.

73. Mr. CALERO RODRIGUES said that the problem was one of drafting. He suggested that the sentence should be amended to read: "The parties to the Code could not, therefore, claim to confer universal jurisdiction on the court."

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

74. Prince AJIBOLA said the first sentence placed too much emphasis on the disagreement in the Commission concerning the Special Rapporteur's overall approach. He proposed that the words "at all" should be deleted.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraphs 22 and 23

Paragraphs 22 and 23 were adopted.

Paragraph 24

75. Mr. PELLET suggested that, in French, the beginning of the last sentence should be amended to read: "*Le paragraphe pourrait aller à l'encontre de la jurisprudence de la Cour permanente de justice internationale dans l'affaire du Lotus . . .*".

It was so agreed.

76. The CHAIRMAN said that the words "run counter to" and "counter to" in the last sentence should be replaced by the words "be contrary to" and "contrary to".

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraphs 25 and 26

77. Mr. NJENGA said the word "final" should be added before the words "decision of a national court" in the fourth sentence of paragraph 25.

78. Mr. CALERO RODRIGUES said that the statement in the second sentence of paragraph 25 that "the judgement submitted for review would have to be final" was open to question. Where a State did not object to the international court's review jurisdiction and its own appeals procedure was not invoked, the judgement would not necessarily be final; it might be a decision in first instance.

79. Mr. NJENGA said that a defendant must exhaust the appeal mechanisms in his own country, as was the case with European human rights jurisdiction. No appeal would be allowed to an international court from a decision of a court of first instance. Even without the word "final", the decision would necessarily be that of the court of final appeal.

80. Mr. CALERO RODRIGUES said that there were two possible interpretations of paragraph 25, which, moreover, represented the view of one member only.

81. The CHAIRMAN said that the text implied that only a final decision would be appealable. It should be left unaltered on that understanding.

82. Mr. MAHIOU, referring to paragraph 26, said that the second sentence required clarification. It seemed to mean that States which were reluctant to confer jurisdiction on the international criminal court would be even less willing to do so if judgements of their own courts were to be reviewed. The members of the Commission who had held that view apparently had in mind a direct channel of appeal to the international criminal court.

83. Prince AJIBOLA said that he objected to the fourth sentence of paragraph 25. In particular, the words "a State which had not felt able to decline jurisdiction" did not clearly bring out the intended meaning. He suggested that they should be replaced by the words "a State which was not disposed to grant jurisdiction".

84. Mr. BARSEGOV said that he agreed with Mr. Mahiou. Cases heard on review by an international court, acting as a court of second instance, could not be reviewed by a national court.

85. Mr. RAZAFINDRALAMBO said that the problem arose as a result of the interpretation of the second sentence of paragraph 26. Would States which objected to the international court having jurisdiction in first instance agree that it should have review jurisdiction for final decisions of their own courts? That idea was already expressed at the end of paragraph 25. To avoid ambiguity, he suggested that the second sentence of paragraph 26 should be deleted.

86. Mr. THIAM (Special Rapporteur) said that he agreed with Mr. Razafindralambo. States which were unwilling to confer jurisdiction on the international court would be equally unwilling to give it review jurisdiction. The text of paragraph 25 was badly drafted and he suggested that it should be left in abeyance until a new version had been prepared.

87. Mr. CALERO RODRIGUES said that the problem was to determine exactly what had been meant by the member of the Commission who had originally raised the point. That could be done by looking at the relevant summary record.

88. The CHAIRMAN, speaking as a member of the Commission, said that his concern was that legally flawed statements should not be incorporated in the Commission's report.

89. Mr. PELLET said that, as one of the members who had raised the point, he had meant that it might be less acceptable for the international court to be given review jurisdiction than jurisdiction in first instance. States were unlikely to welcome its being able to overturn judgements handed down by their own courts. Other members shared that view.

90. Mr. CALERO RODRIGUES, speaking on a point of order, said that the point made in paragraph 25 was the opinion of one member only.

91. Mr. BARSEGOV said that, if members of the Commission were reluctant to admit to authorship of the statements they had made in meetings, it would be better to omit those statements. Otherwise, members might be tempted to change their minds.

92. Prince AJIBOLA said that he disagreed. The member in question was not present and might object to his statement being deleted. It would be best to check the summary record.

93. The CHAIRMAN said it was to be hoped that, in future, the Commission's report would be a synthesis of the discussion, not a record of individual statements.

94. Mr. THIAM (Special Rapporteur) said that he could draft a new version of paragraph 25, in co-operation with Mr. Pellet.

95. Mr. PELLET said that his views were reflected in paragraph 26. However, the second sentence of that paragraph duplicated the statements contained in paragraph 25.

96. Mr. MAHIU said it was important to avoid ambiguity. It would be helpful if the Special Rapporteur could redraft the second sentence of paragraph 26 as well.

97. Mr. RAZAFINDRALAMBO said that the views reflected in paragraph 25 were his. He had meant that, where States rejected the jurisdiction of the international criminal court in first instance, they were unlikely to give it jurisdiction to review decisions of their own courts. Since the idea contained in paragraph 25 was repeated at the end of paragraph 26, the Special Rapporteur should be asked to redraft paragraph 26 as well.

98. Prince AJIBOLA said that, since the two paragraphs were connected, both should be redrafted.

99. Mr. PELLET proposed that the discussion on the two paragraphs should be suspended until the Special Rapporteur was ready to propose amended versions.

It was so agreed.

Paragraph 27

100. Mr. CALERO RODRIGUES said that, in order to bring the English text into line with the French text, the words "and unifying" should be added after the word "harmonizing" in the second sentence.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

101. Mr. PAWLAK said that, for the sake of consistency in the last sentence, the reference to the United Nations General Assembly and Security Council should either be deleted or the words "main organs of" should be added before the words "other intergovernmental international organizations".

102. Mr. PELLET said that, since Article 96 of the Charter of the United Nations provided that advisory opinions could be requested by "other organs of the United Nations and specialized agencies", it would be more logical to refer to "certain organizations".

103. The CHAIRMAN said that the word "international" could then be deleted.

It was so agreed.

104. Mr. THIAM (Special Rapporteur) said that, in the French version of the last sentence, the words *droit pénal international* should be amended to read: *droit international pénal*.

Paragraph 28, as amended, was adopted.

Paragraph 29

Paragraph 29 was adopted.

The meeting rose at 1 p.m.

2243rd MEETING

Monday, 15 July 1991, at 3 p.m.

Chairman: Mr. Abdul G. KOROMA

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

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER IV. Draft Code of Crimes against the Peace and Security of Mankind (continued) (A/CN.4/L.464 and Add.1-4)

B. Consideration of the topic at the present session (continued) (A/CN.4/L.464 and Add.1-3)

1. CONSIDERATION OF THE NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued) (A/CN.4/L.464 and Add.1-3)

(b) The jurisdiction of an international criminal court (concluded) (A/CN.4/L.464/Add.2)

Paragraphs 25 and 26 (concluded)

1. Mr. THIAM (Special Rapporteur) said that, in consultation with Mr. Razafindralambo and Mr. Pellet,

whose comments were reflected in paragraphs 25 and 26, respectively, he had redrafted the sentences of paragraphs 25 and 26 that had given rise to problems.

2. The penultimate sentence of paragraph 25 now read: "But the question arose whether a State that was not prepared to relinquish its jurisdiction in favour of the international criminal court would agree to submit to the reconsideration by that court of a decision rendered by its highest judicial authority." The last sentence of paragraph 26 now read: "The conferment of review jurisdiction upon the court might, as indicated in the previous paragraph, be even more unacceptable for States than attribution to the court of direct jurisdiction."

3. Mr. TOMUSCHAT said that the penultimate sentence of paragraph 25 would be clearer if the words "for the trial stage" were added after "jurisdiction". By agreeing to confer review jurisdiction on an international court, the State also relinquished part of its own jurisdiction. It was therefore logical to specify that the first part of the sentence related to the trial stage.

Paragraphs 25 and 26, as amended by the Special Rapporteur, were adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

4. Mr. RAZAFINDRALAMBO proposed that the first part of the last sentence of the French text should be amended to read: "*On pouvait raisonnablement imaginer que de tels cas se produiraient lorsqu'un Etat jugerait son propre ressortissant . . . , mais ces cas . . .*". The last part of the sentence should be amended to read: "*. . . permettant à ceux-ci d'avoir accès aux dossiers et d'avoir une connaissance exacte et précise des faits de la cause*".

Paragraph 31, as amended, was adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

Paragraph 35

5. Mr. TOMUSCHAT, replying to a question by Prince AJIBOLA concerning the English text, proposed that the words "learned associations" should be replaced by "learned societies".

6. Mr. THIAM (Special Rapporteur) proposed that the word *certain* should be added before *auteurs*, in the first sentence of the French version.

Paragraph 35, as amended, was adopted.

Section B 1 (b), as amended, was adopted.

(c) *The institution of criminal proceedings (submission of cases to the court)* (A/CN.4/L.464/Add.3)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

7. Mr. PELLET suggested that the words *des organes distincts compétence pour engager*, in the second sentence of the French text, should be replaced by *des organes distincts d'exercer leur compétence pour engager* or by *des organes distincts d'engager*.

8. Mr. RAZAFINDRALAMBO proposed that the phrase should read: *système international attribuant à des organes distincts compétence pour engager*. Moreover, States were not empowered to institute proceedings, but only to lodge complaints. The words "instituting proceedings", in the third sentence, should therefore be changed to "lodging a complaint". Lastly, the words "investigating the charges", in the last sentence, should be replaced by "the preliminary investigation" or by "the preliminary proceedings".

9. Mr. THIAM (Special Rapporteur) pointed out that the preliminary inquiry was conducted by the police, whereas the investigation in the present instance was a matter for another authority, which was called upon to decide whether or not proceedings should be instituted. Consequently, the last sentence should not be amended.

10. Mr. TOMUSCHAT said that the sentence in question reflected his own statement and, since it was not known what procedure would apply, he saw no reason to change the wording.

11. Mr. CALERO RODRIGUES said he was against the suggestion to replace the words "instituting proceedings" by "lodging a complaint". It was better for the text to remain unchanged, although he had some doubt about the words "the possibility" used in that same sentence.

12. The CHAIRMAN, speaking as a member of the Commission, suggested that the word "take", in the second sentence, should be replaced by "commence".

13. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 7 taking into account the suggestions made by Mr. Pellet, Mr. Razafindralambo and himself.

Paragraph 7, as amended, was adopted.

Paragraph 8

14. Mr. McCAFFREY suggested that the words "bring cases to the notice" should be replaced by the formula used in paragraph 7, namely "bring cases to the attention".

Paragraph 8, as amended, was adopted.

Paragraph 9

15. Mr. McCAFFREY proposed that the word "start", in the second sentence, should be replaced by "initiate".

16. Mr. RAZAFINDRALAMBO proposed that, in the last sentence, the word *s'agissant* in the French text should be replaced by the words *au sujet*.

17. Mr. TOMUSCHAT suggested that any references to the Red Cross should be deleted, since it was a body that had to operate with the greatest discretion and could not play the role of prosecutor.

18. Mr. BARSEGOV said he shared that view. Instead of referring to the Red Cross it might be better to mention the International Commission of Jurists.

19. Mr. CALERO RODRIGUES said that if the reference to the Red Cross was deleted, the references to the other organizations should also be omitted. Moreover, he had doubts about the role of those organizations and wondered whether their action should be confined to lodging a complaint or whether they could also institute criminal proceedings.

20. Mr. MAHIU said he endorsed Mr. Calero Rodrigues' remarks and suggested that the last sentence should speak only of "non-governmental humanitarian organizations".

21. Prince AJIBOLA said he had doubts as to whether the proposals made by Mr. Calero Rodrigues and Mr. Mahiou really reflected what had been said during the discussion.

22. Mr. TOMUSCHAT suggested that the word "start", in the second sentence, should be replaced by "suggest initiating", which better reflected the idea contained in the French text than did the word "initiate" proposed by Mr. McCaffrey.

23. Mr. THIAM (Special Rapporteur) pointed out that paragraph 9 reflected not the opinion of the Commission but that of Mr. Solari Tudela, who both at the previous session and at the present session had laid much stress on the role of non-governmental organizations. As to whether a complaint could be lodged by non-governmental organizations, the Commission had finally concluded that they could actually do so in the same way as individuals. That was, moreover, the position in France, where non-governmental organizations could initiate proceedings before the criminal courts.

24. Mr. CALERO RODRIGUES said that, in general, he preferred the Commission's report to reflect as accurately as possible the statements by members. In the present instance, however, if the reference to the Red Cross was to be deleted, then it was obviously necessary to eliminate the references to other non-governmental organizations. Besides, a distinction had to be drawn between the right to lodge a complaint and the right to initiate criminal proceedings. The right to initiate criminal proceedings lay not with the State or individuals or organizations but, in the domestic legal system, with the office of public prosecutions. In the case of the international criminal court, it would in due course have to be provided with the equivalent of such an office. However, he supported Mr. Tomuschat's proposal concerning the second sentence. The idea of suggesting the initiation of proceedings went together with the right to bring cases

to the attention of the competent body, mentioned in paragraph 8.

25. Mr. TOMUSCHAT said it was always delicate to correct what had actually been said by a member of the Commission. Nevertheless, it was perhaps sometimes advisable to avoid entering into details. A good example was the reference to the Red Cross: ICRC's mission would be jeopardized if it had to act as prosecutor.

26. Prince AJIBOLA said he shared Mr. Calero Rodrigues' view that non-governmental organizations could only lodge a complaint and could not in any way be entitled to institute criminal proceedings, a right which belonged only to the office of public prosecutions.

27. Mr. GRAEFRATH suggested that paragraphs 8, 9 and 10 should be merged. The first sentence of paragraph 9 and the whole of paragraph 10 would be added to the single sentence of paragraph 8. Those three sentences would thus reflect three different positions and it was unnecessary to mention in the draft report the reasons behind them.

28. Mr. McCAFFREY said that Mr. Graefrath's proposal posed a problem: in all fairness, it would then be necessary to delete from the following paragraphs the lengthy explanations given in support of one position or another.

29. Mr. THIAM (Special Rapporteur) said that, for Mr. Solari Tudela, the essential point was that non-governmental organizations should be entitled to take action, in other words, to bring a case to the attention of the competent authorities with a view to criminal proceedings. He did not believe that Mr. Solari Tudela's thinking would be misrepresented if the examples he had given in support of his ideas were not quoted. Mr. Calero Rodrigues had made an extremely fine distinction between the right to lodge a complaint and the right to institute criminal proceedings, but in French law, for example, when the Public Prosecutor refused to institute proceedings the victim of the offence could always take action as a civil claimant.

30. Mr. MAHIU pointed out that the English translation of the second sentence of paragraph 9 departed from the French original, so it would probably be enough to bring the English text into line with the French in order to meet the concern about the shade of difference between the right to lodge a complaint and the right to institute proceedings. The French wording should make it possible to meet the requirements of any judicial system.

31. The CHAIRMAN suggested that the Commission should adopt the proposals to delete the references to the various non-governmental organizations, to alter the second sentence as suggested by Mr. Tomuschat, and, in the last sentence, to speak of "non-governmental humanitarian organizations".

Paragraph 9, as amended, was adopted.

Paragraph 10

32. Mr. BARSEGOV said he believed paragraph 10 reflected his own opinion. If no other member of the Commission claimed authorship for the observations in

question, he proposed that the phrase “and since States could not be prosecuted under the draft Code” should be deleted. He might have said it in some other context, but in the present instance it had no connection either with what went before or with what came after.

Paragraph 10, as amended, was adopted.

Paragraph 11

33. Mr. McCAFFREY said that, since criminal proceedings were at issue, it was preferable, from the point of view of the common law, to replace the word “damages” by the word “compensation”.

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Paragraph 17

34. Mr. PELLET said that paragraph 17 gave rise to three problems which, as he saw it, were essentially connected with the translation of the observations mentioned. In the first place, the second sentence of the French text was meaningless whereas the English sentence was perfectly clear. The translation could be improved by saying for example: “*Or, un droit international coupé de la justice internationale ne saurait être l'expression d'un idéal*”. In the second place, in the last sentence, after the words *menace d'agression* the words *ou d'un acte d'agression* appeared to have been omitted. They would therefore have to be inserted. Again, the phrase *indépendamment du bien-fondé juridique de l'affaire* in the last sentence, was meaningless in French and it should be replaced by *indépendamment du bien-fondé juridique des positions en présence*.

It was so agreed.

Paragraph 17, as amended in the French text, was adopted.

Paragraph 18

35. Mr. BARSEGOV said he could not accept the word “eclectic”, in the first sentence. It was a word that had a pejorative connotation, at least in Russian. He proposed that the first sentence should be deleted and that the first three words of the second sentence should be replaced by “Another member observed that”.

Paragraph 18, as amended, was adopted.

Paragraph 19

36. Mr. McCAFFREY, supported by Mr. PELLET and Mr. BARSEGOV, said that, as one of the “Some other members” whose opinion was reflected in paragraph 19 he would propose that the second sentence, according to which “An individual could be tried on the ground of aggression only if a State, had been found guilty of that crime by the Security Council” should be changed. A State could not be found guilty of the crime of aggression by the Security Council and, for his part, he had never said such a thing. The end of the sentence should

read “. . . only if a State had been found by the Security Council to have committed aggression”.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 25

Paragraphs 20 to 25 were adopted.

Section B 1 (c), as amended, was adopted.

37. The CHAIRMAN said that the Commission would consider the remainder of chapter IV at subsequent meetings. In the meantime, he invited the Commission to consider chapter II of its draft report.

CHAPTER II. Jurisdictional immunities of States and their property (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

A. Introduction

B. Recommendation of the Commission and

C. Tribute to the Special Rapporteur, Mr. Motoo Ogiso (A/CN.4/L.462)

Sections A, B and C were adopted.

D. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.462/Add.1 and Corr.2 and 3)

Commentary to article 1 (Scope of the present articles)

Paragraph (1)

38. Mr. EIRIKSSON said that the proposed text was too wordy.

39. Mr. CALERO RODRIGUES said he shared that view. What, for example, were the “additional rules” supposed to “supplement and accelerate” the process of “crystallization of norms” on the subject?

40. Mr. SHI said he did not believe the purpose of the articles was, as stated in the first sentence, “to codify rules of international law”. In actual fact, the Commission had worked on a compromise solution between codification and progressive development of the law. He proposed that “formulate” should be used instead of “codify”.

41. Mr. MAHIU, supported by Mr. CALERO RODRIGUES and Mr. GRAEFRATH, said it was possible to dispense with paragraph (1) which was not balanced. It was first claimed that the aim was to “codify rules of international law”, but then a reference was immediately made to “progressively developing additional “rules”, as though the work had not been finished.

42. Mr. NJENGA, supported by Mr. PAWLAK and Mr. TOMUSCHAT proposed that paragraph (1) should be replaced by the following sentence: “The purpose of the present articles is to formulate rules of international law on the topic of jurisdictional immunities of States and their property.”

Paragraph (1), as amended, was approved.

Paragraph (2)

43. Mr. MAHIU pointed to a serious material error in the French version: the fourth and fifth sentences of paragraph (2) had been mistakenly placed at the end of paragraph (3).

44. In addition, the words "The Drafting Committee recommended . . .", in the penultimate sentence, should be changed to "The Commission recommended . . .". The commentary was by the Commission itself.

45. Mr. TOMUSCHAT proposed that the words "in relation to a judicial proceeding" should be added at the end of the third sentence.

46. Mr. BEESLEY proposed that the word "questions", in the first sentence, should be replaced by "issues".

47. Mr. EIRIKSSON proposed that the first sentence should be simplified so as to read: "Article 1 indicates the questions to which the articles should apply."

48. Furthermore, it seemed inappropriate to give a detailed account in the commentary of the proceedings of the Drafting Committee and in particular the discussions on the use of terms "a State" and "another State" or the terms "a foreign State" and "a State of the forum". He therefore suggested that the antepenultimate and penultimate sentences, which contained unnecessary explanations, should be deleted.

49. Mr. NJENGA said it was undesirable to try to shorten a paragraph that was intended to enlighten those who would be participating in a conference of plenipotentiaries. They should be given as complete a picture as possible of the elaboration of the draft submitted to them for approval.

50. Mr. PAWLAK said he, too, was opposed to deletion of the two sentences in question, since it would upset the balance of a very carefully prepared text.

51. Mr. BEESLEY and Mr. TOMUSCHAT said they advised caution.

52. Mr. CALERO RODRIGUES said that, actually, the two sentences were unnecessary because they merely highlighted the Commission's hesitations. Moreover, the text finally adopted on second reading was identical with the one the Commission had adopted on first reading.

53. Mr. OGISO (Special Rapporteur) said he could confirm that remark.

54. Mr. BARSEGOV urged that the two sentences should be retained. The choice between the various formulas mentioned in those sentences had been made in response to the points raised in the Sixth Committee by some Governments, which could thus see that the Commission had taken their concerns into account.

55. Mr. EIRIKSSON proposed that the sentences in question should be replaced by a text reading: "The draft articles refer generally to 'a State' and to 'another State' but it has been found useful to use 'foreign State' and 'State of the forum' in certain articles for the sake of clarity".

56. The CHAIRMAN said he would take it that the Commission was prepared to accept that new formulation, along with the amendments of detail proposed by Mr. Eiriksson for the first sentence and by Mr. Tomuschat, Mr. Mahiou and Mr. Beesley.

Paragraph (2), as amended, was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

57. Mr. EIRIKSSON proposed that, in the interests of clarity, the last sentence should be replaced by a text reading: "Although the draft articles do not define the term 'proceeding', it should be understood that they do not cover criminal proceedings."

It was so agreed.

58. In reply to a question by Mr. TOMUSCHAT, Mr. OGISO (Special Rapporteur) said that the expression "appellate court" meant any higher judicial body to which a case might be referred. In any case, it was not related to any particular legal system.

59. After a discussion in which Mr. TOMUSCHAT, Mr. McCAFFREY, Prince AJIBOLA, Mr. ALBAHARNA, Mr. SHI and Mr. OGISO (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to amend the second sentence to read: "In the context of the present articles, any organ of a State empowered to exercise judicial functions is a court, regardless of the level and whatever nomenclature is used."

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

60. Mr. TOMUSCHAT said it would be best to delete the fourth and fifth sentences, reading: "In some countries, for example, the comptroller of customs is empowered by statute in certain circumstances to confiscate property without reference to a court. Such acts would normally come under administrative powers". Was it to be said that the comptroller of customs was a court? Would he be acting subject to control by the courts? He thought that was certainly not the case. The customs was an administrative service, and even if it was not subject to judicial control, that did not make it a court.

61. Mr. SHI said he fully agreed with Mr. Tomuschat and unreservedly supported his proposal.

62. Mr. MAHIU pointed out that some organs which were normally administrative bodies were authorized by law to exercise functions of a judicial character in some instances, for example for the customs administration and the police. The fact remained, however, that the

wording of the sentences in question left something to be desired.

63. Mr. AL-BAHARNA said that the two sentences served simply as examples and, what was more, unquestionably reflected the facts, as observed by Mr. Mahiou. They should therefore be retained.

64. Mr. BEESLEY suggested use of the term "quasi-judicial functions".

65. Mr. McCAFFREY said that the difficulty lay partly in the third sentence, which ought to be reworded so as to indicate that, in some exceptional cases and in some countries, administrative authorities were empowered to exercise quasi-judicial functions.

66. Mr. MAHIU said that the third sentence indicated the real situation under some legal systems. The fourth sentence, on the other hand, was wrong: the comptroller of customs could no doubt be empowered to confiscate property as a provisional measure but had to refer the case to the courts. The last part, "without reference to a court", should therefore be replaced by the phrase: "before referring the case to a court". The fifth sentence had to be deleted because, contrary to what it said, the measures in question normally came under the powers of the court and it was only in exceptional cases that they could be exercised by an administrative authority.

67. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the fourth sentence contained a legally correct statement.

68. Mr. OGISO (Special Rapporteur) pointed out that paragraph (4) dealt with quasi-judicial functions, but he recognized that paragraphs (3) and (4) did involve some duplication. He was prepared to accept Mr. Mahiou's proposals.

69. Mr. PELLET said that he did not entirely share Mr. Mahiou's views. In the first place, it was not at all certain that the third sentence, in its present form, made sense. In French law, for example, it was very difficult to contrast judicial powers with administrative powers in such a way: that could only be done in regard to jurisdiction—in other words judicial or administrative. It would be hard to admit a distinction based on whether jurisdiction lay with the administrative courts or with the ordinary courts.

70. He would be prepared to support Mr. Mahiou's proposal to amend the fourth sentence, provided the next sentence was retained. It was not possible to take note of a fact without drawing the consequences. In reality, however, he failed to see what conclusions could be drawn from that fifth sentence for the purposes of the draft articles.

71. Mr. AL-BAHARNA said that the fourth sentence was factual. It did not mean that the administrative decision by the customs authorities to confiscate property could not be challenged in court.

72. Mr. TOMUSCHAT said that the fourth sentence, in the wording proposed by Mr. Mahiou, was correct but took the form of a mere declaration. Thus, it did not fit into the logic of paragraph (3), which explained the no-

tion of "judicial functions". Even if the customs comptroller did confiscate property, he was not acting in that case in the capacity of a judge—regardless of whether or not a recourse was available. In fact, the question was whether the Commission intended, in regard to judicial functions, simply to refer the matter to national legislations or else to define an autonomous notion of international law. Nothing in paragraph (3) of the commentary provided an answer to that question. The point therefore needed to be clarified.

