

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1987

*Volume I*

*Summary records  
of the meetings  
of the thirty-ninth session  
4 May-17 July 1987*

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UNITED NATIONS





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## NOTE

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References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1980*).

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

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

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

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

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

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This volume contains the summary records of the meetings of the thirty-ninth session of the Commission (A/CN.4/SR.1990-A/CN.4/SR.2041), 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

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Mr. John Alan BEESLEY	Canada	Mr. Stanislaw PAWLAK	Poland
Mr. Mohamed BENNOUNA	Morocco	Mr. Pemmaraju Sreenivasa RAO	India
Mr. Boutros BOUTROS-GHALI	Egypt	Mr. Edilbert RAZAFINDRALAMBO	Madagascar
Mr. Carlos CALERO RODRIGUES	Brazil	Mr. Paul REUTER	France
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. Emmanuel J. ROUCOUNAS	Greece
Mr. Gudmundur EIRIKSSON	Iceland	Mr. César SEPÚLVEDA GUTIÉRREZ	Mexico
Mr. Laurel B. FRANCIS	Jamaica	Mr. Jiuyong SHI	China
Mr. Bernhard GRAEFRATH	German Democratic Republic	Mr. Luis SOLARI TUDELA	Peru
Mr. Francis Mahon HAYES	Ireland	Mr. Doudou THIAM	Senegal
		Mr. Christian TOMUSCHAT	Federal Republic of Germany
		Mr. Alexander YANKOV	Bulgaria

## OFFICERS

*Chairman:* Mr. Stephen C. McCAFFREY  
*First Vice-Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ  
*Second Vice-Chairman:* Mr. Riyadh Mahmoud Sami AL-QAYSI  
*Chairman of the Drafting Committee:* Mr. Edilbert RAZAFINDRALAMBO  
*Rapporteur:* Mr. Stanislaw PAWLAK

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

## **AGENDA**

The Commission adopted the following agenda at its 1990th meeting, held on 4 May 1987:

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

## ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
IMF	International Monetary Fund
IMO	International Maritime Organization
INTERPOL	International Criminal Police Organization
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OEEC	Organization for European Economic Co-operation (now OECD)
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNICEF	United Nations Children's Fund
UNITAR	United Nations Institute for Training and Research
WHO	World Health Organization
World Bank	International Bank for Reconstruction and Development

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

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

*Source*

**HUMAN RIGHTS**

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

**PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS**

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

**LAW OF TREATIES**

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

**LAW OF THE SEA**

- Convention on the Continental Shelf (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 499, p. 311.