73. Prince AJIBOLA said the discussion provided a good illustration of the fact that administrative and judicial functions varied from one country to another and in some countries overlapped in certain cases. It was precisely for that reason that paragraph (3) specified, and explained, that there was no question of defining the expression "judicial functions". He did not believe that Mr. Tomuschat's proposal to delete the fourth and fifth sentences would provide an answer to the problem. For his part, he proposed that the fourth sentence should be retained because it reflected, perhaps clumsily, the actual situation in some countries, and that the fifth sentence should be deleted.

74. Mr. CALERO RODRIGUES said that, as he saw it, paragraph (3) was both understandable and rational: it stated that, in certain cases that were therein defined, the comptroller of customs was a court for the purposes of the draft. It was understood that the term "court" was construed as any organ of a State entitled to exercise judicial functions, which was the case of the customs comptroller. Accordingly, a State could invoke immunity in the event of its property being confiscated by the customs.

75. Mr. RAZAFINDRALAMBO said that the difficulty lay in the different interpretations of the expression "judicial functions". Actually, it was enough to refer to the definition of the term "court" in paragraph 1 (a) of article 2 and in paragraph (2) of the commentary.

76. The real problem was whether a comptroller of customs did in fact exercise judicial functions. In that connection, he was inclined to believe, as did Mr. Tomuschat, that a comptroller of customs could not be a court: if he confiscated property, it was with powers of constraint that had nothing to do with judicial functions. He believed that the purpose of paragraph (3) of the commentary was to stress the difference, that existed in certain countries, between judicial jurisdiction and the administrative jurisdiction. He accordingly proposed that the third sentence should be amended to read as follows: "The scope of judicial functions, however, should be understood to cover not only judicial jurisdiction but also in some countries, administrative jurisdiction."

77. The CHAIRMAN, speaking as a member of the Commission, said that the fourth sentence was acceptable, since it did not make any general statement. It did, in fact, correspond to reality.

78. Mr. AL-BAHARNA said he shared that view. As he understood it, the differences of opinion related only to the example given in the sentence, and he therefore supported the proposal to delete the fourth and fifth sentences.

79. Mr. GRAEFRATH said that he was prepared to agree to deletion of the fourth and fifth sentences and proposed in addition that the third sentence should be amended to read as follows: "The scope of 'judicial functions', however, should be understood to cover judicial powers, whether exercised by courts or by administrative organs."

80. Mr. BEESLEY said he believed Mr. Graefrath's proposal would solve the problem.

81. Mr. PELLET said that he could not accept the notion that the draft articles should also cover immunity from execution: if confiscation by customs was to be considered as related to immunity from jurisdiction, then every act of authority by the State—whether performed by the police or by the customs—would be covered by the draft, something which would be inadmissible.

82. He supported the proposal to delete the fourth and fifth sentences and proposed that the third sentence should be completely recast so as to indicate very clearly that it was the nature of the functions which mattered and not the nature of the organ exercising them.

83. Mr. McCAFFREY said that he was prepared to accept the proposal by Mr. Graefrath, which took into account the concern voiced by Mr. Pellet.

84. The CHAIRMAN suggested that the Commission should resume the discussion at the following meeting.

It was so agreed.

The meeting rose at 6.15 p.m.

2244th MEETING

Tuesday, 16 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, 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. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER II. Jurisdictional immunities of States and their property (continued) (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. Draft articles on jurisdictional immunities of States and their property (continued) (A/CN.4/L.462/Add.1 and Corr.2 and 3)

Commentary to article 2 (Use of terms) (concluded)

Paragraph (3) (concluded)

1. The CHAIRMAN drew attention to the proposed amendment of the third sentence of paragraph (3) of the commentary to article 2, to read: "The scope of judicial functions, however, should be understood to cover judicial functions whether exercised by courts or by administrative organs." The fourth and fifth sentences of paragraph (3) would be deleted.

2. Prince AJIBOLA said that the repetition of the word "judicial" should be avoided, and suggested instead: "such functions whether exercised . . .".

3. Mr. CALERO RODRIGUES observed that the sentence was tautological, for according to the definition in article 2, paragraph 1 (a), any organ of a State which exercised judicial functions was a court. However, he did not object to the proposal.

Paragraph (3), as amended, was approved.

Paragraph (4)

4. Mr. MAHIU suggested that, to avoid difficulties of interpretation, the paragraph should end simply with the words "by administrative organs".

5. Mr. RAZAFINDRALAMBO proposed the expression "by some administrative organs of a State". Not all such organs had quasi-judicial functions.

It was so agreed.

6. Mr. TOMUSCHAT pointed out that there was no equivalent of the words "or agencies" in the French version.

Paragraph (4), as amended, was approved.

Paragraph (5)

7. Prince AJIBOLA proposed that the word "understanding", in the first sentence, should be replaced by "meaning".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

8. Mr. CALERO RODRIGUES queried the meaning of the phrase "entities that are sometimes not completely foreign". Did it refer to the dependencies of colonial powers?

9. Mr. OGISO (Special Rapporteur) explained that there was a case law concerning entities which were not independent States—for instance, colonial governments.

10. The CHAIRMAN suggested that such entities should be described as “not completely sovereign”.

11. Prince AJIBOLA said they could be described as “not completely independent”.

12. Mr. TOMUSCHAT referred to the footnote, which drew a connection in State practice between colonial dependencies and foreign sovereign States. Where there was such a link between a State and a foreign entity, the entity in question was not completely foreign. The best course, however, would be to replace “completely” by “really”.

13. Mr. MAHIU pointed out that the footnote, together with the remainder of the paragraph, covered the situation of such entities as far as State immunity was concerned.

14. Mr. NJENGA welcomed Mr. Tomuschat’s proposal. The writers had in mind entities which were part of a metropolitan State. Although not really foreign to that State, they enjoyed State immunity.

15. Mr. OGISO (Special Rapporteur) said he could agree to the substitution of “really” for “completely”.

Paragraph (7), as amended, was approved.

Paragraph (8)

16. Prince AJIBOLA said the term “assimilated” seemed to imply that a sovereign or head of State was absorbed into the central Government, rather than recognized as equivalent to it.

17. Mr. TOMUSCHAT suggested that the words “assimilated to” should be replaced by “equated with”.

It was so agreed.

18. Mr. EIRIKSSON, referring to article 2, paragraph 1 (b) (v), pointed out that paragraphs (18), (19) and (20) of the commentary contained further examples of representatives of the State who enjoyed immunity when acting in that capacity.

19. Mr. SEPÚLVEDA GUTIÉRREZ said that, in the Spanish version, the term *equipararse* would be preferable to *asimilarse*.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

20. Mr. TOMUSCHAT proposed that the words “The central Government is therefore the State itself”, in the second sentence, should be deleted.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were approved.

Paragraphs (12), (13) and (14)

21. Mr. TOMUSCHAT said that the proposition contained in paragraph (13) was incorrect. It drew a distinction between sovereign authority and other government authority, concluding that local or municipal agencies exercised only the latter and therefore did not enjoy sovereign authority. As the French text, which referred to *prérogatives de la puissance publique*, showed, it was wrong to derive any substantive consequences from a doubtful choice of legal concepts. States were immune to the extent that any form of public, governmental authority was exercised. This also emerged from the reference to “other entities” in the new version of article 2, paragraph 1 (b) (iv). It was important not to restrict the scope of the article in the commentary by suggesting, quite wrongly, that only institutions at the highest level enjoyed State immunity.

22. Mr. PAWLAK said that paragraphs (12) and (13) both raised the problem of the powers attributed to political subdivisions of a State. It would be better to call them “administrative subdivisions”. In a federal structure, the administrative subdivisions had extensive powers.

23. Mr. MAHIU said that in many countries, local and municipal authorities were empowered by administrative law to act in the exercise of “sovereign authority”. In the French version of paragraph (13), the phrase *prérogatives de la puissance publique de l’Etat* should be replaced by *prérogatives souveraines*.

24. Mr. NJENGA said the second sentence of paragraph (13) could be deleted. Organs of State at lower levels frequently exercised sovereign powers when acting on behalf of the Government; hence, not all subdivisions could be excluded from enjoyment of immunity.

25. The CHAIRMAN said he agreed, but the word “normally” catered for the exceptions.

26. Mr. THIAM said the second sentence of paragraph (13) should either be deleted, or redrafted to reflect the fact that in French law, as in other legal systems, local authorities did exercise the functions of *la puissance publique*.

27. Prince AJIBOLA said he, too, was in favour of deleting the second sentence of paragraph (13).

28. Mr. MAHIU pointed out that the expression “internal law”, in the English version of paragraph (13), had been mistranslated in the French version as “international law”.

29. Mr. BEESLEY said that, if the correct term was “international law”, the problem could arise of the interpretation of the constitutions of federal States. The expression “political subdivision” in paragraph (13) should be replaced by “administrative subdivision”. He agreed with Mr. Njenga that the second sentence should be deleted. Mr. Mahiou’s interpretation of paragraph

(13) appeared to be correct for international law, but not for internal law.

30. Mr. CALERO RODRIGUEZ said that the second sentence of the paragraph was badly drafted, but could easily be adjusted to reflect the idea that State immunity sometimes extended to the local level. He suggested the following wording: "Subdivisions of States at the level of local or municipal authorities, when not performing acts in the exercise of the sovereign authority of the State, do not enjoy State immunity."

31. Mr. PELLET said he agreed with Mr. Mahiou. The English version of paragraph (13), referring to internal law, was the correct one. Although the amendment proposed by Mr. Calero Rodrigues for the second sentence clarified matters, a problem remained concerning the *prérogatives de la puissance publique de l'Etat*. In some legal systems, local authorities exercised such *prérogatives* in their own right. The same question arose in paragraph (16) of the commentary, which linked the acts in question exclusively to State authority. He could accept the amendment, but would prefer to delete the words "of the State".

32. Mr. TOMUSCHAT proposed that paragraphs (13), (14) and (15) should be deleted. The contents of those paragraphs were not in accord with the new definition of the State contained in article 2, paragraph 1 (b). The term "sovereign authority" covered the sovereign powers of the central Government, and also powers exercised by bodies at a lower level. State immunity applied only where sovereign powers were exercised.

33. Mr. RAZAFINDRALAMBO said that he agreed with Mr. Pellet's views but not with all of his conclusions. Unquestionably, constitutional law and internal law could alone determine the extent to which one of the State's subdivisions was able to perform acts in the exercise of the sovereign authority of the State. The issue was not one to be decided by international law. There was a clear distinction, at least in French law, between the prerogatives of sovereign authority and the prerogatives exercised by subordinate bodies of the State. In article 2 the reference was to the "sovereign authority of the State" to quote paragraph 1 (b) (iii) and (iv). Paragraph (13) of the commentary was acceptable, particularly in view of the important qualifier "normally", in the second sentence.

34. Mr. MAHIOU said he fully agreed that it was for the constitution and for internal law to determine whether a State's subdivisions could exercise the State's sovereign authority. The position with regard to "political subdivisions" was that they exercised the prerogatives of *puissance publique* but not the prerogatives of the sovereign authority of the State. Paragraph (13) could therefore be kept, since it dealt only with the sovereign authority of the State.

35. Mr. THIAM said that the commentary should concentrate on its proper subject, namely the State. There was no need to enter into the subtleties of the powers of administrative subdivisions of the State, which varied enormously from one country to another. Venturing into such difficult ground would be of no advantage to the Commission's work.

36. Mr. OGISO (Special Rapporteur) said that article 2, paragraph 1 (b) (iii) was intended to explain the meaning of the term "State" for the purposes of jurisdictional immunity, and not the meaning of "State" in general under international law. As far as paragraph 1 (b) (iii) was concerned, he wished to stress the importance of the words "in the exercise of the sovereign authority of the State".

37. All of the commentaries had been drafted in English. Consequently, the words "internal law" were correct and the word *internationale* in the French version was a mistranslation. The powers of a political subdivision of the State would be determined, of course, by the internal law of that State. Paragraph (13) gave a correct explanation of the general position of political subdivisions of the State from the point of view of State immunity.

38. The second sentence was clear: it indicated that a subdivision of the State which did not perform acts of sovereign authority did not enjoy State immunity. He therefore saw no reason to change paragraph (13). All the paragraph said was that, in the somewhat exceptional cases where a subdivision of the State did exercise sovereign authority, it would enjoy immunity.

39. The CHAIRMAN said that perhaps the Commission would be prepared to accept the wording proposed by Mr. Calero Rodrigues for the second sentence of paragraph (13).

40. Mr. BEESLEY said that the wording did represent an improvement, but the problem was a much larger one, for it involved an important and sensitive issue. The second sentence of paragraph (12) spoke of "such political subdivisions as may be endowed with international legal personality . . .", a passage that left open the whole question of how such subdivisions of the State could be so endowed. The sentence was totally unacceptable and should be amended. Furthermore, Mr. Tomuschat's proposal for the deletion of paragraphs (13), (14) and (15) deserved very careful consideration.

41. Mr. PELLET said that since the text of the article itself referred to the "exercise of the sovereign authority of the State", he would urge that the formulation to be used throughout the commentary, at least in French, should be *la puissance publique de l'Etat*. With regard to the second sentence of paragraph (13) he could accept the rewording proposed by Mr. Calero Rodrigues, provided it included the formulation "sovereign authority of the State". Lastly, he reserved his position with regard to the substance.

42. Mr. PAWLAK said that the expression "political subdivisions" had to be changed to "administrative subdivisions". In a great many States, like his own, there were no political subdivisions—there were only administrative subdivisions.

43. The rewording of the second sentence of paragraph (13) proposed by Mr. Calero Rodrigues was an improvement, although he saw no actual need for the sentence. As far as paragraph (14) was concerned, it should be deleted, for the contents seemed to hark back to the 1930s. Paragraph (15), on the other hand, should be retained.

44. Mr. BENNOUNA supported the wording proposed by Mr. Calero Rodrigues for the second sentence of paragraph (13).

45. Mr. ARANGIO-RUIZ said that he fully agreed with members who had pointed out that it was for constitutional and internal law to determine the authority of an administrative subdivision to act at the international level. The second sentence of paragraph (12), to which Mr. Beesley had referred, was completely wrong both in theory and in practice. It was extremely rare for a subdivision of the State to enjoy international legal personality. Article 2, paragraph 1 (b) (iii), dealt with the exceptional case in which such a subdivision was entitled to perform acts in the exercise of the State's sovereign authority.

46. Mr. RAZAFINDRALAMBO said that it was perhaps inappropriate to criticize paragraph (12), which apparently reflected the views of only some members of the Commission.

47. Mr. SHI objected strongly to the term "political subdivisions" and urged that it should be replaced by "administrative subdivisions" not only in the commentary but also in article 2. The term "political subdivision" was used in United States legislation and such terminology was suitable in the context of a federal State, but not in that of a State having a unitary system.

48. Paragraphs (13), (14) and (15) of the commentary dealt with a great many issues of constitutional law and political theory. The Commission had no time to engage in an in-depth discussion of such delicate matters, and theories differed from country to country. He therefore supported the proposal by Mr. Tomuschat for paragraphs (13), (14) and (15) to be deleted.

49. Mr. CALERO RODRIGUES pointed out that the term "political subdivisions" appeared in the text of article 2 and there could be no question of reopening the debate on the article.

50. The problem of the second sentence of paragraph (12), which had been mentioned by Mr. Beesley, could be solved by deleting the words "international legal personality or". The sentence would thus say that immunity was recognized for those subdivisions which were endowed with "capacity to perform acts of sovereign authority in the name or on behalf of the State", without any reference to international legal personality, in other words, the concept which had created most difficulty.

51. Mr. BEESLEY said that Mr. Calero Rodrigues' earlier proposal paved the way for a solution to paragraph (13); it would not be possible to settle the matter finally, however, until it was decided which passages of paragraph (12) were to be retained.

52. Mr. SHI said he was still of the view that paragraph (13) should be deleted.

53. Mr. THIAM said that he, too, favoured deletion of paragraph (13). A distinction had to be made between the State and local authorities. In his view, the Commission must concentrate on the State; otherwise, it would only be complicating its task.

54. Mr. ARANGIO-RUIZ pointed out that constitutional lawyers drew a distinction between administrative subdivisions of a State and constitutional subdivisions. Constitutional subdivisions enjoyed constitutional decentralization, a feature that was typical of a federal State but one that could also be found in certain other, non-federal, States. Italy, for example, consisted of regions which in terms of their powers and functions, fell somewhere between the State itself and local authorities. They were not only administrative entities, but also exercised constitutional functions since, in some areas, they had legislative powers. In that respect they resembled to some extent the constituent States of the United States of America, the German Länder and the Swiss Cantons, for instance. The word "political", used in the context of the term "political subdivision", had perhaps created some confusion inasmuch as it failed to take account of that distinction between constitutional autonomy and administrative autonomy. What was needed therefore, was a reference to political and administrative subdivisions or to constitutional and administrative divisions.

55. Mr. TOMUSCHAT said he continued to believe that paragraph (13), which did not really reflect the content of article 2, should be deleted. It dated back to a time when the doctrine of restrictive immunity had not yet been recognized. In the first half of the twentieth century, it had been important to determine whether an entity was a sovereign entity or some other entity of public law. Now that a distinction was made between commercial activities and other sovereign activities, that distinction no longer mattered. Basically, a functional criterion was adopted whereby there was immunity wherever an entity exercised the *prérogatives de la puissance publique*.

56. Mr. PELLET said that he could agree to Mr. Calero Rodrigues' proposal with respect to paragraph (12), provided that, wherever the words *puissance publique* occurred in the French text, the words *de l'Etat* were added.

57. A debate on paragraph (13) was necessary to ascertain whether the paragraph should be retained. In particular, it was important to decide whether the draft should cover all, or only some, of the entities which exercised the *prérogatives de la puissance publique*. He did not think it possible to avoid reopening the debate on the second sentence of paragraph (12), which was extremely restrictive. Paragraphs (13), (14) and (15) confused the issue, in his opinion, and should be deleted.

58. He did not agree with Mr. Thiam. If the—admittedly unfortunate—expression "political subdivision" was included in the text, it must be explained. The discussion should, however, concentrate on the explanation and not on the text. In particular, it was important to make clear whether or not administrative subdivisions should be included.

59. Mr. GRAEFRATH said he would propose, first, that the words "international legal personality or", in paragraph (12), should be deleted, as Mr. Calero Rodrigues had suggested; second, that paragraphs (13) and (14) should be deleted; and third, that the word "autonomous" should be deleted from the first sentence of paragraph (15).

60. Mr. PAWLAK, supporting that proposal, said he would further propose that the word “political”, in the first line of paragraph (12), should be replaced by “administrative” or, alternatively, that the words “or administrative” should be added after the word “political”.

61. Mr. BENNOUNA suggested that a small working group should be appointed to prepare a new draft of paragraphs (12), (13), (14) and (15). The four paragraphs went together, and in his view, would have to be dealt with together if a solution was to be found.

62. Mr. JACOVIDES supported the proposals made by Mr. Bennouna and Mr. Graefrath.

63. Mr. ARANGIO-RUIZ said that any text prepared by a working group should explain that the word “political” was not to be understood in the narrow sense but rather as referring to the administrative or constitutional subdivisions of a State.

64. Mr. THIAM urged the Commission to adopt Mr. Graefrath’s proposal forthwith and not to enter into too much pointless detail.

65. Mr. MAHIU said that Mr. Graefrath’s proposal was a move in the right direction and should be accepted.

66. So far as the use of the word “political” was concerned, he would remind members that the possibility of referring to administrative, rather than political, subdivisions had given rise to a lengthy debate in the Drafting Committee. Moreover, when the notion of a federal State had been introduced on second reading, the word “political” could have been dispensed with and the word “administrative” used in place of it. Such a change had not been made, however, which perhaps explained the reason for the present lengthy discussion.

67. Mr. SHI said that he could agree to deletion of the second sentence of paragraph (12) or to the amendment proposed by Mr. Graefrath in that connection. His position on paragraphs (13), (14) and (15) remained unchanged. They should be deleted.

68. Mr. BEESLEY said that he shared Mr. Shi’s position.

69. The CHAIRMAN suggested, in the light of comments made, that a small working group should be appointed composed of Mr. Al-Baharna (General Rapporteur), Mr. Graefrath, Mr. Ogiso (Special Rapporteur) and Mr. Pawlak (Chairman of the Drafting Committee) to submit proposals with respect to paragraphs (12), (13), (14) and (15).

It was so agreed.

*The meeting was suspended at 11.45 a.m.
and resumed at 12.25 p.m.*

70. The CHAIRMAN invited Mr. Ogiso (Special Rapporteur) to introduce the working group’s proposals.

71. Mr. OGISO (Special Rapporteur) said that the working group’s proposals on paragraphs (12), (13), (14) and (15) might not be fully satisfactory to all members,

but they did, in his view, represent a fair compromise. Paragraph (12) should be amended to read:

“(12) The third category covers political as well as administrative subdivisions of a State which are constitutionally entitled to perform acts in the exercise of the sovereign authority of the State. The corresponding term for ‘sovereign authority’ used in the French text is *prérogatives de la puissance publique*. The Commission discussed at length whether in the English text ‘sovereign authority’ or ‘governmental authority’ should be used and has come to the conclusion that ‘sovereign authority’ seems to be, in this case, the nearest equivalent to ‘*prérogatives de la puissance publique*’. Some members, on the other hand, expressed the view that the term ‘sovereign authority’ was normally associated with the international personality of the State, in accordance with international law, which was not the subject of the paragraph. Consequently, it was held that ‘governmental authority’ was a better English translation of the French expression ‘*la puissance publique*’. Autonomous regions of a State which are entitled to perform acts in the exercise of sovereign authority may also invoke sovereign immunity under this category.”

72. Paragraphs (13) and (14) should be deleted.

73. The CHAIRMAN invited comments on the revised text of paragraph (12).

74. Mr. CALERO RODRIGUES proposed that the words “political as well as administrative” in the first sentence should be deleted, so that the third category of entities which might benefit from State immunity would simply be subdivisions of a State. That solution would resolve certain difficulties which had arisen in respect of the wording of paragraph (12).

75. Mr. SHI proposed that the word “constitutionally” should be inserted before the word “entitled”, in the last sentence.

76. Mr. PELLET said that Mr. Shi’s suggestion was logical, since the working group had added the word “constitutionally” to the first sentence of the paragraph. He nevertheless wondered whether that addition was justified, especially in view of the fact that the powers referred to in paragraph (4) derived not only from constitutions but also from legal systems. Paragraph (12) as revised might thus be inconsistent with paragraph (4). He would appreciate clarification from the working group on that point.

77. Mr. MAHIU said that he endorsed the suggestion made by Mr. Calero Rodrigues. As to Mr. Pellet’s query, the term “constitutionally” had been understood to mean “under the internal law of States”. The word “constitutionally” might even be too restrictive. He suggested therefore that the words “under internal law” should replace the word “constitutionally” in both the first and last sentences of the revised text of paragraph (12).

78. Mr. PAWLAK said that, as pointed out by Mr. Mahiou, the working group had understood the word “constitutionally” to mean under internal law. He therefore endorsed Mr. Mahiou’s suggestion. Although he

agreed in principle with the proposal by Mr. Calero Rodrigues, deleting the words "political as well as administrative" might give rise to drafting problems in other parts of the report. It was therefore better to keep the first sentence of paragraph (12) as it stood.

79. Mr. BEESLEY said that he endorsed the view of those who wished to replace "constitutionally" by "under internal law". While he agreed with the point made by Mr. Calero Rodrigues, Mr. Pawlak had also presented a convincing argument in favour of keeping the first sentence as it stood.

80. Mr. AL-BAHARNA said that if the words "political as well as administrative" were deleted from paragraph (12), they should also be deleted from paragraph (15).

81. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the revised text of paragraph (12) proposed by the working group, with three additional amendments. The words "political as well as administrative" would be deleted; the word "constitutionally" in the first sentence would be replaced by "under internal law"; and, in the last sentence, the words "under internal law" would be inserted after the words "of a State which are".

Paragraph (12), as amended, was approved.

Paragraphs (13) and (14) were deleted.

Paragraph (15)

82. Mr. OGISO (Special Rapporteur) said that the working group proposed that the first sentence of paragraph (15) should be amended to read:

"Whatever the status of subdivisions of a State, there is nothing to preclude the possibility of such entities being constituted or authorized to act as organs of the central Government or as State agencies performing sovereign acts of the foreign State."

83. Mr. BEESLEY, supported by Mr. SHI, proposed that the words "by internal law" should be inserted after the words "being constituted or authorized" in the first sentence.

It was so agreed.

Paragraph (15), as amended, was approved.

Paragraphs (16) and (17)

Paragraphs (16) and (17) were approved.

Paragraph (18)

84. Mr. PELLET said that, in the French text, the words *les directeurs de département ministériel* should be replaced by *les ministres*.

85. Mr. CALERO RODRIGUES said that the wording used in paragraph (18) was probably deliberate, in order to avoid listing ministers before ambassadors. He wondered if that might not also be true for the French text.

Paragraph (18) was approved.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were approved.

Paragraph (21)

86. Mr. PELLET said that the words "Drafting Committee" in the penultimate sentence should be replaced by the word "Commission". Paragraph (21) and, to a certain extent, the following paragraphs, were very confusing. Paragraph (21) stated that the term "transaction" was generally understood to have a wider meaning than the term "contract". At the same time, the following paragraphs contained a number of references to "contracts or transactions" and "contracts and transactions", implying that contracts were not subsumed under the notion of transactions. Was such a distinction necessary? It would be better to avoid the dichotomy between contracts and transactions. The commentary on that point was hardly enlightening.

87. The CHAIRMAN said that the distinction between the two terms would be clarified, if necessary. He also took it that the Commission wished to replace the words "Drafting Committee" by "Commission".

It was so agreed.

Paragraph (21), as amended, was approved.

Paragraph (22)

Paragraph (22) was approved.

Paragraph (23)

88. Mr. EIRIKSSON said that the words "Drafting Committee" in the sixth sentence should be replaced by "Commission".

89. Mr. PELLET said that to be consistent with the explanation given in paragraph (21), the word "also" should be deleted from the first sentence of paragraph (23) and the words *inter alia* should be inserted after "covers". That would demonstrate that contracts were not being considered as equivalent to transactions.

It was so agreed.

Paragraph (23), as amended, was approved.

Paragraphs (24) to (26)

Paragraphs (24) to (26) were approved.

Paragraph (27)

90. Mr. EIRIKSSON proposed that the words "if in its practice that purpose is relevant to determining the non-commercial character of the contract or transaction" should be added at the end of the first sentence.

It was so agreed.

Paragraph (27), as amended, was approved.

Paragraphs (28) to (31)

Paragraphs (28) to (31) were approved.

The commentary to article 2, as amended, was approved.

Commentary to article 3 (Privileges and immunities not affected by the present articles)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

91. Mr. MAHIOU said that the words “Drafting Committee” in the fifth sentence should be replaced by “Commission”.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Non-retroactivity of the present articles)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved

The commentary to article 4 was approved.

Commentary to article 5 (State immunity)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraphs (3) and (4)

92. Mr. EIRIKSSON said that paragraphs (3) and (4) overlapped and could be combined. A new paragraph should be drafted whereby the first sentence would be the first sentence of paragraph (3), followed by the entire text of paragraph (4), to which the words “and would not prejudice the future development of State practice” would be added after the phrase “would have no effect on general international law”. That formulation would then be followed by the last sentence of paragraph (3).

93. Mr. CALERO RODRIGUES endorsed Mr. Eiriksson’s suggestion. The proposed arrangement did not imply any substantive changes and was an improvement on the original text.

Paragraphs (3) and (4), as amended, were approved.

The commentary to article 5, as amended, was approved.

Commentary to article 6 (Modalities for giving effect to State immunity)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

94. Mr. TOMUSCHAT said that the words “and only then”, in the second sentence, should be deleted in order to give more flexibility to the meaning of the paragraph. The words “the court is”, in the last sentence, should be replaced by “courts are”.

It was so agreed

Paragraph (3), as amended, was approved.

Paragraphs (4) to (11)

Paragraphs (4) to (11) were approved.

Paragraph (12)

95. Mr. TOMUSCHAT said that the words “so much” should be inserted after the words “the practice of States not” in the first sentence.

It was so agreed

Paragraph (12), as amended, was approved.

Paragraph (13)

96. Mr. EIRIKSSON proposed that the end of the first sentence, beginning with the words “or an action instituted”, should be deleted since the matter was already covered by the commentary to paragraph (10).

It was so agreed.

Paragraph (13), as amended, was approved.

The commentary to article 6, as amended, was approved.

The meeting rose at 1.05 p.m.

2245th MEETING

Tuesday, 16 July 1991, at 3.05 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, 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. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER II. Jurisdictional immunities of States and their property (continued) (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. Draft articles on jurisdictional immunities of States and their property (continued) (A/CN.4/L.462/Add.1 and Corr.2 and 3)

Commentary to article 7 (Express consent to exercise of jurisdiction)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

1. Mr. OGISO (Special Rapporteur) proposed that the last part of the sentence should read: "by a declaration before the courts or by a written communication in a specific proceeding", a formulation taken from paragraph 1 (c) of the article.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were approved.

Paragraph (8)

2. Mr. RAZAFINDRALAMBO proposed that, in the last sentence, the words "such consent" should be replaced by "the consent", since the modalities for expressing consent were set out in the following paragraphs.

It was so agreed.

3. Mr. TOMUSCHAT, supported by Mr. McCAFFREY, said it would be best to delete the penultimate sentence.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

4. Mr. OGISO (Special Rapporteur) proposed that the terminology of the article itself should be used, as had been done for paragraph (2). The expression "specific case" in both the title and the first sentence of the paragraph would therefore be replaced by "specific proceeding".

It was so agreed.

5. Mr. RAZAFINDRALAMBO, supported by Mr. McCAFFREY and Mr. CALERO RODRIGUES, proposed that the first word, "Another", should be replaced by "An", since paragraph (9) began the enumeration of the tangible and indisputable proof of the consent of the State.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

6. Mr. RAZAFINDRALAMBO said that the word *international* should be added, so as to bring the French version into line with the English original.

It was so agreed.

7. Mr. TOMUSCHAT said the last sentence was not correct, since individuals could normally invoke the provisions of an international treaty.

8. Mr. OGISO (Special Rapporteur) replied that it was the States parties and not individuals who could invoke the provisions of an international treaty.

9. The CHAIRMAN said that was actually the case, save for rare exceptions in the field of human rights.

10. Mr. TOMUSCHAT said it was his understanding that in many legal systems, indeed in most of them, individuals could invoke the provisions of an international treaty: it depended on the domestic legal order concerned. In fact, he had doubts as to whether the last sentence accurately reflected contemporary trends and he proposed that it should be amended to read: "On the other hand, the extent to which individuals and corporations may successfully invoke one of the provisions of the treaty or international agreement is generally dependent on the rules of the domestic legal order concerned on the implementation of treaties."

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were approved.

The commentary to article 7, as amended, was approved.

Commentary to article 8 (Effect of participation in a proceeding before a court)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

Paragraph (8)

11. Mr. EIRIKSSON said that the last part of the last sentence, "and does not extend to all appearances of a State or its representatives in a foreign proceeding in the performance of the duty of affording protection to nationals of that State", gave the impression that a State which appeared in a proceeding before a foreign court in order to afford protection to its nationals thereby relinquished its immunity from jurisdiction—something which was at variance with paragraph 3 of article 8. He therefore proposed that the words "does not extend" should be replaced by "does not relate".

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

Paragraph (9) was approved.

The commentary to article 8, as amended, was approved.

Commentary to article 9 (Counter-claims)

Paragraph (1)

12. Mr. TOMUSCHAT proposed that the words “the court”, in the second sentence, should be replaced by “a court”.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

13. Mr. McCAFFREY proposed that, for the sake of clarity, the second sentence should be simplified by replacing the words “cross-claim or a cross-action” by the word “claim”, so as to define a counter-claim solely as a claim brought by a defendant in response to an original or principal claim.

14. Mr. MAHIOU proposed that, since the notion of counter-claim was the same in the English and common law systems on the one hand and in the civil law systems on the other, the first two sentences should be simplified to read: “The notion of ‘counter-claim’ presupposes the existence or preservation of a claim. A counter-claim is a claim brought by a defendant in response to an original or principal claim.” The third sentence would be deleted.

15. After an exchange of views in which Mr. EIRIKSSON, Mr. CALERO RODRIGUES, Mr. NJENGA, Mr. GRAEFRATH and Mr. BENNOUNA took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt Mr. Mahiou’s proposal.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

Paragraph (8)

16. Mr. McCAFFREY proposed, for the reasons he had already stated in connection with paragraph (3), that the words “a cross-suit or a cross-action or”, in the first sentence, should be deleted. The word “cross-actions”, in the fourth sentence, should be replaced by the word “claims”.

It was so agreed.

17. After an exchange of views in which Mr. EIRIKSSON, Mr. BENNOUNA, Mr. CALERO RODRIGUES,

Prince AJIBOLA, Mr. NJENGA, Mr. MAHIOU, Mr. BEESLEY, Mr. TOMUSCHAT and Mr. OGISO (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the penultimate sentence and to amend the beginning of the last sentence to read: “Likewise, under article 9, paragraph 3, a State is deemed . . .”.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

18. Mr. THIAM, supported by Prince AJIBOLA, said that paragraph (9) was obscure and the wording was extremely cumbersome; the text should be recast.

19. Mr. RAZAFINDRALAMBO said he endorsed that observation. Paragraph (9) was very complex and some of the principles it stated with regard to counter-claims were not accepted in civil law countries, France in particular.

20. Mr. BENNOUNA said that the paragraph was indeed somewhat obscure. It did no more than describe the practice of some States and he accordingly had doubts as to whether it had a place in the commentary to article 9.

21. Mr. TOMUSCHAT, supported by Mr. MAHIOU and Mr. BEESLEY, said that paragraph (9) made no useful contribution to explaining article 9. He therefore proposed that it should be deleted.

22. Mr. AL-KHASAWNEH said he favoured eliminating paragraph (9), unless it was the result of a compromise, in which case it should be kept.

23. Mr. OGISO (Special Rapporteur), in response to a query from Mr. AL-BAHARNA, said that paragraph (9) explained the tenor of a proposal which he had made to the Drafting Committee but had been rejected, as the last sentence of the paragraph indicated. The paragraph was intended not to explain article 9, as adopted, but to give the diplomatic conference an opportunity to decide whether it was desirable to include a provision based on the United States practice described in the antepenultimate and penultimate sentences of paragraph (9), which he felt could have its place in the draft. He was convinced that that possibility should be left open to the diplomatic conference, but in view of all the objections raised, he would not object to deletion of the paragraph.

24. Mr. McCAFFREY said that, in any case, the practice in question was described at the end of paragraph (4) of the commentary to article 9, in particular in the ninth and tenth sentences.

25. Mr. PAWLAK said that paragraph (9) was useful because it described a possibility which had been examined but rejected; nevertheless he would not oppose its deletion.

26. The CHAIRMAN said he would take it that the Commission agreed to delete paragraph (9).

It was so agreed.

Paragraph (9) was deleted.

The commentary to article 9, as amended, was approved.

Commentary to articles 10 to 17 as a whole (A/CN.4/L.462/Add.2 and Corr.1)

Paragraphs (1) to (7)

27. Mr. SHI, referring to the seven paragraphs of commentary introducing part III of the draft (articles 10 to 17), said that the title adopted was a compromise solution whereby the Commission had been able to put an end to an interminable doctrinal debate on absolute immunity versus restricted immunity. Actually, the commentary was drafted in such a way as to make one of the schools of thought appear to have prevailed over the other, which was not the case. For that reason, paragraph (1) should be deleted as well as the first three sentences of paragraph (2) and the whole of paragraphs (3) to (7). As a result, the draft articles would become more acceptable for States, apart from the fact that the deletions would shorten a chapter which was already too long.

28. Mr. MAHIOU said he wished to avoid reopening a theoretical debate on the various concepts of immunity. Since, however, the commentary did not seem to strike a proper balance, he was in favour of deleting paragraph (1) and the part of paragraph (2) indicated by Mr. Shi.

29. Mr. GRAEFRATH, Mr. NJENGA and Prince AJIBOLA said that they were of the same view.

30. Mr. PAWLAK said that he was prepared to accept the proposed deletions, provided paragraphs (6) and (7) were retained. In the case of paragraph (7), in particular, there were a number of footnotes which referred to the Commission's earlier work and would be very useful to the conference of plenipotentiaries.

31. Mr. BENNOUNA said he too thought that paragraphs (6) and (7) should be retained but paragraph (7) could include a summary of the considerations set out in the paragraphs that were to disappear; a neutral sentence would thus be added, reading: "The Commission, however, decided to operate on a pragmatic basis, taking into account the situations involved and the practice of States".

32. Mr. TOMUSCHAT said he supported that solution.

33. The CHAIRMAN, speaking as a member of the Commission, said he also supported it.

34. Mr. PAWLAK proposed that the words "On the whole, what", in paragraph (6), should be replaced by "It".

35. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete paragraph (1), the first three sentences of paragraph (2), and paragraphs (3), (4) and (5), and to adopt paragraph (6), as amended by Mr. Pawlak, and paragraph (7), as amended by Mr. Bennouna.

Paragraphs (1) and (3) to (5) were deleted.

Paragraphs (2), (6) and (7), as amended, were approved.

Commentary to article 10 (Commercial transactions)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were approved.

Paragraph (10)

36. Mr. SHI proposed that the second and third sentences, together with the word "Secondly" at the beginning of the next sentence should be deleted. The passage seemed illogical. It laid down the condition that the enterprise should act "on its own behalf", and then went on to say that the enterprise "must have an independent legal personality". It was difficult to see the connection between those two conditions. Moreover, the expression "on behalf of the State", which appeared in the passage in question, was imprecise and dangerous. It had been successfully avoided in the draft of paragraph 3 of article 10 but had now reappeared surreptitiously in the commentary.

The meeting rose at 6.15 p.m.

2246th MEETING

Wednesday, 17 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, 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. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (*continued*)

CHAPTER II. *Jurisdictional immunities of States and their property (continued)* (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. *Draft articles on jurisdictional immunities of States and their property (continued)* (A/CN.4/L.462/Add.2 and Corr.1)

Commentary to article 10 (Commercial transactions) (continued)

Paragraph (10) (*concluded*)

1. The CHAIRMAN reminded members that Mr. Shi had proposed at the previous meeting that the second and

third sentences, and the word “Secondly” at the beginning of the fourth sentence, should be deleted.

2. Mr. OGISO (Special Rapporteur) said that the statement in the second sentence that a proceeding must be concerned with a commercial transaction engaged in by a State enterprise or other entity on its own behalf was the basis for article 10, paragraph 3. To meet Mr. Shi’s point, however, he was prepared to agree to the deletion of the words that followed, namely, “and not on behalf of the parent State”. As to the third sentence, it seemed perfectly reasonable to state that if the State enterprise acted merely as the *alter ego* of the State, the commercial transaction in question would be regarded as having been conducted by that State.

3. Mr. GRAEFRATH said that he supported Mr. Shi’s proposal, since a new element which did not appear in article 10, paragraph 3, was being introduced in the commentary—namely, whether or not an enterprise was to be deemed to be acting on behalf of the State—whereas the point at issue was only the commercial activity of the State enterprise. He therefore proposed that the words “on its own behalf and not on behalf of the parent State”, in the second sentence, and the whole of the third sentence should be deleted.

4. Mr. OGISO (Special Rapporteur) and Mr. SHI expressed their agreement with that proposal.

5. Mr. McCAFFREY said that he would be sorry to see the third sentence of paragraph 10 deleted, since, in his view, it reflected existing law.

6. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to approve paragraph (10) as amended by Mr. Graefrath.

Paragraph (10), as amended, was approved.

Paragraph (11)

7. Mr. PELLET said that, during the lengthy discussion that had been held on article 10, paragraph 3, it had been emphasized in particular that the last part of that paragraph was redundant and added nothing to the idea of legal personality. The commentary did not, however, reflect that point. He therefore proposed that one or two sentences should be added to explain that article 10, paragraphs 3 (a) and (b), had been included merely to spell out what was meant by legal personality and in no way affected the opening clause of the paragraph.

Paragraph (11) was approved on that understanding.

Paragraph (12)

8. Mr. SHI, supported by Mr. BARSEGOV, proposed that, in order to reflect more clearly the debate on the deletion of the article on fiscal matters, the last part of the paragraph, starting with the words “should not be interpreted” in the penultimate sentence, should be replaced by the words “is without prejudice to the law with respect to fiscal matters”.

Paragraph (12), as thus amended, was approved.

Paragraph (13)

9. Mr. SHI proposed that paragraphs (13) to (35) of the commentary to article 10 should be deleted in their entirety. In the first place, the articles in part III reflected a compromise and the second sentence of paragraph (13) of the commentary was therefore particularly unacceptable to him. The paragraphs in question contained a doctrinal discourse which had no place in the commentaries, the purpose being to prove that the restrictive doctrine was predominant: that proposition was totally unacceptable to him. He did, however, accept the compromise as reflected in the articles and, in fact, had even withdrawn his reservation to the article on contracts of employment. Such a lengthy doctrinal discourse would, moreover, be merely counterproductive, for States were more likely to take a pragmatic approach and adopt the draft articles if they did not become enmeshed in doctrinal polemics. It must be remembered that there were certain theoretical concepts that were unacceptable to some nations and could not just be imposed on them.

10. Secondly, a number of examples had been given in the report that were not relevant. For example, the first footnote to paragraph (24) of the commentary quoted article VII of the Sino-Australian Investment Agreement. That Agreement was concerned not with investments by one State party in another State party, but with investments by nationals of the two Contracting Parties. Article VII of that Agreement therefore had to be read in the light of the article on the definition of the term “national”, which was not, however, quoted in the footnote, so that a proper understanding of the intent of article VII would not be possible. The Chinese State corporations which had made sizeable investments in Australian iron-ore mining industries, for example, were ordinary legal persons under Chinese law; they were totally unconnected with the State and could therefore not claim immunity. Accordingly, article VII of the Agreement provided that, where any question arose in relation to an investment by a national of either Contracting Party, the matter should be resolved in accordance with the law of the Contracting Party which had admitted the investment. Article VII was therefore not an example of a restrictive doctrine.

11. Another example given in the commentary was the 1958 Sino-Soviet Treaty of Trade and Navigation, which was referred to in paragraph (25). Once again, that Treaty should not be regarded as an illustration of the restrictive doctrine, but, rather, as an example of a waiver of immunity, at least on China’s part, by explicit consent in the form of a bilateral agreement.

12. Thirdly, and lastly, the entire commentary to article 10 was unduly long and disproportionate in comparison with the commentary to other articles. Every effort should therefore be made to shorten it by deleting paragraphs that were not relevant.

13. Mr. EIRIKSSON said that it might be advisable to place paragraphs (13) to (35) in the introduction to part III.

14. As a general rule, doctrine should be explicated and some precedents should be cited in the commentary. However, he was not at all sure that the survey of State

practice contained in paragraphs (13) to (35) demonstrated that one particular doctrine prevailed over another. What it did demonstrate was that some countries had changed their attitude, while others had not. In the final analysis, it was the Commission's conclusion on the matter that was relevant.

15. Mr. McCAFFREY said that he agreed with Mr. Eiriksson's comments. The Commission should be cautious about any wholesale deletion, especially since the material in question had been included in the commentary to the articles as adopted on first reading. Moreover, it was important to demonstrate that article 10, which was the first substantive article in part III, did indeed have a basis in State practice. The length of the commentary was not without precedent and the cases and examples cited were extremely useful as research and reference sources. It might be possible to delete certain examples which were inappropriate.

16. He proposed that Mr. Shi and the Special Rapporteur should consult in order to arrive at a concrete proposal on the commentary under consideration.

17. Mr. PELLET said that Mr. Shi had brought up the very important question of the exact form the commentary should take. In the commentary, the Commission was called upon to justify and explain the decisions it had taken. The commentary was not the place to review precedents or State practice. In view of those considerations, the part of the text that Mr. Shi had called into question was perhaps not suitable for inclusion in the commentary. At the same time, some parts of the text might be of value and should be retained.

18. Mr. BARSEGOV said that the Commission's aim in drafting its commentary was to explain the reasons for its decisions. The length of the commentary to article 10 might give the impression that the Commission was endorsing a particular doctrine and that was to be avoided. A new and more objective text was therefore in order.

19. Mr. CALERO RODRIGUES said he agreed that paragraphs (13) to (35) could be deleted. It was not necessary to go into such detail in the commentaries to the articles; that information was available elsewhere. The length of the commentary might even make it more difficult for States to accept certain articles.

20. Prince AJIBOLA said that Mr. Shi's proposal had to be considered with caution. The paragraphs in question presented a wealth of material which would clearly be valuable to scholars and researchers. However, the commentary was not intended to be merely an academic exercise. The question remained whether such detailed explanations were advisable. The solution might be to keep some of the most relevant material and to delete those paragraphs which implied a doctrinal orientation and which might be damaging to the article.

21. Mr. ARANGIO-RUIZ, supported by Mr. MAHIU, said that the procedural solution would be to entrust a small working group with the task of reviewing the commentary to article 10 and proposing appropriate changes.

22. Mr. TOMUSCHAT proposed that the words "as an exception to State immunity" contained in the heading preceding paragraph (13) should be deleted.

23. Mr. PAWLAK said that he agreed with the procedural solution proposed by Mr. Arangio-Ruiz. While much of the material in question could be deleted, paragraphs (24) to (28) and paragraph (35) should be retained. They represented a survey of State practice relating to the question of the precise limits of jurisdictional immunities in the area of commercial transactions. It would be very valuable for participants in the proposed plenipotentiary conference to have all the information on that issue available in one document.

24. Mr. GRAEFRATH said he endorsed the idea of a working group. At the same time, he saw the merit of Mr. Shi's proposal. He therefore proposed that the first sentence of paragraph (13) should be retained up to the footnote. The footnote would then provide specific references to the earlier reports which contained most of the material that was currently covered in paragraphs (13) to (35).

25. Mr. BENNOUNA said that, since the survey of State practice contained in the paragraphs (13) to (35) could be found in the Commission's previous reports, he endorsed Mr. Graefrath's proposal.

26. Mr. NJENGA said that he could not accept Mr. Graefrath's proposal. He suggested that the matter should be referred to a working group. He was not certain that all of the paragraphs should be deleted. For example, some of the footnotes were important and could be useful to Governments, which might not have access to the earlier reference material.

27. The CHAIRMAN, speaking as a member of the Commission, said that he endorsed the idea of a small working group. It was not really necessary to cite so much material in the commentary to article 10. Much of that material had already been mentioned when the articles were being drafted. Furthermore, he agreed that, as it stood, the text implied that one particular doctrine had prevailed within the Commission.

28. Mr. OGISO (Special Rapporteur) said that, in preparing the text, he had taken into account the request of one member that specific cases should be cited in the commentary to article 10. Furthermore, the commentary was intended as an aid to participants in the proposed plenipotentiary conference, making available to them in one document all the relevant information relating to the draft articles on jurisdictional immunities of States.

29. It was unfortunate that some members had misunderstood his intentions and had interpreted the commentary as endorsing a particular doctrine. Mr. Shi had criticized the fact that the commentary included references to the 1958 Sino-Soviet Treaty of Trade and Navigation; however, reference had been made to that treaty in the text adopted on first reading. In addition, he had explained in the commentary that some members had held the view that treaty practices were examples of consent and did not necessarily represent acceptance of a particular doctrine.

30. He would be disappointed if the examples cited had to be deleted. He would be willing to delete references to certain treaties. However, he would not be willing to delete the case material presented. It was on that

understanding that he would participate in the working group.

31. The CHAIRMAN suggested that the proposed working group should consist of Mr. Ogiso, as Special Rapporteur, Mr. Shi, Mr. Eiriksson, Mr. Graefrath, Mr. McCaffrey, Mr. Njenga and Mr. Al-Baharna, as General Rapporteur. It would consider shortening paragraphs (13) to (35) of the commentary to article 10, in particular with regard to the examples given and the cases cited.

32. Mr. SHI recalled that he had proposed that the second sentence of paragraph (13) and paragraphs (14) to (35) of the commentary should be deleted.

33. Mr. RAZAFINDRALAMBO said that Mr. Njenga's suggestion was a good one and he supported it. He was certain that the proposed working group would give careful consideration to the paragraphs in question and make a positive proposal.

34. Mr. DÍAZ GONZÁLEZ said that he fully agreed with Mr. Shi. It was necessary to adopt a realistic approach. Governments had already taken a position on the draft articles which had been adopted on first reading and had been accompanied by supporting material. The articles adopted on second reading took account of the opinions expressed by Governments, particularly in the Sixth Committee.

35. In the circumstances, he agreed with Mr. Pellet that there was no need for so much documentation. The General Assembly did not need any justification for the articles from the Commission. It needed conclusions to explain the compromise solutions reflected in the articles adopted on second reading. It was not necessary to add anything else.

36. If a plenipotentiary conference was held, it would necessarily receive all the relevant documentation and, in particular, the Special Rapporteur's reports and the summary records of the Commission's discussions.

37. Mr. ARANGIO-RUIZ said it was not realistic to think that the working group could complete its work in a few minutes. It would require the rest of the morning.

38. Mr. PELLET said that the working group should not confine its work to the deletion of certain paragraphs. Some members would want compromise solutions on some of them.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to set up a working group which would consist of the members he had mentioned and would report back to the Commission.

It was so agreed.

*The meeting was suspended at 11.20 a.m.
and resumed at 12.15 p.m.*

40. Mr. OGISO (Special Rapporteur), reporting on the recommendations of the working group, said it was proposed that, in paragraph (13), the second sentence would be deleted; paragraphs (14), (15), (17), (19), and (25)

would be deleted; the word "comparable" from the first sentence of paragraph 26; the last four sentences of paragraph (28); and paragraphs (29) to (33) would also be deleted and the references in the headings would be incorporated in a footnote; in paragraph (34), the words "the present article" would be followed by the words "finds precedent in the sources reviewed above". Some of the footnotes relating to the paragraphs which would be deleted could be included in appropriate places in the text.

41. Mr. TOMUSCHAT proposed that the heading before paragraph (13), namely, "(b) Legal basis of 'commercial transactions' as an exception to State immunity" should be amended to read: "(b) Legal basis of 'commercial transactions' within the context of State immunity".

42. Mr. PELLET said that he was in favour of Mr. Tomuschat's proposal, but its wording in French would be unintelligible.

43. The CHAIRMAN proposed that the heading should be amended to read: "Commercial transactions in the context of State immunity".

It was so agreed.

44. The CHAIRMAN invited the Commission to consider the recommendations of the working group in respect of paragraphs (13) to (35).

Paragraph (13)

Paragraph (13), as amended, was approved.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were deleted.

Paragraph (16)

Paragraph (16) was approved.

Paragraph (17)

Paragraph (17) was deleted.

Paragraph (18)

45. Mr. PELLET said that the example of the case of the *United States Diplomatic and Consular Staff in Tehran* had nothing to do with commercial transactions and was not instructive in the present context. He therefore suggested that the second and third sentences of paragraph (18) should be deleted.

46. Mr. OGISO (Special Rapporteur) said that he had no objection to Mr. Pellet's suggestion.

47. The CHAIRMAN said that the example referred to by Mr. Pellet might be relevant because ICJ had had to consider the lawfulness of the action taken to freeze the assets of one of the parties. In view of Mr. Pellet's objection, however, he suggested that the second and third sentences of paragraph (18), together with the footnote, should be deleted.

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

Paragraph (19) was deleted.

Paragraph (20)

48. Mr. TOMUSCHAT proposed that, since paragraph (19) had been deleted, the word "Thus" at the beginning of paragraph (20) should also be deleted.

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21) and (22)

Paragraphs (21) and (22) were approved.

Paragraphs (23) and (24)

49. Mr. PELLET, referring to the first footnote to paragraph (23), said that the draft report did not have to contain the full text of all the instruments cited. He hoped that, when the Special Rapporteur rearranged the reference material, he would eliminate the footnotes for the paragraphs which had been deleted and shorten those for the paragraphs which had been retained.

50. Mr. OGISO (Special Rapporteur) said that his intention was to retain only the references to sources. Relevant case material contained in the deleted paragraphs would be reproduced in footnotes elsewhere in the commentary.

51. The CHAIRMAN said that, as the basis of that approach, the first to sixth footnotes would be shortened.

52. Mr. PELLET said that the footnotes were intended only as references and should not contain quotations or additional comments. He also hoped that the Special Rapporteur and the secretariat would eliminate references which were merely of academic interest.

53. The CHAIRMAN said he was confident that the Special Rapporteur would treat the reference material appropriately. He agreed that footnotes which were not directly relevant to the text should be deleted.

54. Mr. EIRIKSSON said that in addition to those footnotes that related to parts of the text which had now been deleted, the working group also recommended that the three footnotes to paragraph (24) should be deleted, as they referred to controversial aspects of the text.

Paragraphs (23) and (24) were approved.

Paragraph (25)

55. Mr. EIRIKSSON said that the working group had decided to recommend that paragraph (25), together with the footnote, should be deleted.

56. The CHAIRMAN said that the retention or deletion of footnotes should be left to the Special Rapporteur to decide.

It was so agreed.

Paragraph (25) was deleted.

Paragraph (26)

57. The CHAIRMAN said that the working group recommended that the word "comparable" should be deleted.

Paragraph (26), as amended, was approved.

Paragraph (27)

Paragraph (27) was approved.

Paragraph (28)

58. The CHAIRMAN said that the working group recommended that the last four sentences should be deleted.

Paragraph (28), as thus amended, was approved.

Paragraphs (29) to (33)

59. The CHAIRMAN said that the working group recommended that paragraphs (29) to (33) should be deleted and that the references in the headings to the Institute of International Law, the International Law Association, the Harvard Research Institute and the International Bar Association should be incorporated in a footnote.

Paragraphs (29) to (33) were deleted on that understanding.

Paragraph (34)

60. The CHAIRMAN said that the working group recommended that the words "the present article" should be followed by the words "finds precedent in the sources reviewed above".

Paragraph (34), as amended, was approved.

Paragraph (35)

Paragraph (35) was approved.

The meeting rose at 1 p.m.

2247th MEETING

Wednesday, 17 July 1991, at 3.15 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, 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. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER II. Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. Draft articles on jurisdictional immunities of States and their property (concluded) (A/CN.4/L.462/Add.2 and Corr.1)

Commentary to article 10 (Commercial transactions) (concluded)

Paragraph (11) (concluded)

1. The CHAIRMAN said that the text of the sentence the Commission had agreed to insert at the end of paragraph (11) at Mr. Pellet's request¹ had been submitted to the secretariat. It read: "Other members emphasized that the provisions of paragraph 3 (a) and (b) added nothing to the notion of independent legal personality and were therefore superfluous."

Paragraph (11), as amended, was approved.

The commentary to article 10, as amended, was approved.

Commentary to article 11 (Contracts of employment)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Mr. BENNOUNA, referring to the second sentence, said it was inappropriate to use the word "administrative" to describe the law that the employer State was to apply. The State did not necessarily employ civil servants, and other branches of law could well be applied, for example in the case of contractual employees. He therefore proposed that the term "administrative", in the second and the third sentences, should be deleted.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

3. Mr. TOMUSCHAT, pointing out that the Commission wanted to remain neutral in the debate on the conflicting concepts of restricted immunity and absolute immunity, proposed that the phrase "or another exception to the general rule of State immunity" should be deleted from the title of the paragraph. Again, for the reasons advanced by Mr. Bennouna, the word "administrative" should be removed.

Paragraph (5), as amended, was approved.

Paragraph (6)

4. Mr. PAWLAK said that, in paragraph (6) too, the phrase "or another exception to the general rule of State immunity", in the first sentence, should be deleted.

5. Mr. TOMUSCHAT said that the last sentence of the paragraph was worded in such a way that it appeared to contradict the provision it commented on.

6. Mr. EIRIKSSON proposed that the sentence should be shortened to make it clearer, in other words, it should stop after the words "has also been deleted".

Paragraph (6), as amended, was approved.

Paragraph (7)

7. Mr. EIRIKSSON said that the examples given in the paragraph were not a good illustration of the cases that were intended to be covered. It was improper, in such a text, to speak of "employees of lower echelons" and "menial tasks". The paragraph should be deleted.

Paragraph (7) was deleted.

Paragraph (8)

8. Mr. BENNOUNA proposed that the second part of the first sentence, starting with the words "thus permitting . . .", should be deleted. It contained an idea that was adequately conveyed by the first part of the sentence.

9. The CHAIRMAN, speaking as a member of the Commission, said he was not opposed to such a deletion, but it made for an abrupt transition to the next sentence.

10. Mr. NJENGA said he shared the Chairman's views. He was not opposed to deletion of the phrase, but it would detract from the paragraph's consistency and it would be difficult to see the logic between the first and the second sentences. Moreover, generally speaking all such selective deletions might well affect the intelligibility of the report, which had been very carefully drafted, and the Commission did not have proper time to discuss their merits.

Paragraph (8), as amended by Mr. Bennouna, was approved.

Paragraph (9)

11. Mr. PELLET pointed out that he had entered formal reservations when article 11 had been adopted. Unlike other members, he thought that immunity was the rule and that non-immunity was the exception. He would like that view to find a place in the commentary on the article in question. It could be inserted with a sentence stating that "While not opposed to the adoption of article 11, some members stated a preference for reversing the rule and the exception, and considered that immunity constituted the principle in this field."

12. Mr. NJENGA, supported by Mr. BARBOZA, said he thought that the commentary was not the place to mention members' reservations. Rather, they should appear in the summary record and in that part of the Com-

¹ See 2246th meeting, para. 7.

mission's report dealing specifically with its deliberations.

13. Mr. AL-BAHARNA (Rapporteur) proposed that, as had been done earlier, the phrase "or the exception to State immunity" should be deleted.

Paragraph (9), as amended, was approved.

Paragraphs (10) to (15)

Paragraphs (10) to (15) were approved.

Paragraphs (16) and (17)

14. Mr. CALERO RODRIGUES said that the two paragraphs reported views of individual members, which should not appear in a commentary, as had just been pointed out in reply to Mr. Pellet.

15. Mr. BENNOUNA, supported by Mr. BARBOZA, said that the purpose of the commentary was to explain the articles and not to report the opinions of members; the commentary related to the essence of the provisions and not to the Commission's discussion.

16. Mr. PELLET said that the two paragraphs raised a fundamental question. When a member entered a reservation to a particular article, he did so to indicate his opposition, without hindering completion of the work. The fact remained that the Commission should disclose that the compromise solution it had worked out and proposed had been much debated. Otherwise, positions would harden and compromises would become impossible. He therefore proposed that at least paragraph (17) should be retained.

17. Mr. SHI said his was the opinion that was mentioned in paragraph (16). He would have no objection if the paragraph was eliminated. As for paragraph (17), it was for the members concerned to decide. Personally, he took the view that the solution chosen should be equitable and should also apply to all members. If not, the entire report would have to be rethought.

18. Mr. PAWLAK said that, in principle, the commentary should not record positions of a technical nature adopted by members of the Commission in the form of reservations or withdrawals of reservations. Such positions were duly set out in the summary records. There was only one instance in which an individual opinion should appear in the commentary, namely, when such a course was stipulated as a prerequisite to facilitate a compromise in the Drafting Committee.

19. Mr. BARSEGOV said that the issue was much broader than the matter now at hand. At the next session, it should be settled before the report was drafted. Opinions were divided, and one reason was as good as another. He had no set position of his own and he trusted that the Commission would discuss the question in depth.

20. The CHAIRMAN said he too thought that the Commission should, once and for all, settle the question at the next session.

21. Mr. BENNOUNA formally proposed that paragraph (16) should be deleted and that an impersonal turn of phrase should be used for paragraph (17), so that it would start with the phrase: "It was pointed out in the Commission that paragraph 2 (c) . . .".

22. Mr. PELLET said he supported that solution.

Paragraph (16) was deleted.

Paragraph (17), as amended, was approved.

The commentary to article 11, as amended, was approved.

Commentary to article 12 (Personal injuries and damage to property)

Paragraph (1)

23. Mr. SHI proposed that the word "delict" should be replaced by "tort" in the English version and that the other versions should be altered if necessary.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

24. Mr. TOMUSCHAT said that an insurance company was not a State and could not avail itself of immunity. Accordingly, the fourth sentence should be deleted, for it had no place in the paragraph. However, if the majority of members were in favour of keeping it, he would not press the proposal.

25. The CHAIRMAN said his interpretation of the sentence was that, if an insurance company refused to meet its liability and the State invoked immunity, the company would not be required to meet its liability. On the other hand, it would have to if there was no immunity. In short, the insurance company could not hide behind immunity in order to evade its liability.

Paragraph (4) was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

26. Mr. TOMUSCHAT said that he could in no way agree to the rule being construed in such a way that it could protect those who knowingly committed wrongful acts, such as sending letter-bombs. Consequently, it would be best to delete the word "letter-bombs" from the first sentence, along with the last phrase: "or indeed with intent to inflict physical injury upon a person or cause damage to tangible property". The second sentence would start with the words "It is also clear that cases of shooting . . .".

27. Mr. EIRIKSSON proposed that the phrase "which constitute clear violations of the territory of the neigh-

bouring State under public international law” should be deleted from the second sentence.

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the amendments proposed by Mr. Tomuschat and Mr. Eiriksson.

Paragraph (7), as amended, was approved.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were approved.

The commentary to article 12, as amended, was approved.

Commentary to article 13 (Ownership, possession and use of property)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

29. Mr. RAZAFINDRALAMBO drew attention to an editorial change required in the first sentence of the French version.

30. Mr. CALERO RODRIGUES proposed that the penultimate sentence should be deleted.

It was so agreed.

31. Mr. PELLET said he could not accept in the French version the use of the English expression “which is otherwise competent” when the self-same expression was translated in the article itself. The commentary should therefore use the expression *compétent en l’espèce*.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

32. Mr. RAZAFINDRALAMBO said that the fifth sentence was quite clumsy, for it conveyed the idea that there were a number of legal systems within the English system; the point perhaps was that there were different interpretations of what constituted property and what constituted interest. He proposed that the sentence should be amended to read: “Accordingly, even in the English usage, what constitutes a right in property may be considered as an interest.”

33. The CHAIRMAN suggested that the sentence should be deleted.

34. Mr. GRAEFRATH proposed that the words “and niceties within each municipal legal system”, at the end of the fourth sentence should be deleted.

35. Mr. PELLET, supported by Mr. CALERO RODRIGUES, said he was troubled by the use of the words “right or interest” in the French version, which should be replaced by the French expression *droit ou intérêt*.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph (4), taking into account Mr. Pellet’s comment and amending the fourth and fifth sentences to read: “The law of property, especially real property or immovable property, contains many peculiarities. What constitutes a right in property in one system may be regarded as an interest in another system.”

Paragraph (4), as thus amended, was approved.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were approved.

Paragraph (8)

Paragraph (8) was deleted.

The commentary to article 13, as amended, was approved.

Commentary to article 14 (Intellectual and industrial property)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were approved.

Paragraph (10)

37. Mr. BENNOUNA said he took objection to the use of the words “including any developing State”, in the second sentence, for they were discriminatory. The fact was that every State was free to pursue its own policy within its own territory. The words should be deleted.

It was so agreed.

Paragraph (10), as amended, was approved.

The commentary to article 14, as amended, was approved.

Commentary to article 15 (Participation in companies or other collective bodies)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

38. Mr. PAWLAK proposed that the words “or the exception to State immunity”, in the first sentence, should be deleted, as had been done elsewhere.

It was so agreed.

Paragraph (5) as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

39. Mr. BENNOUNA proposed that the words *les plus compétents*, in the last sentence of the French version, should be replaced by *les plus qualifiés*.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were approved.

The commentary to article 15, as amended, was approved.

Commentary to article 16 (Ships owned or operated by a State)

Paragraphs (1) to (16)

Paragraphs (1) to (16) were approved.

Paragraphs (17) to (20)

40. Mr. CALERO RODRIGUES said that paragraph (17) posed some problems: it spoke of the question raised by one Government, without mentioning the reply that had been given, and it went on to refer to the Drafting Committee instead of Commission. He suggested that the phrase "which was also considered by the Commission" should be added at the end of the second sentence, in order to justify the paragraphs that followed.

41. Mr. BARSEGOV said that, since the Commission had not had the opportunity to consider the questions mentioned in paragraph (17) and the paragraphs that followed, he wondered whether it was indeed appropriate to refer to them in the commentary. He also wondered about the origin of the conclusions set out in paragraph (18), however valid they might be.

42. Mr. NJENGA suggested that paragraphs (17), (18) and (19) should be deleted.

43. Mr. RAZAFINDRALAMBO pointed out that paragraphs (17), (18) and (19) gave an account of the work of the Drafting Committee. Were the Committee's deliberations simply to be ignored?

44. Mr. PELLET said he shared the views of Mr. Razafindralambo and supported Mr. Calero Rodrigues' suggestion. The questions mentioned in paragraphs (17), (18) and (19) had been the subject of long and lively discussion in the Drafting Committee, which had ultimately decided not to place them before the Commission, on the understanding that the Commission, in its report, would draw the General Assembly's attention to them.

45. Mr. GRAEFRATH said he, too, was of the opinion that paragraphs (17) to (20), which set out essential information, should be retained as they stood.

46. Mr. MAHIU said that, while he understood Mr. Razafindralambo's and Mr. Pellet's point of view, care should be taken not to liken the commentary to the consideration of the report made by the Chairman of the Drafting Committee on its work. He proposed that paragraph (17) and the following paragraphs should be merged; the international instruments that were listed would be mentioned in footnotes.

47. Mr. CALERO RODRIGUES said that he was concerned above all by the presentation of the paragraphs in question. It was merely stated at the end of paragraph (18) that "the Commission . . . simply took note of the

views exchanged in the Drafting Committee", again in paragraph (20) that "The Commission thus simply took note of the exchange of views in the Drafting Committee", and the remainder of the paragraphs consisted solely of references to international instruments. Perhaps Mr. Mahiou's suggestion would be a solution to the problem.

48. Mr. BEESLEY suggested that the conclusions in paragraphs (18) and (20) should be set out in the following terms: "The Commission took note of the problem and agreed to bring it to the attention of the General Assembly." The instruments mentioned would appear in a footnote. Since the part of the commentary appearing in paragraph (18) did no more than recount the discussion in the Drafting Committee and the question had not been brought before the plenary, he wondered whether that part had a place in the Commission's report.

49. Mr. BARSEGOV said that the solution would be to mention briefly the questions raised and refer readers to the relevant summary records. If the list of instruments was useful, it could form the subject of a footnote. On the other hand, the Commission should indicate why it had not considered the questions raised.

50. Mr. SHI said it would be logical for the commentary to follow closely the provisions of article 16, which related to ships. Paragraphs (17) to (20), however, had nothing to do with ships. Hence, they had no place in the commentary, especially as the Commission had taken no position on the issues mentioned. Those paragraphs should therefore be eliminated. Nevertheless, he could accept the compromise formula, namely a brief statement in a footnote of the Commission's position on aircraft.

51. Mr. PELLET said that, to supplement Mr. Mahiou's proposal, which seemed acceptable to a large number of members, he would suggest that paragraph (17) should be retained, with the last sentence to read: "The Drafting Committee, then the Commission, briefly examined the question." The list at the beginning of paragraph (18) would be deleted, together with the next four sentences after the list. Paragraph (18) would then read: "The relevant conventions [with a footnote listing the conventions] do not deal expressly with the question . . . further analysis. Recognizing that the question arose, the Commission, while noting the importance of the problem, simply took note of the views exchanged in the Drafting Committee." Only the first sentence of paragraph (19) would be retained and it could be followed immediately by paragraph (20), the last sentence of which would read: "The Commission also took note of the exchange of views in the Drafting Committee"; the relevant conventions would be the subject of a footnote. He still preferred the present text, for all that.

52. Mr. NJENGA said it would be enough to replace paragraphs (17) to (20) by a footnote which would follow the wording of paragraph (17), together with a phrase reading "during which various views were expressed as to the need for inclusion of a provision on this topic".

53. Mr. BENNOUNA said that paragraphs (17), (18) and (19) were not a commentary to article 16 and furnished no explanation as to why the Commission had not deemed it necessary to include a specific provision on the topic, while showing that there was a wealth of treaty practice on civil aviation law and space law. He proposed that the first sentence of paragraph (17) should be retained, followed by a text reading: "The Commission discussed this question and that of space objects. In view of the large body of treaty practice concerning international civil aviation rules, space law and space objects, the Commission did not consider it necessary to include a general provision in this regard." The titles of the conventions in question would appear in the footnotes. Lastly, in commentaries to articles there was no need to mention the Commission's relations with the Drafting Committee.

54. Mr. PELLET said that Mr. Bennouna's proposal would endorse the view of members who considered that, since the subject was covered by a large number of conventions, there was no need to engage in codification work. However, the very fact that there was a wealth of practice afforded room for discussion, as in the case of ships. If the Commission accepted Mr. Bennouna's and Mr. Njenga's arguments, it would then have to develop the argument that the former had advanced—something that his own proposal would avoid.

55. Prince AJIBOLA said that paragraphs (17) to (20) reflected ideas that did indeed have a place in the commentary to article 16. However, the instruments listed in paragraphs (18) and (19) should be mentioned in footnotes.

56. Mr. TOMUSCHAT proposed that paragraphs (17) to (20) should be deleted and replaced by a paragraph reading: "Article 16 does not deal with the issue of immunity of States in relation to aircraft or space objects, and hence it cannot be applied to such objects." The paragraph would be accompanied by a footnote stating: "For the discussion of this issue in the Commission, see summary records . . ."; it would be enough for the secretariat to insert the symbols of the relevant summary records.

57. Mr. GRAEFRATH said he supported Mr. Tomuschat's proposal, but would point out that the note should refer to the oral report by the Chairman of the Drafting Committee to the Commission, in which Mr. Pawlak had mentioned the question.

58. Mr. MAHIOU said that he endorsed Mr. Tomuschat's proposal, and especially since it was Mr. Tomuschat who had first raised the question in the Drafting Committee.

59. Mr. OGISO (Special Rapporteur) said that, in his second report,² he had drawn attention to the problem of aircraft, but the Commission had never considered the matter before referring the draft articles to the Drafting Committee. In the Committee, some members had rather belatedly raised the question of aircraft and space objects. Although he had stated in his second report that, in his opinion, it would not be appropriate at that stage to

try to formulate basic principles on immunity for aircraft and space objects and had therefore been very reluctant about submitting a draft article to the Commission, the Chairman of the Drafting Committee had asked him to formulate a proposal for the purposes of discussion in the Committee. Consequently, he had proposed a very straightforward provision whereby only aircraft used by the armed forces, the police and the Customs were considered as State aircraft enjoying immunity. However, following the discussion in the Drafting Committee, he had received a suggestion that he should mention the question of aircraft and space objects in the commentary, explain why the Commission had left the question aside and draw the General Assembly's attention to it. That was the purpose of paragraphs (16) to (20) and was the reason why they had nothing to do with article 16. Since very marked differences of opinion had emerged in the Drafting Committee it had seemed difficult to arrive at a text that was acceptable to everybody. Accordingly, he had had no choice but to indicate the treaty regime in force and then go on to state that the Commission had simply taken note of the exchange of views in the Drafting Committee. Moreover, in fact it was the question of aircraft that had been the subject of an exchange of views in the Committee and he had spoken of space objects in the commentary only because the Chairman of the Drafting Committee had asked him to do so.

60. The many criticisms of the paragraphs in question were understandable, in view of the positions of the members of the Drafting Committee. He wondered whether it was legitimate to say that the Commission had discussed the question, even in the setting of the Drafting Committee, for the summary records would undoubtedly show that such consideration had been very brief.

61. He would prefer paragraphs (17) to (20) to be deleted and the question of aircraft and space objects not to be mentioned in the commentary. A very frank account would thus be given of the Commission's work on the question at the present session. However, if members wanted the problem to be mentioned in a footnote, he would not be opposed to such a course.

62. Mr. PELLET pointed out that some members of the Commission, including the Chairman of the Drafting Committee and himself, considered that the absence of a provision on aircraft and space objects was a very serious lacuna. It was precisely because the question had posed a problem that it needed to be discussed in the commentary, and he saw no better place to do so than in the commentary to article 16, on ships, an article that would in some sense have a natural counterpart in one on aircraft and space objects.

63. In addition, he noted once again that, in the Commission, flexibility did not pay off. The members of the Drafting Committee who had wanted to include such a provision had agreed to give up the idea in view of the time that would have been needed to elaborate it, but on the express understanding that the question would not be side-stepped, as was now the case, simply by mentioning it in two lines in a footnote. Accordingly, he was completely against the proposed solution.

² See *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/422 and Add.1

64. The CHAIRMAN said that, in reporting to the Commission on the work of the Drafting Committee, the Chairman of the Committee, who was very much in favour of considering the question, had mentioned it at some length at the Commission's 2221st meeting, and he confirmed that the summary record of the meeting reflected that. He therefore proposed, in order to respond to Mr. Pellet's concern and the wishes of other members, that a sentence should be added at the end of paragraph 7 of the introduction to chapter II of the Commission's report (A/CN.4/L.462): "At the request of some members, the Commission briefly considered the question of State-owned or operated aircraft engaged in commercial service as well as the question of space objects. Recognizing that this question would call for more time and study, the Commission, while noting the importance of the problem, took note of the exchange of views."

65. As to the commentary, paragraphs (17) to (20) would be deleted and replaced by a new paragraph (17) stating simply, as proposed by Mr. Tomuschat, that: "Article 16 does not deal with the issue of immunity of States in relation to aircraft or space objects, and hence it cannot be applied to such objects." It would be accompanied by a footnote reading: "For the discussion of this question in the Commission, see the summary record of the 2221st meeting."

It was so agreed.

66. Mr. BEESLEY said it was he who had chaired the meeting at which the Chairman of the Drafting Committee had raised the question of aircraft and space objects in the terms reported by the Chairman. However, he recalled that there had been no discussion of the proposal by the Chairman of the Drafting Committee to bring the question to the attention of the General Assembly. The Chairman of the Drafting Committee himself had not insisted. Accordingly, the proposal the Commission had just approved could well give the impression that the question had been considered when in actual fact it had not been examined, except at the present meeting.

67. Mr. SHI said he would like to correct a point of detail. Contrary to what the Special Rapporteur had said, the question of aircraft mentioned in his second report had been discussed in the Commission and he (Mr. Shi) had commented on that part of the report. Moreover, he thought, as did the Special Rapporteur, that a provision on aircraft should not be included in the draft.

Paragraphs (17) to (20), as amended, were approved.

The commentary to article 16, as amended, was approved.

Commentary to article 17 (Effect of an arbitration agreement)

Paragraph (1)

68. Mr. MAHIOU said that the footnote to that paragraph was too long; there was no need for it to reproduce legal provisions that a jurist could easily find if he so wished. Consequently, he suggested that it should be shortened by deleting the quotations from United States legislation.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were approved.

Paragraph (6)

69. Mr. TOMUSCHAT said it was not possible to affirm that recognition of an award was a measure of constraint within the meaning of article 18. Recognition of an award was not even the start of an execution procedure. He therefore proposed the deletion of the fourth to last sentences.

70. Mr. NJENGA supported Mr. Tomuschat's proposal: the opinion of "one Government" had no place in a commentary.

71. Mr. OGISO (Special Rapporteur), replying to Mr. Tomuschat, confirmed that it was precisely because it had considered that recognition should be regarded as being "among the measures of constraint referred to in article 18" that the Drafting Committee had decided to reject his own proposal to include a provision on it in article 17.

72. Mr. DÍAZ GONZÁLEZ said that the commentary should reflect the opinions and decisions of the Commission, not of the Drafting Committee. Consequently, it was surprising to find that paragraph (6) stated that "the Drafting Committee decided . . .", when the Commission itself had decided to avoid that kind of formulation.

73. Mr. MAHIOU said that Mr. Tomuschat's proposal, which he endorsed, solved the problem mentioned by Mr. Díaz González.

74. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the fourth to last sentences.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

75. Mr. RAZAFINDRALAMBO drew attention to the need to insert a phrase which had been erroneously omitted from the first sentence of the French version.

Paragraph (7) was approved on that understanding.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were approved.

The commentary to article 17, as amended, was approved.

Commentary to articles 18 and 19 as a whole (A/CN.4/L.462/Add.3 and Corr.1)

Paragraphs (1) to (3)

76. Mr. PELLET said that, logically, paragraph (3), which was concerned with the content and title of part IV, should precede paragraphs (1) and (2). He therefore proposed that it should be placed first, and paragraphs (1) and (2) should be renumbered accordingly.

It was so agreed.

Paragraphs (1) to (3), as renumbered, were approved.

Commentary to article 18 (State immunity from measures of constraint)

Paragraph (1)

77. Mr. PELLET said that article 18 dealt with immunity from measures of constraint connected with the exercise of jurisdiction and not measures of constraint in general. He would therefore propose that a sentence should be added at the beginning of paragraph (1) reading: "Article 18 concerns immunity from measures of constraint only in so far as they are connected with the exercise of jurisdiction."

Paragraph (1), as amended, was approved.

Paragraph (2)

78. Mr. RAZAFINDRALAMBO, referring to the French version, said that the words *règlements judiciaires*, in the last sentence, were unfortunate, for the expression had a very special meaning. It should therefore be replaced by the words *qu'il s'agisse de règlement par voie judiciaire ou par voie d'arbitrage*.

It was so agreed.

79. Mr. PELLET, recalling his remarks in connection with paragraph (1), said the second sentence of paragraph (2) should be amended. Some thought the question of immunity from execution could be separated from that of immunity from jurisdiction. Accordingly, the words "the fact remains that" in the second sentence, should be replaced by "for the purposes of this article".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (12)

Paragraphs (3) to (12) were approved.

The commentary to article 18, as amended, was approved.

Commentary to article 19 (Specific categories of property)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were approved.

The commentary to article 19 was approved.

Commentary to article 20 (Service of process)

Paragraph (1)

80. Mr. PELLET, supported by Mr. NJENGA and Mr. RAZAFINDRALAMBO, said paragraph (1) stated the obvious. In view of the differences between procedural systems, most of the time one had to make do with "approximate equivalents", and that remark applied to virtually all the draft articles. He therefore proposed that the paragraph should be deleted.

Paragraph (1) was deleted.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

81. Mr. RAZAFINDRALAMBO said that the word "However", at the beginning of the third sentence, was inappropriate, since there was no contrast between the sentence it introduced and the preceding one. It should be replaced by "Then".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 20, as amended, was approved.

Commentary to article 21 (Default judgement)

Paragraphs (1) to (4)

82. Mr. TOMUSCHAT drew attention to the need for a minor editorial change.

Paragraphs (1) to (4) were approved.

The commentary to article 21 was approved.

Commentary to article 22 (Privileges and immunities during court proceedings)

Paragraph (1)

83. Mr. AL-KHASAWNEH pointed out that the footnote related not to paragraph (1) but to paragraph (2).

Paragraph (1) was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraphs (5) and (6)

84. Mr. BENNOUNA, supported by Mr. AL-BAHARNA, proposed that the last two sentences of paragraph (5) should be linked by the word "since" and the word "however" should be deleted. Paragraph (6), which added nothing to what was said in paragraph (5), since it only mentioned a proposal by the Special Rapporteur that had been rejected and the position of one member of the Commission, should simply be eliminated.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6) was deleted.

The commentary to article 22, as amended, was approved.

Chapter II of the draft report, as amended, was adopted.

85. The CHAIRMAN said that, if he heard no objection, he would give the floor to Prince Ajibola, who wished to speak in connection with article 2 of the draft articles on jurisdictional immunities of States and their property.

86. Prince AJIBOLA said that, inasmuch as article 2, on the use of terms, defined "court", "State", and "commercial transactions", he saw no reason why it should not define "State enterprise", the interpretation of which had given rise to a great deal of litigation. The uncertainty about what amounted to commercial activities by States had given room for some States to assume "long-arm jurisdiction" against other sovereign States for acts outside their territory, and State property had been attached in execution of judgements obtained.

87. It would therefore be desirable, in order to eliminate that type of problem, to define the term "State enterprise". An "agency" of the State would be a State enterprise if it was a sovereign State's "alter ego", in such a way that it could bind that State to a contract. He therefore proposed a definition that would read: "A 'State enterprise' means an agency or organ or instrumentality of a sovereign State or a political subdivision thereof which enjoys an *alter ego* relationship with that State or a political subdivision thereof".

88. In that regard, he would refer members to article 31 of the Havana Charter,³ which contained the notion of effective control.

89. The CHAIRMAN said that he took note of Prince Ajibola's proposal, which would appear in the summary record.

The meeting rose at 6.50 p.m.

³ Havana Charter for an International Trade Organization (*United Nations Conference on Trade and Employment, Final Act and Related Documents*, Havana, 1948 (E/CONF.2/78, sect II)).

2248th MEETING

Wednesday, 17 July 1991, at 7.25 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (*continued*)

CHAPTER III. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.463 and Corr.1 and Add.1-4)

1. The CHAIRMAN invited the Commission to consider chapter III of its draft report, paragraph by paragraph.

A. *Introduction* (A/CN.4/L.463 and Corr.1)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. *Consideration of the topic at the present session* (A/CN.4/L.463 and Corr.1)

Paragraphs 7 to 19

Paragraphs 7 to 19 were adopted.

Paragraph 20

2. Mr. NJENGA requested that the following sentence should be added at the end of the paragraph: "A view was, however, expressed by one member that ground-water travelling between two or more States should also be included, since the same rules were applicable."

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Paragraphs 24 and 25

3. Mr. BARSEGOV proposed that, in the first sentence of paragraph 24, the words "most members" should be replaced by the words "many of the members" and that, at the beginning of paragraph 25, the words "certain members" should be amended to read: "several members".

Paragraphs 24 and 25, as amended, were adopted.

Paragraphs 26 to 29 bis

Paragraphs 26 to 29 bis were adopted.

Section B, as amended, was adopted.

C. *Tribute to the Special Rapporteur, Mr. Stephen McCaffrey* (A/CN.4/L.463 and Corr.1)

Paragraph 30

Paragraph 30 was adopted.

Section C was adopted.

D. Draft articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.463 and Add.1-4)

1. TEXT OF DRAFT ARTICLES PROVISIONALLY ADOPTED BY THE COMMISSION ON FIRST READING (A/CN.4/L.463/Add.4)

Section D.1 was adopted.

2. TEXT OF DRAFT ARTICLES 2, 10, 26 TO 29 AND 32, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-THIRD SESSION (A/CN.4/L.463 and Add.1-3)

Commentary to article 2 (Use of terms)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were approved.

Paragraph (9)

4. Mr. MAHIU suggested that the passages in English in paragraph (9) and other parts of the French text should be translated into French.

5. Mr. McCAFFREY (Special Rapporteur) said that there were a number of technical corrections relating to punctuation and form, especially in the footnotes, which he would make available to the secretariat in writing.

Paragraph (9) was approved on that understanding.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were approved.

The commentary to article 2, as amended, was approved.

Commentary to article 10 (Relationship between uses)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

The commentary to article 10 was approved.

Commentary to article 26 (Management)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

The commentary to article 26 was approved.

Commentary to article 27 (Regulation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

6. Mr. McCAFFREY (Special Rapporteur) said that paragraph (3) did not place enough emphasis on the residual nature of the rule embodied in article 27, paragraph 2. He therefore suggested that, in the second sentence, the words "It requires watercourse States" should be replaced by the words "It is a residual rule which requires watercourse States"; that the words "unless they have agreed on some other arrangement" should be added at the end of the first sentence; and that the words

"would be obligated to contribute" in the last sentence should be replaced by the words "would be obligated, in the absence of agreement to the contrary, to contribute".

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 27, as amended, was approved.

Commentary to article 28 (Installations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

7. Mr. BARSEGOV said that a drafting change was required in the Russian text.

Paragraph (3) was approved on that understanding.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 28, as amended, was approved.

Commentary to article 29 (International watercourses and installations in time of armed conflict)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

8. Mr. PAWLAK proposed that the words "to the extent possible" in the second sentence should be deleted. They could serve as an escape clause to enable States not to implement the provisions of article 29.

9. Mr. CALERO RODRIGUES pointed out that, if the draft articles ever became a convention, they would establish obligations that could not be implemented in time of armed conflict.

10. Mr. McCAFFREY (Special Rapporteur) said that, in his original draft of paragraph (3), he had referred to various circumstances which precluded wrongfulness and which might be applicable in time of war, such as necessity or *force majeure*. After informal discussions with some members of the Commission, he had replaced those references by the words "to the extent possible". In some cases, there might be a reason for exculpating a State for what would otherwise be a breach of its international obligations because of the need, for example, to protect its population.

11. Mr. GRAEFRATH said that he was in favour of the retention of the words "to the extent possible", which provided a realistic safeguard that related only to the draft articles, not to the rules applicable in time of armed conflict.

12. Mr. MAHIU said that, if the words "to the extent possible" were retained, they would have to be added to the French text.

13. Mr. AL-KHASAWNEH said it would be unwise to state expressly that the obligations under the draft articles would apply only "to the extent possible" in time of war. He therefore supported the proposal that those words should be deleted. Circumstances such as necessity, which precluded responsibility, would apply in any case.

14. Mr. McCAFFREY (Special Rapporteur) suggested that, if the words "to the extent possible" were deleted, the sentence should be amended to read: "The obligation of watercourse States to protect and use international watercourses and related works in accordance with the articles remains in effect during such periods." That wording would place the emphasis on the obligation rather than on the results to be achieved.

15. Mr. GRAEFRATH said that it would be totally unrealistic to believe that the obligations to consult and negotiate, for example, could be maintained without any restriction in time of armed conflict.

16. Mr. CALERO RODRIGUES said that the new wording suggested by the Special Rapporteur was a slight improvement. Nevertheless, he was not altogether satisfied because the second sentence would still contain a concept which everyone knew could not be applied.

17. Mr. PAWLAK said that the Drafting Committee had rejected the suggestion that the words "to the extent possible" should be included in article 29 itself. He could therefore not agree that they should be included in the commentary. He could, however, accept the wording proposed by the Special Rapporteur.

18. Mr. BARSEGOV said that there were rules relating to watercourses which had to be complied with even in time of war. That did not mean, of course, that an army would be allowed to cross a river, but it did mean that the water could not be polluted and that dams could not be blown up. He therefore supported the suggestion that the words "to the extent possible" should be deleted.

19. Mr. AL-KHASAWNEH recalled that, when the Commission had discussed the question of indirect procedures, it had agreed that those procedures would remain in effect and that the obligations would continue to be in force. He could agree with Mr. Graefrath's point if reference was being made to the exceptional case of the outbreak of hostilities. That situation was, however, dealt with in the third and fourth sentences of paragraph (3). He therefore supported the suggestion that the words "to the extent possible" in the second sentence should be deleted as unnecessary and inappropriate.

20. The CHAIRMAN suggested that the second sentence should be amended to read: "The obligation of watercourse States to protect and use an international

watercourse and related works in accordance with the articles remains in effect during such times."

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 29, as amended, was approved.

Commentary to article 32 (Non-discrimination)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

21. Prince AJIBOLA requested the Special Rapporteur to explain the use of the word "transfrontier" in the first sentence. He also wished to know the meaning of the word "eventuate" in the third sentence.

22. Mr. McCAFFREY (Special Rapporteur) said that the term "transfrontier harm" meant harm which had its source in one State and its effects in another State. The word "eventuate" should be replaced by the word "occur".

23. Mr. AL-BAHARNA proposed that the words "transfrontier harm" should be replaced by the words "transboundary harm", which was the usual term.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

24. Mr. PAWLAK suggested that the word "substantive" in the first sentence should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 32, as amended, was approved.

25. Mr. GRAEFRATH noted that section D contained the texts of draft articles 28, 29 and 32, but not of draft articles 30 and 31. In his view, the final version of the report should include draft articles 30 and 31 as well.

26. Mr. McCAFFREY (Special Rapporteur) suggested that a footnote should be added to draft article 32 to indicate that draft articles 30 and 31 were renumbered versions of articles that had previously been adopted.

It was so agreed.

Section D. 2, as amended, was adopted.

Chapter III of the draft report, as amended, was adopted.

27. Mr. McCaffrey (Special Rapporteur) said that he wished to mention two further points. In the first place, a document entitled "Development of legal instruments for transboundary waters" had been issued by the Preparatory Committee for UNCED to be held in Rio de Janeiro in June 1992. That document, which the secretariat had made available in all languages, referred to the work on the draft articles on international watercourses, and that was a very positive development.

28. Secondly, a number of members had suggested that the commentaries to all the draft articles on international watercourses should be included in the Commission's report to the General Assembly. The main reason for that suggestion was that a number of important technical changes had been made to the commentaries adopted earlier. At the same time, he understood that the secretariat was planning to circulate a document to Governments incorporating those changes, so that it might not be necessary to include all the commentaries in the report. His own feeling was, however, that, if such a document was being prepared, its content could still be incorporated in the report, since no additional translation or typing would be required; in that way, the commentaries to the articles adopted on first reading would be available in one document.

29. Mr. Pawlak said the prevailing view in the Drafting Committee had been that the inclusion of the commentaries would make the report too voluminous. That was why the alternative solution had been advanced of making the full text of the commentaries and articles available to Governments in a separate document.

30. Mr. Graefrath said that he was very much in favour of including in the report the articles and commentaries in their entirety. He also considered that it should be indicated in a footnote that some of the commentaries and articles had already been introduced in earlier reports. Simply to set forth in the report part of what had been adopted, asking Governments to refer back to earlier reports if they wanted to know what had already been adopted, seemed to him to be a very strange way of going about matters.

31. Mr. Kotliar (Secretary to the Commission) said that the secretariat fully appreciated how useful it would be to include in the report all the commentaries to the draft articles on international watercourses. Before the Commission took a decision on the matter, however, he would like it to consider the following points. In the first place, it had never been the Commission's practice to include commentaries to articles adopted on first reading: in 1990, for instance, the commentaries to the articles on jurisdictional immunities had not been included in the report. Secondly, if the commentaries on international watercourses were included, the commentaries to the draft Code of Crimes Against the Peace and Security of Mankind would also have to be included, since the two topics could not be treated differently. That would add some 150 pages to a report already over 400 pages long, with a resultant increase in the costs of, and delay in, the reproduction of the report. Lastly, regard must be had to the possible reactions of representatives to the Sixth Committee of the General Assembly when faced with a

document of some 600 pages, which they would, moreover, receive later than usual.

32. Mr. Barboza asked why there should be any change in the Commission's practice of not including in its report commentaries to articles adopted on first reading.

33. Mr. Roucounas said that he supported Mr. McCaffrey's very useful proposal. If it had indeed been the Commission's practice not to include commentaries in the report to articles adopted on first reading, then it was time to change that practice. He appreciated that the Commission's report on its current session was particularly voluminous, but did not think that was a valid reason for not including in the report the full set of draft articles and commentaries. As a former student of the Commission's work and as a current member, he had had much difficulty in sifting through past reports of the Commission in an endeavour to determine the line of thinking of the author of a particular draft. In his view, the time had therefore come to harmonize the Commission's whole approach in the matter.

34. Mr. Shi said that he was extremely sympathetic to the suggestion that all the commentaries to the draft articles on international watercourses should be included in the report. That would, however, add at least 100 pages to the report, quite apart from the fact that the commentaries to the articles on the draft Code would also have to be included, since there must be no discrepancy in the treatment of the two topics. Such a voluminous report would undoubtedly give rise to strong reactions in the Sixth Committee and the members of the Commission who attended its meetings would be placed in a very awkward position. His own suggestion was therefore that, after the first reading, all the draft articles on a given topic should be assembled together with the relevant commentaries in one document which should then be transmitted to Governments. A copy should also be sent to all members of the Commission.

35. Mr. Arangio-Ruiz said that he endorsed the views expressed by Mr. Shi.

36. Mr. Calero Rodrigues said that, while he fully agreed that it might be helpful to include in the report all the commentaries on the articles, he considered that, in view of the technical problems, the Commission should not press the point. For his own part, he would be satisfied to some extent if the commentaries to the draft articles adopted at the current session were included in the report. In addition, the Special Rapporteur and secretariat could perhaps be authorized to make any minor changes in the commentaries previously adopted that were necessary to adapt them to the revised texts of the articles.

37. Mr. Eiriksson said that the adoption of articles on first reading was not an everyday occurrence. Although the inclusion of the commentaries would add to the volume of the report, that drawback would be offset by the usefulness of the commentaries.

38. He understood, however, that the preparation of the documents incorporating the draft articles and commentaries on the topic of international watercourses and

of the draft Code were well under way. The best solution might therefore be to complete those documents as quickly as possible and make them available before the next session of the General Assembly.

39. Mr. McCaffrey (Special Rapporteur) said that he would not press his point. So far as the length of the report was concerned, however, it should be remembered that the Commission was faced with a very unusual situation in that it had completed three topics at the current session, but, to invoke that as a ground for not including the commentaries in the report was, in his view, quite unjustified. It was not just a matter of sifting through past commentaries. His main point was simply that, if an effort was to be made to assemble all the draft articles and commentaries in a single document, for submission to representatives in the Sixth Committee, the content of that document might just as well be incorporated in the report and eventually appear in the *Yearbook of the International Law Commission* so that a comprehensive set of commentaries was available.

40. Mr. AL-KHASAWNEH asked whether the commentaries to all the articles could be enclosed with the letter to be addressed to Governments in January 1992. A paragraph could perhaps also be included in the report to explain that that course had been adopted in order to save time. It would, of course, also save money.

41. Prince AJIBOLA said that he supported Mr. Shi's proposal on account of its realistic approach.

42. The CHAIRMAN said that it would have been of great assistance, particularly to researchers, to set forth in one document all the commentaries to the draft articles on international watercourses and on the draft Code of Crimes against the Peace and Security of Mankind. That might, however, have had a negative effect, causing the Sixth Committee to focus on the size, rather than the content, of the report. In the circumstances, he suggested that the Special Rapporteur should be requested to update the commentaries to the articles on the law of the non-navigational uses of international watercourses so that they could be made available to representatives to the Sixth Committee of the General Assembly.

It was so agreed.

The meeting rose at 9 p.m.

2249th MEETING

Thursday, 18 July 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, 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. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (*continued*)

1. The CHAIRMAN invited the Commission to consider chapter VII of its draft report, paragraph by paragraph.

CHAPTER VII. *State responsibility* (A/CN.4/L.467)

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

2. Mr. ARANGIO-RUIZ (Special Rapporteur), responding to a query by Prince AJIBOLA, said that the word "notably" helped to indicate that the third report dealt in principle only with delicts, although the existence of other internationally wrongful acts had not been forgotten.

Paragraph 9 was adopted.

Paragraphs 10 to 17

Paragraphs 10 to 17 were adopted.

Paragraph 18

Paragraph 18 was adopted with a minor drafting change.

Paragraph 19

3. Mr. JACOVIDES said that "imperative rules", in the second sentence, should be replaced by "peremptory norms".

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Section B, as amended, was adopted.

C. Text of the draft articles of part 2 provisionally adopted so far by the Commission

Paragraph 22

4. Mr. CALERO RODRIGUES said he wondered whether it was necessary to reproduce the text of the draft articles of part 2 provisionally adopted so far by the Commission. The articles had no direct bearing on the points raised in the report.

5. Mr. ARANGIO-RUIZ (Special Rapporteur) agreed that it was unnecessary to reproduce the draft articles in question, since they could readily be consulted in the Commission's documentation. The whole of paragraph 22, in other words, section C, could be deleted.

6. The CHAIRMAN pointed out that it was the Commission's practice to reproduce in its report the text of articles it had already adopted.

7. Mr. CALERO RODRIGUES said it had been argued on previous occasions that the Commission should not submit information to the General Assembly about reports it had not yet discussed, nor should the General Assembly discuss the content of a report before the Commission had had an opportunity to consider it. He suggested that, by way of explanation, a sentence reading: "Since the report has not yet been considered by the Commission, the following paragraphs are only for information purposes" should be inserted at the end of paragraph 8.

8. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was willing to accept those suggestions.

9. Mr. RAZAFINDRALAMBO said that to include in section C the text of the draft articles previously adopted might give the mistaken impression that they had been adopted at the current session. However, the usual practice of reproducing articles previously adopted was a sound one, enabling the reader to review them in the light of the Commission's current work on the topic. He suggested that the draft articles should be placed instead in section B, in a footnote, with an appropriate reference in the text.

10. Prince AJIBOLA supported that proposal.

11. Mr. CALERO RODRIGUES emphasized that the draft articles in question bore no relationship whatever to the present report on State responsibility or to the work done at the present session. It was useful to reproduce the text of articles only when there were new articles to compare them with. At most, there should be a reference to the text of the draft articles, perhaps in a footnote to paragraph 5.

12. Mr. BARSEGOV said it was useful to have a complete picture of the state of work on a topic. He would prefer the text of the draft articles to be reproduced in an appropriate place in the report, with a clear indication of their status.

13. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the best solution would be to omit them altogether, referring in a footnote to paragraph 5 to the document in

which they had first appeared. As an alternative, the text of the articles could be reproduced in a footnote.

14. The CHAIRMAN suggested that, as a compromise, the text of the draft articles should be placed in a footnote to paragraph 5. Section C would therefore be deleted.

It was so agreed.

Chapter VII of the draft report, as amended, was adopted.

CHAPTER V. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.465)

15. The CHAIRMAN invited the Commission to consider chapter V of its draft report, paragraph by paragraph.

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

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

16. The CHAIRMAN said that the word "however" at the beginning of the second sentence should be replaced by "moreover".

17. Mr. PAWLAK, commenting on the statement that "the Drafting Committee had not found the time to consider any of the draft articles referred to it by the Commission since 1988", pointed out that the Drafting Committee had not neglected its duty; it had merely acted in accordance with the priorities established by the Commission itself. Hence the statement was not factually correct.

18. Mr. BARBOZA (Special Rapporteur) said that he agreed. As explained in the same sentence, the fact that the articles had not been considered was "due to other priorities". He suggested that the phrase "had not found the time to consider" should be replaced by "had not considered".

19. Mr. BEESLEY and Mr. CALERO RODRIGUES expressed support for that proposal.

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 9

Paragraphs 7 to 9 were adopted.

Paragraph 10

20. Mr. PAWLAK said that paragraph 10 merely repeated the point made in paragraph 6. Moreover, it over-

stated the situation; the Drafting Committee, as a subsidiary body of the Commission, had to follow the Commission's instructions.

21. Mr. BEESLEY said that paragraph 10 mirrored the concern of several members that the Special Rapporteur had been deprived of the benefit of the Drafting Committee's views on the draft articles referred to it since 1988. Perhaps the paragraph should be toned down, to remove any pejorative connotation; alternatively, it could be incorporated in paragraph 6.

22. Mr. CALERO RODRIGUES pointed out that paragraph 10 reflected the views expressed by members of the Commission, and could not readily be incorporated in paragraph 6, which reflected the views of the Special Rapporteur.

23. Mr. MAHIOU said he agreed with that comment. He was among those who had argued that the Special Rapporteur had lost the benefit of the Drafting Committee's views on the 10 articles, which would be particularly helpful in regard to the basic concepts of the topic.

24. Mr. BARBOZA (Special Rapporteur) said that it was not his intention to blame the Drafting Committee, which had worked hard during the session, but simply to reflect the opinions voiced by members. He suggested that the second sentence could be reworded to read: "Some members felt that future consideration by the Drafting Committee of the 10 articles referred to it by the Commission would provide a firm basis for further development of the topic."

25. Mr. BEESLEY said that paragraph 10 dealt with the past and the present, not with the future. He would prefer to leave the paragraph unaltered.

26. Mr. DÍAZ GONZÁLEZ said that the second sentence could be omitted. It was not the Drafting Committee, but the Commission itself, which laid down the basic principles and concepts of a topic.

27. Mr. PAWLAK proposed that the third sentence should begin "That the Drafting Committee", and the phrase "due to the existence of other priorities" should be deleted.

28. Mr. BEESLEY said he was anxious to avoid any implied criticism of the Drafting Committee. He suggested that "Commission" should be substituted for "Special Rapporteur" in the third sentence.

29. Mr. CALERO RODRIGUES said he was reluctant to tamper with statements which accurately reflected the views of members. Amendments should be made to the report only where the text was unclear, or failed to reflect what had actually been said.

30. Mr. MAHIOU suggested that the words "They pointed out that . . ." should be added at the beginning of the third sentence.

It was so agreed.

31. The CHAIRMAN, replying to Mr. Calero Rodrigues, said there could be no question of the Commission practising censorship. He proposed deletion of the

phrase "due to the existence of other priorities". The remainder of the paragraph would stand.

It was so agreed.

Paragraph 10, as amended, was adopted.

Paragraph 11

32. Mr. BARSEGOV said that he had noted the statement, in the fourth sentence, that "one member" had expressed the view that there were no precise or general rules at present concerning liability and reparation for transboundary harm in the circumstances indicated. He was not the member mentioned, but he did share that view, as did other members. The sentence should therefore begin with the words: "In that context, some members . . .".

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 12

33. Mr. ARANGIO-RUIZ said that the third sentence of the paragraph stood in need of correction, for it referred to the existence of "a wide variety of relevant precedents to be found in both conventional and customary law". From the legal and technical point of view, it was not appropriate to speak of "precedents" in customary law.

34. Mr. BEESLEY said that he was one of the members that had expressed the view reflected in the third sentence. Perhaps the problem could be solved by introducing a reference to "jurisprudence".

35. Mr. ARANGIO-RUIZ said that, unquestionably, in the matter of liability there were not only instruments but also some customary rules and principles. The subject had evolved considerably since 1959 when, like others, he used to express the view that fault was the only basis for the liability of the State for nuclear damage.

36. Mr. DÍAZ GONZÁLEZ said that, since the sentence in question expressed the view of only one member, it was necessary to obtain that member's views before altering the wording.

37. Mr. ARANGIO-RUIZ suggested that the sentence should be reworded so as to state that "there were a wide variety of relevant norms to be found not only in jurisprudence and conventional law, but also in customary law".

It was so agreed.

38. Mr. BENNOUNA, supported by Mr. BEESLEY, said that, since the word "precedents", the main source of difficulty in the third sentence, appeared in two other places as well, a number of changes should be made consequential to the replacement of the words "relevant precedents", in the third sentence, by "relevant norms". The words "useful precedents for the topic", in the fourth sentence, should be replaced by such wording as "relevant to the topic", and the phrase "on the basis of earlier precedents in both treaty and customary law", in

the last sentence, by wording along the lines of “on the basis of both treaty and customary law”.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

39. Mr. BARSEGOV proposed that the words “The leitmotiv was”, at the beginning of the second sentence, should be deleted.

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

40. Mr. PAWLAK objected to the impersonal form of the opening words; he said the studies in question contained very important information and it would be appropriate to identify the source.

41. Mr. BARBOZA (Special Rapporteur) suggested that the words “Reference was made” should be replaced by: “One member referred”.

Paragraph 16, as amended, was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

42. Mr. BARSEGOV said that the first sentence of the paragraph did not give a full account of the position regarding the approach of certain countries to the problems of ecology and pollution; it needed to be reworded.

43. Mr. BARBOZA (Special Rapporteur) explained that paragraph 18 reflected the views of only one member.

Paragraph 18 was adopted.

Paragraph 19

44. Mr. TOMUSCHAT suggested that the Special Rapporteur should reformulate the last sentence, which was difficult to understand.

45. Mr. BARBOZA (Special Rapporteur) said that the sentence was indeed cumbersome. He suggested that it should be left to him to redraft it, with the help of the secretariat.

Paragraph 19 was adopted on that understanding.

Paragraphs 19 bis and 19 ter

46. Mr. BARBOZA (Special Rapporteur) said members would have noted that, in each of the sections dealing with “specific issues”, the last paragraph set out conclusions. As he had not originally drafted such a paragraph for the “General issues” subsection he was proposing the inclusion of two new paragraphs, 19 bis and 19 ter, to read:

“19 bis. The Special Rapporteur concurred with the view expressed in the Commission to the effect that the Commission had reached a broad consensus on important areas of the topic on which he would comment later and which formed a suitable basis for further work on the topic. With regard to the Commission’s future work, he felt that there had been a consensus that the topic should be given high priority in the next quinquennium and that the Drafting Committee should begin at the next session with the examination of the first 10 articles referred to it in 1988.

“19 ter. The Special Rapporteur wholeheartedly agreed that the special situation of the developing countries should be borne in mind throughout the development of the topic. Finally, he concurred with the opinion expressed in the Commission that in the last 20 years during which environmental law had flourished many rules had been formulated more for specific activities but few rules had been developed in general terms. Similarly, little had been done in the area of liability, apart from the exhortation to States contained in Stockholm Principle 22. He felt strongly that certain general principles should be formulated, because no legal system could afford to leave a gap that would reveal a lack of solidarity as to cast doubts on the very existence of an international community.”

47. The wording of those paragraphs had been taken from the summary record of the Commission’s 2228th meeting, and his own statement summing up the discussion.

48. Mr. EIRIKSSON supported by Mr. BEESLEY, said that the last phrase of paragraph 19 bis, “the first 10 articles referred to it in 1988” should be corrected, since further articles were referred to the Drafting Committee in 1989.

49. Mr. BARBOZA (Special Rapporteur) suggested that the words in question should be simplified to read: “the articles referred to it”.

Paragraph 19 bis, as amended, was adopted.

50. Mr. EIRIKSSON proposed that the words “to develop rules” should be inserted in the third sentence of paragraph 19 ter, after “little had been done”. Moreover, the sentence should refer not only to Stockholm Principle 22 but also to Principle 21.

51. Mr. BEESLEY said that, as the Special Rapporteur and many members of the Commission had frequently cited Stockholm Principle 21, he agreed that a reference to that Principle would be appropriate.

52. The CHAIRMAN, speaking as a member of the Commission, said that, in view of the fact that liability

obligations had been established in a number of conventions, he had some doubts about the affirmation in the third sentence that "little had been done in the area of liability".

53. Mr. BARBOZA (Special Rapporteur) said that he endorsed the proposal by Mr. Eiriksson. Admittedly, there were many legal instruments which contained references to general principles on liability. However, there was no general instrument which expressly formulated those general principles.

54. Mr. PAWLAK said that the words "no legal system", in the last sentence, should be replaced by "the international legal system could not", so as to clarify the meaning of the sentence.

55. Mr. CALERO RODRIGUES said that he endorsed Mr. Pawlak's suggestion and proposed that the word "more" should be deleted from the second sentence. In addition, the words "to develop general rules" should be inserted in the third sentence, after "little had been done", in line with Mr. Eiriksson's proposal and in order to express more precisely the Special Rapporteur's view on the matter.

It was so agreed.

Paragraph 19 ter, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraphs 21 and 22

56. Mr. AL-KHASAWNEH said that the other language versions mentioned in the penultimate sentence of the paragraph should be specified.

57. Mr. BARSEGOV said that during the general debate, he had stated that changing the title of the topic also involved changing its content. He would like his view reflected in the report.

It was so agreed.

58. Mr. BENNOUNA said that during the general debate, he had drawn attention to the fact that the title of the topic was difficult to understand for anyone who was not an expert in the matter; it was also too long and inaccurate. He therefore proposed adding the following as paragraph 22 bis: "Some members considered that the present title of the topic was long, complex and incorrect and that it should be simplified by an appropriate description of the liability involved."

59. Mr. GRAEFRATH pointed out that the last sentence in paragraph 21 reflected to a great extent the content of the proposed paragraph 22 bis.

60. The CHAIRMAN said that proposed paragraph 22 bis added one new element, namely, the notion that the title was incorrect. He wondered if Mr. Bennouna would consider using a different word.

61. Mr. BENNOUNA said that he would agree to have his views reflected at the end of paragraph 21. He therefore proposed that, in the last sentence of that paragraph,

the word "complex" should be inserted after "cumbersome" and that the words "the Commission would eventually have to simplify the whole title" should be replaced by "it should be simplified by a proper description of the responsibility concerned", since it was not only the Commission that would be involved in modifying the title.

62. Mr. ARANGIO-RUIZ said that more than a few members of the Commission were dissatisfied with the title of the topic; the last sentence of paragraph 21 should be amended accordingly and should also mention that some members found the title technically incorrect.

63. Mr. MAHIOU suggested that the final drafting changes could be worked out between Mr. Bennouna, Mr. Arangio-Ruiz and the secretariat.

64. Mr. BEESLEY said that, in the discussions on the topic of international liability, he had maintained for many years that the title should speak of "activities" rather than "acts". However, he had finally come to the conclusion that it was the "act" of pollution which gave rise to the transboundary harm and he therefore preferred the term "act".

65. Mr. CALERO RODRIGUES said that if the last sentence of paragraph 21 was amended as proposed, it would no longer reflect the views of other members. He therefore suggested that it should remain in its present form and that another sentence should be added to include Mr. Bennouna's proposal and the views of those who endorsed it.

66. Mr. BARBOZA (Special Rapporteur) said that, during the discussion on the topic, the main issue had been whether the word "acts" should remain in the title. Only a few members had expressed other concerns with regard to the title. Members' views did have a rightful place in the report as long as those views had been expressed in the general debate.

Paragraphs 21 and 22, as amended, were adopted.

Paragraphs 23 to 25

Paragraphs 23 to 25 were adopted.

Paragraph 26

67. Mr. TOMUSCHAT proposed that the word "had" should be inserted after the words "for one reason or another", at the end of the first sentence.

It was so agreed.

Paragraph 26, as amended, was adopted.

Paragraph 27

68. Mr. CALERO RODRIGUES proposed that, in the second sentence, the second "of" should be replaced by "or".

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Paragraph 30

69. Mr. CALERO RODRIGUES said that the third sentence of the paragraph was confusing. First, he did not believe that *lex ferenda* could be “reflected” because the term referred to something that did not yet exist. Again, the third and fourth sentences seemed very similar. The legally binding draft articles referred to in the third sentence would be based on *lex ferenda*, namely, on new rules of international law. The following sentence, which spoke of creating rules and principles that would be new under present international law, also referred implicitly to *lex ferenda*. The two sentences needed improvement.

70. Mr. PELLET said he agreed that the text was not clear. To resolve the difficulty, he proposed that the end of the third sentence should be amended to read “. . . so as to reflect *lex lata*”. The words “at least *lex ferenda* under present international law” would thus be deleted.

71. Mr. ARANGIO-RUIZ said that he endorsed the comments by Mr. Calero Rodrigues and Mr. Pellet. He would also insert the word “are” after “if the draft articles”, in the third sentence.

72. Mr. BEESLEY said that in earlier discussions, he had addressed the issue of “soft” and “hard” law. In that connection, he had rejected the notion of primary and secondary obligation as lacking merit and had also attempted to demonstrate how difficult it was to distinguish between so-called soft law and so-called hard law. He would like those views to be reflected in the Commission’s report, otherwise they should be reflected in the summary record.

73. Mr. GRAEFRATH proposed the following amendments to paragraph 30: the words “the code”, in the fourth sentence, should be replaced by “a code”; the words “so as to reflect if not *lex lata* at least *lex ferenda* under present international law”, in the third sentence, should be replaced by “so as to be acceptable to most States”; and the words “even create rules and principles”, in the fourth sentence, should be replaced by “go much further in creating rules and principles”.

74. Mr. ARANGIO-RUIZ said that the word “creating” was not appropriate in the context of recommendations. Mr. Graefrath’s proposed amendment could perhaps be adjusted to avoid any contradiction.

75. Mr. BARBOZA (Special Rapporteur) said that Mr. Graefrath’s proposed amendment was acceptable, though he would prefer to retain the reference to *lex lata* since the intent was that the final instrument should be drafted to reflect that law. Also, to meet Mr. Arangio-Ruiz’s point, he would suggest that the word “creating” should be replaced by “drafting”.

76. Mr. CALERO RODRIGUES said that the two ideas could perhaps be combined by replacing the words “so as to reflect if not *lex lata* at least *lex ferenda* under present international law” by “so as to reflect *lex lata* and to be acceptable to most States”.

77. Mr. AL-KHASAWNEH said that he found no reflection in the report of the reservations he had expressed about a framework convention approach nor of the questions he had put to the Special Rapporteur in that con-

nection. He could suggest a suitable form of wording in that respect, or alternatively, he would be satisfied with an assurance that his point would be covered.

78. The CHAIRMAN said that the third and fourth sentences of the paragraph as amended by Mr. Graefrath, and further amended by Mr. Barboza (Special Rapporteur) and Mr. Calero Rodrigues, would read: “If the draft articles are intended to be legally binding, at least the core part of that instrument would have to be drafted so as to reflect *lex lata* and to be acceptable to most States. If, on the contrary, it was to be recommendatory, or in the nature of a code of conduct, it was possible to go much further in drafting rules and principles which would be new under present international law.”

79. If he heard no objection, he would take it that the Commission agreed to adopt paragraph 30 with those changes, on the understanding that Mr. Beesley and Mr. Al-Khasawneh would provide the secretariat with a form of wording to cover the points they had raised.

Paragraph 30, as amended, was adopted on that understanding.

Paragraphs 31 to 36

Paragraphs 31 to 36 were adopted.

Paragraph 37

80. Mr. CALERO RODRIGUES said that the paragraph reflected in part the views he had expressed during the debate on the topic. He was certain, however, that he had not made the statement contained in the second sentence and therefore proposed that it should be deleted.

It was so agreed.

Paragraph 37, as amended, was adopted.

Paragraph 38

81. Mr. BARSEGOV proposed that, to reflect his point of view on the role of harm, the following sentence should be added at the end of the paragraph: “While not denying the link between harm actually caused as a result of a lawful activity and the resultant liability, one member pointed out that if harm alone is taken as the ground for liability this may infringe upon the topic of responsibility for unlawful acts, since the harm may be the result of both lawful and unlawful conduct.”

It was so agreed.

Paragraph 38, as amended, was adopted.

Paragraph 39

Paragraph 39 was adopted.

Paragraph 40

82. Following a point raised by Mr. PAWLAK, Mr. BARBOZA (Special Rapporteur) suggested that the words “a recommendatory character” should be replaced by “an indicative character”.

Paragraph 40, as amended, was adopted.

Paragraphs 41 to 58

Paragraphs 41 to 58 were adopted.

Paragraph 59

83. Mr. TOMUSCHAT proposed that, in the first sentence, the words "under their jurisdiction" should be added after the word "individuals" and that, in the second sentence, the words "or under their close control" should be added after "carried out by States".

84. Mr. MAHIOU, supporting that proposal, said that it would suffice to say "under their control" rather than "under their close control".

85. Mr. AL-KHASAWNEH said that, once again, the paragraph did not reflect the views he had expressed on the matter, when he had stressed that compensation did not have to be pecuniary. To save time, however, he would simply request the secretariat to ensure that his point was covered.

86. Mr. ARANGIO-RUIZ said that he too found no reflection of the remarks he had made during the discussion. In particular, he had pointed out, with reference to article 2050 of the Italian Civil Code, which was similar to many provisions contained in other legal systems, that in the case of dangerous activities a rule of international law should either be recognized as already existing or should be created. Again, nothing reflected his remarks at the 2227th meeting with respect to nuclear activities and the responsibility of States. It was not his intention at that stage to embark upon a drafting exercise but he would like his point to be recorded.

87. Mr. TOMUSCHAT said that, in his view, any member wishing to have a particular point reflected in the report should submit a drafting proposal.

88. Mr. BARBOZA (Special Rapporteur) said that he had not thus far opposed any request by a member for his views to be included in the report. That did not mean, however, that each and every opinion had to be reflected. There were certain criteria by which the Commission's Rapporteur had to abide. It was not his task to reflect all the opinions expressed, particularly since they were in any event to be found in the summary records.

89. The CHAIRMAN said that, at the beginning of the next quinquennium, the Commission should perhaps draw up guidelines for the preparation of its reports.

90. Mr. CALERO RODRIGUES, agreeing with the Chairman, said that it was not for the Commission to try and improve on what had been said by members but only to ensure that the report was clear. If a member had expressed a certain opinion it should be reflected as such, irrespective of whether or not other members considered that the opinion was correct.

91. He fully agreed with the Special Rapporteur that it would be impossible to set out all the views of all the members, for that would merely be to repeat the content of the summary records. If a member wanted his views to receive special mention, however, then he should make a request to that effect.

92. Mr. BARSEGOV said that the views reflected in paragraph 59 were his. In that connection, he noted that the second and third sentences referred respectively to "primary liability" and "strict liability". He had, however, spoken of "absolute liability", which was the term used in the Convention on International Liability for Damage Caused by Space Objects.

93. Mr. BEESLEY said that he would try to formulate a sentence to reflect a comment he had made repeatedly, namely, that the purpose of many of the conventions cited was to limit the liability of operators. The point was so fundamental that it was essential to convey it in the report.

94. The CHAIRMAN said that due note had been taken of Mr. Barsegov's comment and, if he heard no objection, he would take it that the Commission also agreed to adopt the proposal made by Mr. Tomuschat, as amended by Mr. Mahiou.

Paragraph 59, as thus amended, was adopted.

The meeting rose at 1.15 p.m.

2250th MEETING

Thursday, 18 July 1991, at 3 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, 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. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (*continued*)

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/L.465)

B. Consideration of the topic at the present session (*concluded*)

Paragraphs 60 to 72

Paragraphs 60 to 72 were adopted.

Paragraph 73

1. Mr. PAWLAK proposed that the word “many”, in the first sentence, should be replaced by “most”, so as to reflect the discussion more accurately.

Paragraph 73, as amended, was adopted.

Paragraphs 74 to 79

Paragraphs 74 to 79 were adopted.

Section B, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

2. Mr. PAWLAK said that the Commission should, in some way or other, draw attention to the question of the “global commons”, one which could be considered not only under liability for injurious consequences arising out of acts not prohibited by international law but also in other contexts.

3. Mr. BEESLEY said he fully shared Mr. Pawlak’s view: it was essential that some aspects of the problem of harm to the “global commons” should be dealt with in the context of the topic of liability for injurious consequences arising out of acts not prohibited by international law. Aspects of the matter which did not fall under that topic should at least be identified for the purposes of future work, either inside or outside the Commission.

4. The CHAIRMAN invited the Commission to consider chapter I of its draft report.

CHAPTER I. Organization of the session (A/CN.4/L.461)

A. Membership

B. Officers

C. Drafting Committee

D. Secretariat and

E. Agenda

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Sections A to E were adopted.

F. General description of the work of the Commission at its forty-third session

Paragraphs 9 to 15

5. Mr. CALERO RODRIGUES, supported by Mr. PAWLAK, said that, when the Commission had decided to include “a general description of the work” of the session in its report to the General Assembly, the idea had been to submit a summary of the report’s content that could be read to assess the results of the session and highlight the most notable progress achieved in considering the various topics. It was, therefore, regrettable that section F did not at all meet that expectation. It was a bureaucratic description consisting chiefly of an enu-

meration of the documents examined, with the relevant symbols, and of the draft articles adopted; it gave absolutely no idea of what had been achieved in the course of the session, which had none the less been fruitful, since three series of draft articles had been adopted. That, to say the very least, ought to have been indicated at the beginning of paragraph 9. He hoped that the Rapporteur would be able to recast section F thoroughly.

6. The CHAIRMAN proposed that, in the light of Mr. Calero Rodrigues’ remarks, the consideration of document chapter I should be suspended to allow the Rapporteur, in consultation with Mr. Calero Rodrigues and Mr. Pawlak and other members of the Commission who so wished, to recast section F and to bring out the progress achieved in the course of the session.

It was so agreed.

7. The CHAIRMAN invited the Commission to consider chapter VIII of its draft report.

CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.468 and Corr.1)

8. The CHAIRMAN said that, in the French version, the second sentence of paragraph 7 should form the start of paragraph 8 and the other paragraphs should be renumbered accordingly.

A. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

9. Mr. PELLET said it was surprising that the corrigendum to the document under consideration had been circulated so prematurely. The Commission had never considered the Planning Group’s report in plenary. Perhaps it was the customary procedure, but it was unusual to prejudice, as did the corrigendum, the position the Commission would adopt on that report.

10. The CHAIRMAN said it was the Commission’s established practice for the Planning Group to report to the Enlarged Bureau and for the Bureau to adopt the Group’s report on behalf of the Commission.

Paragraph 6 was adopted.

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

11. Mr. TOMUSCHAT said it was regrettable that the paragraph gave the impression that it was the General Assembly that included a topic in the Commission’s long-term programme of work; it was the Commission that did so, not the Assembly. The Assembly could make recommendations, but the decision lay with the Commission. He therefore proposed that the introductory phrase in paragraph 8 should read: “On the basis of the report,

the Commission submits to the General Assembly for its consideration the following list of topics which the Commission may wish to include in its long-term programme of work.”

12. Mr. McCAFFREY said he shared Mr. Tomuschat's view. Since its inception, it was the Commission itself that established its long-term programme of work, even though it had always consulted the General Assembly and received recommendations from the Assembly concerning its agenda. As a specialized body, the Commission itself chose the topics—generally on the basis of a secretariat study—which, in its opinion, lent themselves to codification and progressive development. Accordingly, he proposed that the introductory part of paragraph 8 should read: “On the basis of the report, the Commission decided to include the following list of topics in its long-term programme of work.” Needless to say, the list was being submitted to the General Assembly for its consideration, as was the whole of the Commission's report.

13. Mr. BEESLEY (Chairman of the Planning Group) said that the wording of the new introductory part of paragraph 8 had been carefully worked out and it should be noted that the list of topics was submitted to the General Assembly for its consideration, not for a decision. Nevertheless, to meet Mr. McCaffrey's concern, perhaps the end of the introductory part could be reworded: “. . . for inclusion by the Commission in its long-term programme of work.” One thing was certain: the present members of the Commission could not impose a programme of work on their successors for the next quinquennium.

14. Mr. SHI said that he supported Mr. McCaffrey's proposal, which was wholly in keeping with the Commission's function and mandate. The Commission could choose any topic for inclusion in its long-term programme of work and had no need of a mandate from the General Assembly. Admittedly, the General Assembly could recommend any topic for inclusion in the Commission's agenda, but that was not the point.

15. Again, that did not mean, as Mr. Beesley feared, that the present members would impose a programme of work on their successors in the Commission. Since it had been established the Commission had included very many topics in its programme of work, and some had never been taken up.

16. Mr. PELLET said it might be more logical in that regard to reproduce the terms of the Statute, even though article 18 of the Statute appeared to confer powers of initiative on the Commission only in the codification of international law. Actually, even in that field, such powers did not seem to be unconditional, for paragraph 2 of article 18 said that, when it considered that the codification of a particular topic was necessary or desirable, the Commission

. . . shall submit its recommendations to the General Assembly.

In any event, it would seem that, on the juridical level, the Commission should look to article 18 of its Statute. As far as he was concerned, the paragraph under consideration posed no particular difficulty, but to meet the concern that had been voiced, perhaps it could be re-

worded to read: “On the basis of the report, the Commission recommends to the General Assembly the following list of topics which it considers desirable for inclusion in its long-term programme of work.” The proposal none the less implied that everyone recognized that that step came under article 18 of the Statute.

17. Mr. TOMUSCHAT said that, in his opinion, the real situation was that the Commission submitted a list of topics to the General Assembly, awaited the Assembly's comments on the proposals made, and, the following year, in the light of those comments, the Commission decided to include some of the topics in its long-term programme of work. He therefore proposed that the last phrase of the initial text of the introductory part of paragraph 8 should be recast to read: “which the Commission intends to include in its long-term programme of work”; it was the Commission that took the final decision, in the light of the Assembly's comments.

18. Mr. CALERO RODRIGUES said that, in the present instance, the Statute was of no help to the Commission, for the notions of long-term programme of work and agenda were rooted in practice. Members seemed unanimous in the view that the list of topics was submitted to the General Assembly not for approval but simply for consideration. Accordingly, Mr. Tomuschat's proposal should, for the reasons Mr. Tomuschat had given, be acceptable to all.

19. Mr. DÍAZ GONZÁLEZ said he endorsed Mr. Tomuschat's proposal.

20. Mr. McCAFFREY said that he supported it, too, for the advantage of the proposal was that it did not commit the future members of the Commission. It was not for the General Assembly to play the Commission's role, which was that of an expert body capable of determining the legal topics that called for codification or progressive development.

21. Mr. PELLET, referring to the topics for inclusion in the long-term programme of work, suggested that a footnote should indicate that the list did not follow any particular order.

It was so agreed.

22. Mr. McCAFFREY, referring to the second topic in paragraph 8, said that the title “Extraterritorial application of national legislation” was not appropriate. It might be better to say “Conflicts of jurisdiction in the extraterritorial application of national legislation”.

23. Mr. GRAEFRATH and Mr. PELLET said they were opposed to a change in the title, which was quite explicit.

24. Mr. BENNOUNA, referring to the third topic in paragraph 8, said that the details in the explanatory note, which was intended to help the reader, were inadequate. The note simply mentioned the 1951 Convention relating to the Status of Refugees, when there were many other treaties, concluded more particularly under the auspices of the Office of the United Nations High Commissioner for Refugees. Another difficulty of the topic was that the issues not yet covered by a convention were political issues, as in the case of that of “ways and means

sued to avert new flows of refugees” mentioned in the explanatory note.

25. Mr. EIRIKSSON said that, instead of consideration of the Commission’s final report, a discussion was starting on matters of substance. It was the first time that members had had an opportunity to put forward their ideas on the long-term programme. In his opinion, there was no reason to be hasty in establishing the programme. The Commission’s agenda was a heavy one and should not be made still heavier.

26. As to the proposed topic of “the law concerning international migrations”, the title or the explanatory note should emphasize the legal aspects of the problem and expressly leave aside the political aspects, which were very delicate. In any event, great caution was needed in defining exactly what the title covered.

27. Mr. McCAFFREY said that migrations and the environment would be the two major issues over the next two decades. The topic of international migrations was one that cried out for progressive development of the law. At the present time, refugee law was rudimentary.

28. The word “migration” was a difficult one to use. It conveyed the idea of persons who moved and, once they had arrived at their destination, settled in. In many cases, however, as was indeed pointed out in the explanatory note, in the world of today the phenomenon was one of populations moving but not settling anywhere. For that reason, it would be advisable to replace the term “migrations” by, for example, “movement of populations”, thereby avoiding the term “refugees”, found in the explanatory note.

29. In the Planning Group, he had maintained that, in his opinion, the topic should be extended to cover internal migrations, or more exactly “internally displaced peoples or populations”, for that too was a major problem.

30. Mr. BARSEGOV, speaking on a point of order, called for a halt to a discussion which would lead nowhere. The Planning Group had had the opportunity to realize that any topic it proposed was much debated and that any one of them could lead to controversy. That was exactly what was happening in plenary. He therefore proposed that the question should be settled either by referring it to the Planning Group or by stating very clearly that the proposed list was entirely provisional and that it committed nobody.

31. Mr. CALERO RODRIGUES said that, like Mr. Barsegov, he thought the discussion could well go on indefinitely. Moreover, one of the major problems lay in the fact that the topics were spread out over two paragraphs; in addition, including them in the Commission’s long-term programme of work did not mean that they would automatically figure on the agenda. Again, since the Commission could not, without discrediting itself, fall short of the General Assembly’s expectations, the solution was to place all of the topics in one list from which it could choose the ones it intended to include in its long-term programme of work.

32. Mr. THIAM said that such a solution was satisfactory, especially since paragraph 8 of the annex to the present document stated that no specific priority was intended by the order in which the headings, or the topics under each heading, were presented.

33. Mr. PELLET pointed out that paragraph 8 grouped the topics on which the Planning Group had been agreed, and paragraph 9 the topics which had involved reservations, or even objections. Moreover, it was unacceptable for the discussion, which was of crucial importance to the future activity of the Commission, to be side-stepped in plenary. Mr. Calero Rodrigues’ proposal was not realistic, for it would be difficult to reach an agreement when the number of topics proposed was so large.

34. Mr. BARBOZA said he recognized, as did Mr. Pellet, that there could be no question of accepting everything without discussion, yet it was simply a list from which to choose topics. He endorsed Mr. Calero Rodrigues’ proposal, which seemed to be the most practical.

35. Mr. MAHIU said he did not believe it was too early to draw up a possible list of topics that the Commission, in the course of the next quinquennium, could use for the purposes of codification of the law. The process that had to be followed was long and complex. At the present late stage, he thought that the solution suggested by Mr. Calero Rodrigues was a wise one, although he appreciated the frustration experienced by some members.

36. Mr. BENNOUNA said that he supported the proposal by Mr. Calero Rodrigues.

37. Mr. DÍAZ GONZÁLEZ said that the number of topics was really of little importance. The point was to prepare a long-term programme of work, and it would be for the Commission, at its next session or at some later stage, to select the topics which could usefully be pursued in the immediate future.

38. Mr. BEESLEY (Chairman of the Planning Group) agreed that there were topics on the Commission’s programme of work which regularly failed to find a place on its agenda, one such example was the topic of recognition of States and Governments.

39. He would not at the present stage object to paragraphs 8 and 9 being merged, but would none the less point out that they were the outcome of a delicate compromise in the Planning Group. Paragraph 8 concerned topics to which no objection had been raised, whereas paragraph 9 covered topics which had been the subject of strong reservations. Perhaps it would be enough, in order to bring the discussion to an end, to state at the beginning that the list was indicative. The main thing was not to fall short of the expectations of the General Assembly.

40. Mr. GRAEFRATH proposed that paragraphs 8 and 9 should be merged by deleting the introduction to paragraph 9. Paragraph 10, which would then be pointless, would be eliminated.

41. Mr. EIRIKSSON said he would like to make sure that, during the next quinquennium, the Commission

would not be obliged from the very beginning of its mandate to assign a week or two each year to considering a topic which had not been sufficiently thought out beforehand. It might be better to start such consideration only after three or four years, in the meanwhile appointing a special rapporteur to look into the topic in depth and prepare a full set of draft articles. Only after that task was completed would the Commission actively discuss the question.

42. The CHAIRMAN, noting that the proposal by Mr. Calero Rodrigues to merge paragraphs 8 and 9 commanded broad support, proposed that paragraph 8 should begin with the words "On the basis of the report, the Commission drew up the following list of topics from which it intends to select topics for inclusion in its long-term programme of work." It would be followed by a list of all the topics mentioned in paragraphs 8 and 9 and the introductory and last sentences of paragraph 8 would be deleted. Paragraph 10 would also be deleted.

43. Mr. PELLET said he supported the proposal by the Chairman. However, it was not normal for members of the Commission to be unable to decide about the list of topics themselves and to have their opinions reflected in the summary record, when it was the only occasion open to them. They were being called upon to consider not the report of the Planning Group but the report of the Commission, when they had not in fact had the opportunity to speak about the proposed topics.

44. The CHAIRMAN thanked Mr. Pellet for his understanding. He said it was not his intention to deprive any member of the Commission of his right to state his views, but it had to be recognized that time was running short. He, too, would have had a great deal to say, for example, about the topic of the law concerning international migrations, and he shared Mr. McCaffrey's opinion in that regard.

The Chairman's proposal was adopted.

Paragraph 8, as amended, was adopted.

Paragraphs 11 to 17

Paragraphs 11 to 17 were adopted.

Paragraph 18

45. Mr. MAHIU said the Planning Group had considered the possibility of splitting the Commission's session into two parts, but had not lingered over the matter, so that the next Commission would be free to make its own decisions. He had none the less told the Planning Group of his intention to raise the question in plenary, where no opportunity had ever arisen to discuss it. Some members of the Commission held the view that the session was indeed very long and, for all kinds of reasons—efficiency, professional or personal considerations, and so on—it should be held in two parts. The Commission's report should include a paragraph indicating that it would be worth assessing the financial, practical, administrative and other advantages and disadvantages of splitting the session. The Commission could engage in a brief exchange of views on the question or consider a text along the lines he had just indicated.

46. Mr. DÍAZ GONZÁLEZ said that the Commission had discussed the question for a number of years. If the report was to include a text like the one envisaged by Mr. Mahiou, the Commission should engage in an exchange of views, for the majority of members did not share his view. Moreover, since the mandate of the present members of the Commission was drawing to a close it was not the right time to raise the matter. The next Commission should be left to discuss the issue, if it so wished, and it could then request the secretariat to examine the financial implications of such a proposal. The secretariat had already informed the Commission of the disadvantages, if only financial, of splitting the session into two parts. Personally, he had no objection to making a number of journeys each year, but he was not unaware of the cost.

47. Mr. MAHIU proposed that, in order to save having a discussion, a paragraph should be included in the report requesting the secretariat to evaluate the advantages and disadvantages of a split session. In that way, the next Commission would be able to take up the question on the basis of the secretariat's note.

48. Mr. DÍAZ GONZÁLEZ said that, if such a paragraph was to be included in the report, the Commission should first engage in an exchange of views to determine whether the majority of the members approved of it in principle.

49. Mr. McCAFFREY said he had always been an advocate of splitting the session in two and he endorsed Mr. Mahiou's proposal. It would be useful to have the text of such a paragraph.

50. Mr. PELLET said that he fully supported Mr. Mahiou's proposal. Together with Mr. Mahiou and Mr. Solari Tudela, before the latter had left, he had drafted a text on which he had asked the views of a number of members. The text read:

"1. A measure which, in the opinion of the Commission, would help to improve the efficiency and quality of its work would be to divide the present single 12-week session into two separate sessions.

"2. This suggestion is based on a number of considerations:

"(a) It is difficult for the secretariat to prepare the Commission's report and the commentaries to articles, and, moreover, service meetings that continue to be held in the normal fashion;

"(b) Consequently, draft reports and commentaries are often circulated late to members of the Commission, who cannot always devote sufficient time to studying them;

"(c) Consideration of them, towards the end of the session, must sometimes be done with some haste;

"(d) In addition, some members of the Commission—and it should be remembered that they also have professional activities—would experience less difficulty in attending two sessions than in taking part in the whole of a 12-week session.

"3. The Commission is aware that implementation of such a proposal involves new administrative arrangements and could have financial implications. It

requests the secretariat to prepare for the next session a feasibility study on such a measure and the additional costs or any savings as a result of various possibilities concerning the duration of the sessions, the place or places at which they would be held and the possibility of allocating the end of the first session or the beginning of the second to the work of the Drafting Committee.”

51. On the basis of the very informal consultations he had had with all members, the text had received the support of Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Graefrath, Mr. McCaffrey, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela and Mr. Tomuschat. Other members agreed with the principle, but not the wording, of the proposal.

52. It was to be inferred, from the support enlisted by the text, that more than half the members of the Commission approved of the idea. He would emphasize that there was no question of asking the Commission to take a decision on the subject, or even make a formal recommendation to the General Assembly. The important thing was that the next Commission should have the benefit of a study; otherwise, it would not be in a position to take a decision. It was usual for the Commission whose term was expiring to make a suggestion of that kind, on the understanding that the recommendation would be a matter for the Commission during its next term.

53. Mr. THIAM said it was regrettable that such an important issue should be raised without warning in plenary, when there was a Planning Group whose task it was to study a question of that kind. Procedures should be respected. A proposal on the periodicity of the Commission's sessions could not be considered in a hurry. The proposed text spoke of difficulties of the secretariat—it was for the secretariat itself to lay the matter before the Commission. Mention was made of members with professional activities—he knew of no one on the Commission who had no professional activities elsewhere. The problem was that splitting the session into two parts would doubtless be more helpful to some professions than to others. Since the proposal did not command unanimous support, it would be better to give up the idea, especially since a question of such importance could not be decided on the basis of informal consultations.

54. Prince AJIBOLA said that Mr. Pellet's proposal should be regarded as out of order, for it had nothing to do with the question of the duration of the next session, which was the subject of the paragraph under consideration. He was surprised at such an unorthodox approach and said it was the first time that he saw a text being supported by proxy. It was for the Planning Group to consider the question.

55. Mr. GRAEFRATH said he supported the proposal to ask the secretariat to carry out a study on the implications of dividing the session into two parts, so as to help the Commission arrive at a decision.

56. Mr. SHI said he shared Mr. Thiam's point of view. The text Mr. Pellet had read out was a blitzkrieg for which many members had been unprepared. He was shocked by such a course of action. The Commission

had discussed the question for years and had never reached agreement. The report ought simply to suggest that, at its next session, the Commission should take up the question of dividing the session into two parts and consider it in detail, from all angles.

57. Mr. DÍAZ GONZÁLEZ said that to use such an approach was not only unusual but also inadmissible. Every member of the Commission was entitled to make proposals, but not subversively.

58. Mr. PELLET said that there had been a misunderstanding. The proposal, which he endorsed, was by Mr. Mahiou and consisted simply in indicating in the report that the Commission requested the secretariat to carry out a study on the feasibility and the cost of a split session. The Planning Group, to which he did not belong, had made no proposal in that regard, yet the problem had existed for a very long time and the Commission should deal with it one day. The members whose names he had mentioned agreed with the text and endorsed the underlying idea for the reasons set out in the proposal. There was no question of asking for the text as a whole to be included in the report or of conveying the impression that the Commission had already taken a decision or that it was unanimous on that point. Quite simply, the report should mention the request made by the Commission to the secretariat, so that the Commission could then take a proper decision. It was considered that the text would obviate the need for a large number of members to repeat their reasons for suggesting a split session.

59. Mr. EIRIKSSON said that the Commission did not have the necessary information for a fruitful exchange of views. In his opinion, the proposals by Mr. Shi and Mr. Pellet were akin, since they sought to indicate in the report that the Commission should later examine the question on the basis of information to be supplied to members of the Commission during its next term.

60. Prince AJIBOLA said that, if the Commission wished to make a recommendation, it was late to do so, on the eve of the last day of the session and, what was more, of the quinquennium. The Commission was wasting time in discussing the matter. It was for the Planning Group to examine it at future sessions.

61. Mr. MAHIOU, referring to paragraph 546 of the Commission's report on the work of its forty-second session,¹ said the Commission was not discussing the question for the first time. It had been raised in the Planning Group, but not at such length as he would have wished, and what was more, he had agreed not to include a special paragraph in the Planning Group's report only by reserving his right to raise the matter in plenary. He had drawn the attention of the Chairman of the Planning Group to the fact that it might well lead to a wide-ranging debate in plenary. It would have been better to engage in a more thorough exchange of views in the Planning Group. Again, he failed to see how one could speak of lack of time in order to side-step a real problem. If the problem could not be settled, at least it should be raised. In fact, it had been raised in the report on the previous session. Had the time not come to draw conclu-

¹ *Yearbook* . . . 1990, vol. II (Part Two), chap. VIII.

sions, to ask the secretariat how a split session would complicate or facilitate the Commission's task? It was on the basis of such information that the Commission could take a decision during its next term.

62. Mr. THIAM said a proposal to the General Assembly to change the way the Commission operated was a question of the utmost importance and one to be taken very seriously. If Mr. Mahiou had wanted the question to be considered in the Commission, he should have asked the Planning Group to report on it. In that way, the Commission would not have been taken by surprise. At the present stage, it could only take note of the statements by Mr. Mahiou and Mr. Pellet. At the next session, the Commission would be able to look into the problem, if it wanted to. There should be no decision to request the secretariat to carry out a study.

63. Mr. BENNOUNA said that some members were more fervent about a secondary issue, procedure, than about problems of substance, such as the codification of international law. Apparently, the outgoing Commission was not entitled to take decisions for the incoming Commission, but it had just adopted a list of topics to be considered in the years ahead. The time had not come to raise the problem, but there was nothing to prevent members of the Commission from discussing it in plenary, for it was not out of order. The Commission was the only United Nations body to meet for 12 consecutive weeks. Consultations behind the scenes had nothing subversive about them and were simply part of normal work. A study of the question was essential if the Commission was to have the necessary information to come to a decision. Mr. Mahiou had made a deliberately moderate proposal: the study being requested committed nobody. The Commission must definitely come to a decision, whether by consensus or by some other means.

64. Mr. NJENGA said that the Commission could indeed request the secretariat to carry out the study, but in doing so it would be shirking the problem. The best course would be first to obtain the views of members of the Planning Group in the course of a thorough discussion, so that the Group could gain an accurate idea. If it turned out that one particular aspect of the problem called for a study, then the Commission could give the secretariat a specific mandate in due and proper form. There was no point in wondering about the financial implications of splitting the session in two—it was already known what they were.

65. Mr. DÍAZ GONZÁLEZ said he shared Mr. Thiam's and Prince Ajibola's view. Admittedly, members were entitled to submit proposals, but not at the last minute. Moreover, since the secretariat was at the service of the Commission, it was not for the secretariat to shape the Commission's decisions. The study envisaged could not precede a discussion by the Commission. Mr. Njenga was right to urge the partisans of that last-minute proposal not to press it but to wait until the next session.

66. Mr. PAWLAK said that, a number of times in the past, he had proposed a split session but had never obtained the support expected. In the light of the discussion, the Commission could simply make do with a summary of the exchange of views in the summary record or

draw the necessary conclusions, along the lines of what was stated in paragraph 546 of the previous report. Personally, he found the session a long one and thought that the Commission's work would be more effective if it met twice a year. However, in taking a decision the Commission should know about the financial implications of such a change and hence it stood in need of a secretariat study. If there was no agreement in that regard, the Commission could also reiterate the conclusions set out in its previous report and postpone consideration of the matter to the next session.

67. Mr. ARANGIO-RUIZ said he wished to remain neutral in the debate, but was concerned about two issues. First of all, with regard to the duration of the session, which some members regarded as too long, to insist on that side of the matter might well give the General Assembly the impression that it could shorten the sessions by a week or even more. Again, he had heard it said that, in the event of a split session, one part would be held in New York. If that was the case, he would give up any neutral position for, apart from climatic factors, he would point out that the library at Headquarters was in no way comparable to the library at the Palais des Nations. In New York, members of the Commission would have to consult a university library.

68. The CHAIRMAN, speaking as a member of the Commission, advised members against a trend to form clans and to plot, which appeared to have emerged in the Commission and could well divide it. As a jurist, he would emphasize that for one party in court proceedings, for example, it was unethical to catch another party unawares by submitting a last-minute proposal without warning him in advance. It was also going too far to compromise the secretariat: to his knowledge, the secretariat had made no complaints about lack of time to prepare the draft report. The matter should have been examined in the Planning Group. The financial implications of the proposal were not the only implications involved: members were now free to attend meetings on one agenda item rather than another, something that could not be done if the session was split into two parts. Lastly, it was not customary for the Commission to work on the basis of majority opinions. It had always held to the policy of endeavouring to arrive at a consensus.

69. Mr. CALERO RODRIGUES said that he had the strongest reservations and objections to such terms as "plot", "unethical" and "unawares".

70. Prince AJIBOLA formally proposed that the proposal submitted to the Commission should be declared inadmissible, for it had nothing to do with paragraph 18, the paragraph under consideration. A proposal of that kind should obviously come from the Planning Group and, in the event, it had been made only at the end of the session and hence the Commission should proceed no further in examining it.

71. Mr. NJENGA proposed that the report should include a text, drafted in neutral terms, reading:

"The Commission considered the issue raised in paragraph 546 of the report on its forty-second session on the possibility of splitting the session of the Commission into two parts. However, since this pro-

posal had not been considered in detail in the Planning Group, it was agreed that during the next session of the Commission the issue would be discussed and, if necessary, a study would be requested from the secretariat on all the implications of such a decision.”

72. Mr. PELLET said that, first of all, there was no reason to be surprised that the problem was being raised at the end of the session: no other opportunity had arisen to discuss the issue in plenary. What was more, he had listed the members who agreed to the principle of a split session simply because Mr. Díaz González had given the impression that he would support the majority view—there was not the slightest conspiracy or attack on the authority of the Chairman. Moreover, consensus, conservatism’s weapon *par excellence*, should not be abused, since a small number of members objecting was enough to put a stop to any proposal for change. To his mind, Mr. Njenga’s proposal was very reasonable. Personally, he would none the less prefer the Commission at least to request the secretariat to be ready to answer requests for information the members of the Commission might wish to make in 1992 about the financial implications and administrative possibilities of a split session. Lastly, he asked for Mr. Njenga’s proposal to be submitted to the Commission in writing, so that it could be adopted at the following meeting.

73. Mr. MAHIU said that he was ready to endorse Mr. Njenga’s compromise proposal.

74. Mr. THIAM said that he had no objections to Mr. Njenga’s proposal, but he would insist that procedures should be observed in the future.

75. Mr. AL-BAHARNA (Rapporteur) said it was regrettable that the Commission was faced at the end of the quinquennium with a proposal that had not been submitted in accordance with the rules and which was aimed at changing its rules of procedure. As a compromise, he could agree to Mr. Njenga’s proposal and hoped that the Commission would take a decision without further delay.

76. Mr. DÍAZ GONZÁLEZ said he supported the motion by Prince Ajibola to declare Mr. Pellet’s proposal inadmissible. It was wrong to contend that the Commission had not had time to discuss the issue, since there had been occasions when a meeting had risen for lack of speakers. If the majority of members deemed Mr. Njenga’s proposal acceptable, he would not oppose it. Nevertheless, the usual procedure for considering such a proposal should have been followed.

77. Prince AJIBOLA said that, in a spirit of cooperation and consensus, he formally withdrew his motion, but emphasized that the normal procedure should have been followed, even though, personally, he would prefer the Commission’s sessions to be held in two parts. Lastly, he supported Mr. Njenga’s proposal.

78. Mr. THIAM said it might be better for Mr. Njenga’s proposal to refer to the “financial and administrative implications of such a decision”, not “all the implications”, since family or professional considerations, for instance, could not be taken into account by the secretariat.

79. Mr. PAWLAK said that the study which might be requested should indeed be confined to the financial and administrative implications, so as not to impose too heavy a burden on the secretariat.

80. The CHAIRMAN said that the Commission would have Mr. Njenga’s proposal before it in writing at the next meeting.

The meeting rose at 6.30 p.m.

2251st MEETING

Friday, 19 July 1991, at 10.15 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, 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. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER IV. Draft Code of Crimes against the Peace and Security of Mankind (concluded)* (A/CN.4/L.464 and Add. 1-4)

A. Introduction (A/CN.4/L.464)

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.464 and Add.1-3)

CONSIDERATION OF THE NINTH REPORT OF THE SPECIAL RAPporteur (concluded) (A/CN.4/L.464 and Add.1-3)

Paragraphs 8 to 20

Paragraphs 8 to 20 were adopted.

Section B was adopted.

* Resumed from the 2243rd meeting.

C. Tribute to the Special Rapporteur, Mr. Doudou Thiam
(A/CN.4/L.464)

Paragraph 21

Paragraph 21 was adopted.

Section C was adopted.

**D. Draft Code of Crimes against the Peace and Security of Man-
kind** (A/CN.4/L.464/Add.4)

1. TEXT OF DRAFT ARTICLES PROVISIONALLY ADOPTED BY THE
COMMISSION ON FIRST READING

Section D.1 was adopted.

2. TEXT OF DRAFT ARTICLES 3, 4, 5, 11, 14, 19, 20, 21, 22 AND
26, WITH COMMENTARIES THERETO, AS PROVISIONALLY ADOPTED
BY THE COMMISSION AT ITS FORTY-THIRD SESSION

Commentary to article 3 (Responsibility and punishment)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

1. Mr. THIAM (Special Rapporteur) proposed that a sentence should be inserted after the third sentence to read: "While draft article 3 provides for the criminal responsibility of the individual, article 5 clearly establishes that criminal responsibility of the individual is without prejudice to the international responsibility of States."

Paragraph (2) as amended, was approved.

Paragraph (3)

2. Mr. TOMUSCHAT said that the assertion "While there was no doubt in the Commission", in the third sentence, was not accurate. He therefore proposed that the phrase should be replaced by "Most members agreed" and that the sentence should end with the words "obvious cases of complicity". The words "the same was not true with regard to aiding" should be replaced by "On the other hand, opinions were divided on how to deal with aiding".

Paragraph (3), as amended, was approved.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Motives)

The commentary to article 4 was approved.

Commentary to article 5 (Responsibility of States)

The commentary to article 5 was approved.

Commentary to article 11 (Order of a Government or a superior)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

3. Mr. CALERO RODRIGUES said that the second sentence of the paragraph posed a question. Where was the answer?

4. Mr. THIAM (Special Rapporteur) said that the answer was implicit in the sentence that followed.

5. Mr. CALERO RODRIGUES said it should be made more clear that the third sentence did in fact contain a response to the issue raised in the second sentence.

6. Mr. TOMUSCHAT said that the words "at this stage", in the third sentence, were ambiguous.

7. Mr. THIAM (Special Rapporteur) proposed that the words "at this stage" should be deleted.

Paragraph (4), as amended, was approved.

The commentary to article 11, as amended, was approved.

Commentary to article 14 (Defences and extenuating circumstances)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

8. Mr. GRAEFRATH proposed that the word "also", should be deleted from the fourth sentence.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 14, as amended, was approved.

Commentary to article 19 (Genocide)

Paragraph (1)

9. Mr. THIAM (Special Rapporteur) said that the words *L'énorme gravité*, in the first sentence of the French version, should be replaced by *L'extrême gravité*.

Paragraph (1), as amended, was approved.

Paragraph (2)

10. Mr. TOMUSCHAT said, in reference to the second sentence, that the essential principle was *nullum crimen sine lege* rather than *nulla poena sine lege*.

11. Mr. THIAM (Special Rapporteur) said that he agreed with Mr. Tomuschat's observation. He also proposed that the words *a cru convenable*, in the French text, should be replaced by *a décidé*.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were approved.

Paragraph (7)

12. Mr. EIRIKSSON pointed out that paragraph (7) contained the wording "One member of the Commission was of the opinion". In general, the Commission had moved away from that approach in its other commentaries. The commentary to article 19 might be an appropriate place to add a paragraph which would explain why the Commission had not taken a position with regard to penalties but had, instead, chosen to include in the *chapeau* of the articles dealing with specific crimes the wording "be sentenced [to . . .]". That same paragraph could include a cross-reference to the discussion that had been held on penalties, which was reflected elsewhere in chapter IV.

13. Following an exchange of views in which Mr. GRAEFRATH, Mr. CALERO RODRIGUES, Mr. PAWLAK, Mr. EIRIKSSON and Prince AJIBOLA took part, Mr. THIAM (Special Rapporteur) suggested that he and Mr. Eiriksson should draft a text which would explain the Commission's decision to use the wording "be sentenced [to . . .]" throughout the draft Code. The appropriate place for the new text would be decided at a later time.

14. Mr. EIRIKSSON said that the secretariat would be preparing for the Sixth Committee a document containing all the commentaries to the articles. That document might include a general commentary to part two of the draft Code, referring to the question of applicable penalties.

Paragraph (7) was approved.

15. Mr. BARSEGOV said he thought it had been generally agreed that paragraph 2 (c) of article 19 could, in some cases, be extended to include deportation. However, he saw no mention of it in the commentary. He therefore proposed that a paragraph should be added to the commentary to the effect that, in the Commission's opinion, paragraph 2 (c) could include deportation, if it was carried out with intent to destroy a group in whole or in part.

16. Mr. THIAM (Special Rapporteur) said it was true Mr. Barsegov had always maintained that deportation should be included among the acts considered as genocide. A reference to deportation should therefore be made in the commentary. However, Mr. Barsegov's view was not held by all the members and he would thus propose the insertion of a sentence reading: "According to one member, deportation, under certain circumstances, is equivalent to genocide."

17. Mr. CALERO RODRIGUES said that he agreed with the comments by Mr. Barsegov and by Mr. Thiam. To make the commentary even more clear, he proposed that the following wording could be used: "The suggestion was made that deportation should be included among the acts qualifying as genocide; however, the Commission decided that deportation already fell within the scope of paragraph 2 (c)."

The commentary to article 19, as thus amended, was approved.

Commentary to article 20 (Apartheid)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

New paragraph (3)

18. Mr. THIAM (Special Rapporteur) proposed that, to make it clear that certain categories of officials were not covered by the draft article, a passage should be added to the commentary as new paragraph (3) to read:

"(3) The Commission has restricted the scope *ratione personae* of the draft article to leaders or organizers—an approach it has also adopted in relation to other crimes, such as aggression and intervention. It has thereby sought to make criminally liable only those who are in a position to use the State apparatus for the planning, organization or perpetration of the crime."

New paragraph (3) was approved and the following paragraph was renumbered accordingly.

Paragraph (4) (formerly para.(3))

Paragraph (4) was approved.

19. Mr. GRAEFRATH, supported by Mr. MAHIOU and Mr. THIAM (Special Rapporteur), said that the wording of the draft article differed from that of the International Convention on the Suppression and Punishment of the Crime of Apartheid in that the Convention used the expression "racial group or groups" whereas the draft article referred to "a racial group". He therefore proposed that it should be made clear in the report that the Commission felt that the expression "a racial group" was sufficient to cover several groups and had therefore deleted the words "or groups".

The commentary to article 20, as amended, was approved.

Commentary to article 21 (Systematic or mass violations of human rights)

20. Mr. RAZAFINDRALAMBO, proposed that, to bring the French version of the title of the article into line with the English, the word *et* should be replaced by *ou*.

It was so agreed.

21. Mr. AL-BAHARNA pointed out that the third human rights violation listed in the article should be amended to read: "Establishing or maintaining over persons a status of slavery, servitude or forced labour".

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

22. Mr. CALERO RODRIGUES pointed out that, in the fifth sentence, the word "not" should be added before "systematic".

Paragraph (3), as amended, was approved.

Paragraph (4)

23. Mr. MAHIOU proposed that the words *nulla poena sine lege* should be replaced by *nullum crimen sine lege*.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

24. Mr. TOMUSCHAT proposed that the first part of the second sentence should be amended to read: "Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the crimes covered by the draft article, . . .".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

25. Mr. TOMUSCHAT pointed out that the word "had", following the word "torture", in the third sentence, should be replaced by "has".

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

26. Mr. TOMUSCHAT said that some of the examples of persecution given in the second sentence could not really be classified as crimes against the peace and security of mankind. He therefore proposed that the references to the compiling of secret files and the systematic destruction of books should be deleted.

27. Mr. CALERO RODRIGUES, agreeing with Mr. Tomuschat, proposed that the reference to the systematic destruction of monuments and buildings should be retained, and the reference to books or other objects deleted.

28. Mr. PAWLAK proposed that the words "political, religious, cultural and other groups" should be added after the words "who represent", also in the second sentence.

29. Mr. EIRIKSSON, agreeing with Mr. Pawlak, proposed that a sentence should be added at the end of the list of examples, reading: "Such acts could come within the scope of this article when committed in a systematic manner or on a mass scale."

30. Mr. PAWLAK said that such a sentence would be repetitious, since the same idea was reflected elsewhere in the paragraph.

31. Mr. CALERO RODRIGUES said that it would none the less be a useful repetition as it would

emphasize that certain kinds of persecution committed in a systematic manner or on a mass scale would amount to a crime under the Code.

32. Following a further exchange of views, in which Mr. CALERO RODRIGUES, Mr. EIRIKSSON, Mr. MAHIOU and Mr. THIAM (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to amend the second sentence of the paragraph to read:

"Persecution may take many forms, for example, a prohibition on practising certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national language even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group. Such acts could come within the scope of this article when committed in a systematic manner or on a mass scale."

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

33. Mr. TOMUSCHAT proposed that the words "a practice of systematic" should be added before "disappearances" and that the words "covered by" should be replaced by "specifically mentioned in".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

34. Mr. BARSEGOV, referring to the third sentence, said that he did not see the difference between expulsion and forcible transfer of population, both of which could occur either within or outside a State's frontiers. In his country, for instance, the Crimean Tartars had been expelled from one republic to another. Was that deportation? And if a State which was not a federal State exiled part of its population to remote regions under bad conditions, was that deportation? In his opinion, it was. The reference to "frontiers" at the end of the sentence could only create confusion and perhaps even be used in justification; unfortunately, the explanation given in the subsequent sentences merely complicated the issue. In the circumstances, it seemed preferable to state simply that: "Deportation, already included in the 1954 draft Code, implies expulsion from the national territory."

35. Mr. MAHIOU said that the word "expulsion" admittedly posed a problem. Traditionally, it referred to a person in one territory who was expelled to another territory or State, though it could have another meaning under other systems of law. Hence there was some ambiguity, depending on the context. The ultimate object, of course, was to condemn deportation or forcible transfers, whether or not they took place within or outside the frontiers of a State. That could perhaps be spelt out, without making certain distinctions. At any rate, expulsion should always be reserved for movements from one State to another State, and forcible transfer should be re-

served for movements of populations within a State. A sufficiently broad form of wording would convey that idea.

36. Mr. CALERO RODRIGUES said that the commentary referred to the 1954 Code which called to mind the classic concept of deportation and thus covered every possible situation. The precise terminology used was not that important, and the paragraph as now drafted should be satisfactory.

37. Mr. PAWLAK suggested that the words “of population in accordance with international agreements or” should be added after “directed at transfers”, in the fifth sentence.

38. Mr. TOMUSCHAT said it was important to specify that the international agreements in question must be agreements between the States concerned. It would be unacceptable for third States to enter into an agreement to transfer populations; moreover, the victim State must agree to the transfer.

39. Mr. PAWLAK said he thought that was implicit in the term “international agreements”. As a compromise, he suggested the wording “in accordance with international agreements between the States concerned”.

40. Mr. BARSEGOV said that the issue was a complex one; it was impossible to cover all the possibilities, nor should the Commission attempt to do so. However, Mr. Pawlak’s proposal, as amended by Mr. Tomuschat, would be a satisfactory solution for the future.

41. Mr. CALERO RODRIGUES said he was concerned that the wording proposed by Mr. Pawlak might be used to justify gross violations of human rights if two States entered into an agreement forcibly to transfer the population of a third.

42. Mr. TOMUSCHAT said he concurred. The rights of peoples and of States should not be placed at odds. The existence of an international treaty would not justify the uprooting of an indigenous population. It was a very delicate problem, and it was hardly possible to legislate for all eventualities. Accordingly, it would be best to leave the text as it stood.

43. Mr. BARSEGOV suggested that the phrase “in accordance with the requirements of international law” should be inserted after “international agreements”. That would resolve the problem raised by Mr. Calero Rodrigues.

44. Mr. PAWLAK said he was willing to withdraw his proposal. However, if the sentence defined what lay outside the scope of the draft article, it must cover every situation, not merely internal transfers of population.

45. Mr. THIAM (Special Rapporteur) said that transfers of population could constitute crimes against humanity whether they took place within the same territory or across frontiers. The key issue was whether they inflicted the kind of suffering contemplated by the draft Code. In view of the discussion, it would be better to delete the third sentence.

46. Mr. MAHIOU queried the use of the word *mieux* in the French text, in the penultimate sentence of paragraph (11). The end of the sentence should be redrafted in the French version.

47. Mr. CALERO RODRIGUES proposed that the entire phrase “for the purposes of better integration with the rest of the nation” should be deleted from the penultimate sentence. There might be various reasons for attempting to uproot a population.

48. The CHAIRMAN said that the penultimate sentence of paragraph (11) would end “. . . their ancestral lands”.

49. Mr. THIAM (Special Rapporteur) said he could also agree to deletion of the fifth sentence. The third sentence, referring to deportation, would be retained.

Paragraph (11), as amended, was approved.

The commentary to article 21, as amended, was approved.

Commentary to article 22 (Exceptionally serious war crimes)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

50. Mr. EIRIKSSON proposed that the words “grave breaches” should be used to replace “serious offences” and “common articles” to replace “joint articles”, in the first sentence.

Paragraph (2), as amended, was approved.

Paragraph (3)

51. Mr. PELLET said that paragraph (3) (c) was confusing. It might convey the impression that commission of any of the acts in question would be enough to constitute a crime against the peace and security of mankind. He suggested that the subparagraph should read: “(c) that the act constituting a crime falls within any one of the six categories in paragraph 2 (a) to (f)”.

52. Mr. THIAM (Special Rapporteur) said he could accept that proposal.

53. Mr. EIRIKSSON proposed that, for the sake of logic, subparagraphs (a) to (c) should be reordered so that, with the inclusion of Mr. Pellet’s proposal, subparagraph (c) would become the first of the subparagraphs.

54. Mr. GRAEFRATH said he agreed, and pointed out that the words “for the draft Code”, in the last sentence of the English text, should be replaced by “of the draft Code”.

55. Mr. ROUCOUNAS proposed that the qualifier “war”, before “crime”, should be deleted. The article dealt with war crimes of a special kind.

56. Mr. MAHIOU said it was clear from the statement at the beginning of paragraph (2) of the commentary, that the article dealt expressly with war crimes.

57. Mr. RAZAFINDRALAMBO pointed out that the title of the article was "Exceptionally serious war crimes". The term "crime", on its own, was too broad.

58. Mr. CALERO RODRIGUES said that in the light of the title to the draft article, the point was unimportant.

Paragraph (3), as amended, was approved.

Paragraph (4)

59. Mr. PELLET proposed deletion from the first sentence of the whole of the text after "Geneva Conventions". He said that it simply reintroduced a controversial question which the Drafting Committee had sought to avoid. If his proposal was not accepted, he wished to state for the record that some members did not agree with the interpretation placed on article 2 (b) of Additional Protocol I.

60. Mr. GRAEFRATH said he did not understand the difficulty in accepting rules stemming from international agreements between parties to an armed conflict. However, the chief problem in paragraph (4) lay in the second sentence. He proposed that the phrase "in other words in the traditional sense of war between two or more States, but also conflicts in which the parties are national liberation movements" should be omitted. The expression "international armed conflicts" should be substituted for "international conflicts" and the words "or internal" should be deleted.

61. Mr. THIAM (Special Rapporteur) said he could accept the proposals of both Mr. Pellet and Mr. Graefrath.

62. Mr. TOMUSCHAT said he thought the disagreement referred to by Mr. Pellet related only to the reference, in the first sentence of paragraph (4), to "international agreements in which the participants are parties to an armed conflict". The mention of customary and treaty law was important, and should be retained.

63. Mr. PELLET said that, in his view, treaty law would be relevant in the context of paragraph (4) only if it was derived from the general principles of international law. Where the rule was of a customary nature, one conventional source would be unimportant. He objected, however, to the mention of treaty law as such.

64. Mr. THIAM (Special Rapporteur) said that a reference to the law of war was unavoidable.

65. The CHAIRMAN suggested that the first sentence of paragraph (4) should end with the words "Geneva Conventions". The second sentence would be amended as proposed by Mr. Graefrath.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

66. Mr. EIRIKSSON proposed that the seventh sentence should be amended to read: "The subparagraph sets out in square brackets a number of examples of acts which unquestionably fall within the general definition in the subparagraph."

67. Mr. THIAM (Special Rapporteur) said he could accept that proposal.

68. Mr. PELLET proposed that the words "and their questionable character" should be added at the end of the last sentence.

It was so agreed.

69. Mr. THIAM (Special Rapporteur) said he thought only one member had expressed that view. The sentence should therefore begin "The view was expressed".

Paragraph (6), as amended, was approved.

Paragraph (7)

70. Mr. EIRIKSSON proposed that the words "in the draft article" should be substituted for "among exceptionally serious war crimes", in the second sentence.

71. Mr. MAHIU proposed that the word *faire* in the last sentence of the French version, should be deleted.

72. Mr. THIAM (Special Rapporteur) proposed that "odious", in the second sentence, should be replaced by "serious".

Paragraph (7), as thus amended, was approved.

Paragraph (8)

73. Mr. EIRIKSSON suggested that the first sentence should be reformulated so as to begin with the words: "Another category of exceptionally serious war crimes was covered by the draft articles . . .".

74. Mr. GRAEFRATH suggested that, the words "the 1925 Geneva Protocol" in the second sentence, should be followed by "for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction". Furthermore, the reference to methods or means of combat should be deleted. They were out of place in a paragraph of the commentary that dealt with the use of unlawful weapons, not with the means or methods of combat.

It was so agreed.

Paragraph (8), as amended by Mr. Graefrath, was approved.

Paragraph (9)

75. Mr. PELLET said that he had placed on record his strong reservations to subparagraph (d). He suggested that a sentence should be added at the end of the paragraph reading: "One member made a formal reservation on subparagraph (d)."

76. Mr. GRAEFRATH proposed that the words in the first sentence "from article 35, paragraph 3, of Protocol

I . . .” should be amended to read: “from article 35, paragraph 3, and article 55 of Protocol I”.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

77. Mr. EIRIKSSON proposed that the first sentence should be reworded to read: “Subparagraph (e) covers large-scale destruction of civilian property.”

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

78. Mr. EIRIKSSON proposed that the beginning of the first sentence should be amended to read: “Subparagraph (f) covers . . .”.

79. Mr. THIAM (Special Rapporteur) said that the words “international law applied in armed conflicts . . .”, in the second sentence, should be amended to read “international law applicable in armed conflicts . . .”.

Paragraph (11), as thus amended, was approved.

The commentary to article 22, as amended, was approved.

Commentary to article 26 (Wilful and severe damage to the environment)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

Paragraph (5) was approved with a minor drafting change.

Paragraph (6)

80. Mr. THIAM (Special Rapporteur) said that the beginning of the second sentence, “This precludes from the scope of the crime . . .” should be altered to read: “This excludes from the scope of the draft article . . .”.

Paragraph (6), as amended, was approved.

The commentary to article 26, as amended, was approved.

81. Mr. BEESLEY said he had no objection to the commentary, but wished to enter a reservation with regard to article 26 itself, because of the narrowness of the crime it defined.

82. Mr. EIRIKSSON pointed out that the Commission had to discuss the inclusion of a passage as a commen-

tary to part two of the draft Code and suggested a text along the lines of:

“(1) Part two sets out in individual articles the crimes against peace and security of mankind covered by the draft Code.

“(2) The Commission approved a standard format for the articles specifying, in some cases in an introductory paragraph, the categories of persons which can be covered by the crime. Thus, in articles 15 to 18, and article 20, the scope of the crime is confined to leaders or organizers, a distinction adopted in the Nürnberg trials. Articles 23 and 24 apply to agents or representatives of States. Other crimes can, in accordance with the draft Code, be committed by any individual.

“(3) In all cases, the scope of the crimes extends also to cases where the persons concerned do not commit the crime themselves but order other individuals to commit them.

“(4) The articles in part two do not take a position on punishment but include with respect to each crime the clause “be sentenced [to . . .]”. This question will be reviewed on second reading and is without prejudice to whether penalties will be specified for each crime, or whether there will be a single provision for all crimes.

“(5) The scope of the articles with respect to persons is also affected by the provisions of article 3 dealing with the categories of persons other than those who commit the crime who would be responsible therefor.”

83. Mr. THIAM (Special Rapporteur) said that he would prepare, with the help of the secretariat, a passage along those lines for inclusion in Chapter IV of the report.

84. Mr. PAWLAK said that the text proposed by Mr. Eiriksson did not introduce any new element; it simply described the situation. The actual formulation could be left to the Special Rapporteur and the secretariat.

85. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to include a passage of that kind, leaving it to the Special Rapporteur and the secretariat to devise the exact wording.

It was so agreed.

Chapter IV of the draft report, as amended, was adopted on that understanding.

CHAPTER I. Organization of the session (concluded)
(A/CN.4/L.461)

F. General description of the work of the Commission at its forty-third session (concluded)

86. The CHAIRMAN invited the Commission to resume consideration of chapter I, more particularly section F (General description of the work of the Commis-

sion at its forty-third session). He said that, in accordance with the decision taken at the previous meeting, it was proposed to add at the beginning of the section an additional paragraph to read:

“8 bis. At its forty-third session, the Commission achieved major progress on three topics on its agenda. It concluded the consideration of the topic ‘Jurisdictional immunities of States and their property’ by finally adopting a set of draft articles on the topic. In addition, the Commission provisionally adopted complete sets of draft articles on two other topics on its agenda, namely ‘Draft Code of Crimes against the Peace and Security of Mankind’ and ‘The law of the non-navigational uses of international watercourses’. It is to be recalled that, at its forty-first session, the Commission finally adopted draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols thereto. Thus, during the current term of office of its members, the Commission achieved the specific goals which it had set for itself at the beginning of that term of office.”

Paragraph 8 bis was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraphs 10 and 11

87. Mr. EIRIKSSON proposed that, in each paragraph, the last sentence, mentioning the Commission’s decision to transmit the draft to Governments for comments and observations, should be moved to become the second sentence.

It was so agreed.

Paragraphs 10 and 11, as amended, were adopted.

Paragraphs 12 to 15

Paragraphs 12 to 15 were adopted.

Chapter I of the draft report, as amended, was adopted.

CHAPTER VIII. Other decisions and conclusions of the Commission (continued) (A/CN.4/L.468 and Corr.1)

88. The CHAIRMAN invited the Commission to resume consideration of chapter VIII. Following the discussion at the previous meeting, it was proposed to insert a new paragraph 18 bis, to read:

“18 bis. The Commission considered the issues raised in paragraph 546 of the report on the work of the forty-second session on the possibility of splitting the session of the Commission into two parts. However, since this proposal had not been considered in detail in the Planning Group, it was agreed that during the next session of the Commission the issue would be discussed and, if necessary, a study would be requested from the secretariat on the administrative and financial implications of the matter.”

Paragraph 18 bis was adopted.

89. The CHAIRMAN said it was gratifying that a formula had been agreed upon on the possibility of splitting the Commission’s session into two parts. He was confident that the lively debate on the subject would in no way impair the spirit of friendship and comradeship which had always prevailed in the Commission.

90. Mr. MAHIU said he hoped that the Chairman would confirm that his critical remarks during that discussion had not been directed against those who had initiated the discussion, including himself.

91. The CHAIRMAN said that any adverse comments he might have made had not been directed at the initiators of the discussion, namely Mr. Mahiou and Mr. Pellet.

Paragraph 18

92. Mr. PELLET said that the somewhat neutral formulation of paragraph 18 did not appear to explain adequately why the Commission wanted the session to last the usual 12 weeks. A passage should be added to state that, notwithstanding a shorter agenda, the Commission still had very important work ahead of it, apart from the need to examine its methods of work in depth.

93. Mr. MAHIU suggested that it should be left to the members of the Sixth Committee to raise such specific issues as those indicated by Mr. Pellet.

94. Mr. CALERO RODRIGUES pointed out there would always be some representatives in the Sixth Committee opposed to a 12-week session for the Commission. The Chairman, who would be representing the Commission at the next session of the General Assembly, would have an opportunity to explain during the debate in the Sixth Committee why the Commission wanted to maintain the 12-week session. Moreover, some members of the Commission would be attending the General Assembly as representatives of their Governments in the Sixth Committee and would be able to contribute to the discussion.

95. Mr. PAWLAK suggested that, in the circumstances, paragraph 18 should be left as it stood. It was best not to depart from the standard formula.

96. Mr. PELLET said he would not press his suggestions.

Paragraph 18 was adopted.

97. Mr. BEESLEY said that he would be unable to attend the next meeting, and therefore wished to place on record his request for deletion of the whole of the explanatory note to the annex.

The meeting rose at 1 p.m.

2252nd MEETING

Friday, 19 July 1991, at 3.25 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (concluded)

CHAPTER VIII. *Other decisions and conclusions of the Commission (concluded)* (A/CN.4/L.468 and Corr.1)

1. The CHAIRMAN invited the Commission to resume consideration of chapter VIII of its draft report.

B. Cooperation with other bodies

Paragraphs 19 to 21

Paragraphs 19 to 21 were adopted.

Section B was adopted.

B bis. Other cooperation activities related to the work of the Commission

2. The CHAIRMAN said that the Chairman of the Drafting Committee was proposing the insertion of a new section B bis entitled "Other cooperation activities related to the work of the Commission", to read:

"1. A group of members of the Commission as well as other scholars in international law participated in a seminar on the draft Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal jurisdiction. The seminar was arranged on 18-20 May 1991 in Talloires (France) by the Foundation for the Establishment of an International Criminal Court and International Criminal Law Commission.

"2. Some members of the Commission as well as other legal experts on disarmament participated in the meetings of the Committee on Arms Control and Disarmament Law of the International Law Association held in Geneva on 7-8 July 1991."

Section B bis was adopted.

C. Date and place of the forty-fourth session

Paragraph 22

Paragraph 22 was adopted.

Section C was adopted.

D. Representation at the forty-sixth session of the General Assembly

Paragraph 23

3. The CHAIRMAN proposed that, in addition to himself, Mr. Barboza, Special Rapporteur for the topic of international liability for injurious consequences of acts not prohibited by international law, should attend the forty-sixth session of the General Assembly. Mr. Barboza would attend meetings at which his topic was being discussed and would be able to reply to the questions put by Governments.

4. He said that, if he heard no objection, a footnote to that effect would be added to paragraph 23.

It was so agreed.

5. Mr. BARBOZA thanked the Commission for the confidence it had shown in him and assured it that he would do his best to carry out the task entrusted to him.

6. The CHAIRMAN said that, following the consultations he had held, the Commission appeared to be considering the possibility of sending a second Special Rapporteur to the forty-sixth session of the General Assembly. The name of Mr. McCaffrey, Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, seemed to be the one mentioned most often.

7. Mr. DÍAZ GONZÁLEZ, supported by Mr. EIRIKSSON, Mr. CALERO RODRIGUES, Mr. BEESLEY, Prince AJIBOLA, Mr. PELLET, Mr. SHI and Mr. ARANGIO-RUIZ questioned whether the General Assembly would agree that the Commission should send two Special Rapporteurs. Quite apart from considerations of cost, it was to be feared that such an initiative might be regarded as setting a precedent and that the General Assembly might therefore decide not to receive Special Rapporteurs from the Commission.

8. Mr. McCAFFREY thanked his colleagues for the confidence they had shown in him, but recalled that he would no longer be a member of the Commission at the next session. He would also not be available during the session of the General Assembly.

Paragraph 23, as amended, was adopted.

Section D, as amended, was adopted.

E. International Law Seminar

Paragraphs 24 to 34

Paragraphs 24 to 34 were adopted.

Section E was adopted.

F. Gilberto Amado Memorial Lecture

Paragraphs 35 to 37

Paragraphs 35 to 37 were adopted.

Section F was adopted.

Annex

9. Mr. BEESLEY, speaking as Chairman of the Planning Group, said that several members of the Planning Group had taken the view that it would be useful to add an explanatory note to the list of topics which followed paragraph 7. Since there had been strong objections to that view, the Planning Group had concluded that it would be better to recommend to the Commission that the explanatory note in the annex should be deleted.

The annex, as amended, was adopted.

Chapter VIII 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.466)

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 to 42

Paragraphs 9 to 42 were adopted.

Section B was adopted.

Chapter VI of the draft report was adopted.

The draft report of the Commission on the work of its forty-third session, as a whole, as amended, was adopted.

Closure of the session

10. The CHAIRMAN said that a special word of thanks should be addressed to the three Special Rapporteurs who had contributed so significantly to the success of the current session. Thanks to the diligence and expertise of Mr. McCaffrey and Mr. Thiam, the Commission had adopted complete sets of draft articles on topics which, although they were quite different, had one thing in common, namely, their topicality. Thanks to the dedication and scholarly work of Mr. Ogiso, the Commission had adopted in final form a draft on the jurisdictional immunities of States and their property which it could now recommend to the General Assembly as the basis for a convention. Mr. Ogiso would no doubt have an important role to play at the time of the finalization of such a convention.

11. After the usual exchange of courtesies, the CHAIRMAN declared the forty-third session of the International Law Commission closed.

The meeting rose at 4.40 p.m.

كيفية الحصول على منشورات الأمم المتحدة

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