Source

- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

LIABILITY FOR DAMAGE CAUSED BY NUCLEAR AND OUTER SPACE ACTIVITIES

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

## CHECK-LIST OF DOCUMENTS OF THE THIRTY-NINTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/403	Provisional agenda	Mimeographed. For the agenda as adopted, see p. ix above.
A/CN.4/404 [and Corr.1]	Fifth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in <i>Yearbook . . . 1987</i> , vol. II (Part One).
A/CN.4/405 [and Corr.1 and 2]	Third 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.4/406 [and Corr.1] and Add.1 [and Add.1/Corr.1] and Add.2 [and Add.2/Corr.1]	Third report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	<i>Idem.</i>
A/CN.4/407 and Add.1 and 2	Draft Code of Offences against the Peace and Security of Mankind: observations of Member States received pursuant to General Assembly resolution 41/75	<i>Idem.</i>
A/CN.4/L.410	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-first session of the General Assembly	Mimeographed.
A/CN.4/L.411	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: titles of parts I and II of the draft; articles 1 to 7	See summary records of the 2028th meeting, 2029th meeting (paras. 26 <i>et seq.</i> ), 2030th meeting (paras. 2 <i>et seq.</i> ) and 2033rd meeting (paras. 27 <i>et seq.</i> ).
A/CN.4/L.412	Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: titles of chapter I and parts I and II of the draft; articles 1, 2, 3, 5 and 6	See summary records of the 2031st meeting (paras. 2 <i>et seq.</i> ), 2032nd meeting and 2033rd meeting (paras. 1-26).
A/CN.4/L.413	Draft report of the International Law Commission on the work of its thirty-ninth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Forty-second Session, Supplement No. 10 (A/42/10)</i> . The final text appears in <i>Yearbook . . . 1987</i> , vol. II (Part Two).
A/CN.4/L.414 and Add.1	<i>Idem</i> : chapter II (Draft Code of Offences against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.415 and Add.1-3	<i>Idem</i> : chapter III (The law of the non-navigational uses of international watercourses)	<i>Idem.</i>
A/CN.4/L.416 and Add.1 [and Add.1/Corr.1]	<i>Idem</i> : chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.417	<i>Idem</i> : chapter V (Relations between States and international organizations (second part of the topic))	<i>Idem.</i>
A/CN.4/L.418 and Add.1	<i>Idem</i> : chapter VI (Other decisions and conclusions of the Commission)	<i>Idem.</i>
A/CN.4/L.419	Draft Code of Offences against the Peace and Security of Mankind: text of paragraph 2 of article 1 proposed by Mr. Pawlak	Mimeographed.
A/CN.4/SR.1990- A/CN.4/SR.2041	Provisional summary records of the 1990th to 2041st meetings	Mimeographed. The final text appears in the present volume.





# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE THIRTY-NINTH SESSION

*Held at Geneva from 4 May to 17 July 1987*

### 1990th MEETING

*Monday, 4 May 1987, at 3.30 p.m.*

*Outgoing Chairman:* Mr. Doudou THIAM

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Prince Ajibola, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Yankov.

#### Opening of the session

1. The OUTGOING CHAIRMAN declared open the thirty-ninth session of the International Law Commission.

#### Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN welcomed the members of the Commission, both old and new, and expressed the hope that the new period which the Commission was entering would be rich and fruitful. He paid tribute to the former members of the Commission who, for various reasons, had not come back and expressed the Commission's gratitude to them for the outstanding services they had rendered.

3. In accordance with the mandate given him, he had represented the Commission at the forty-first session of the General Assembly, where he had been struck by the increasing interest shown in the Commission's work. The topics reported on had been carefully studied, and interesting and very useful suggestions had been made. The Commission's methods of work had again been examined, and it would be able to study the comments made on them.

4. As further requested by the Commission, he had also represented it at the sessions of the Inter-American Juridical Committee, held at Rio de Janeiro in January 1987, and of the Asian-African Legal Consultative Committee, held at Bangkok, also in January 1987. The

Inter-American Juridical Committee had particularly asked that the Commission should be represented at its August session rather than its January session, so that the Commission's representative could devote a few hours to courses or lectures at the Committee's seminar usually organized in August. The Commission had been represented at the session of the European Committee on Legal Co-operation held at Strasbourg in December 1986 by Mr. Reuter.

5. The length of the present session would be 11 weeks, which was one week longer than the previous session. That decision by the General Assembly, which was quite exceptional under the policy of austerity at present in force, bore witness to the interest taken in the Commission's work and the high regard in which it was held. Nevertheless, he hoped to see a return to the customary 12-week session as soon as the financial position had improved.

6. Lastly, he expressed his thanks to the whole Secretariat for the valuable assistance it had given him throughout his term of office.

#### Election of officers

*Mr. McCaffrey was elected Chairman by acclamation.*

*Mr. McCaffrey took the Chair.*

7. The CHAIRMAN thanked the members of the Commission for the honour done him and paid tribute to the outgoing Chairman's outstanding contribution to the work of the previous session, when, for the first time in its history, the Commission had been able to complete the first reading of draft articles on two important topics at the same session.

8. He welcomed back those members who had been re-elected and extended a most cordial welcome to the newly elected members, whose contributions to the Commission's work would certainly be very valuable.

*The meeting was suspended at 3.45 p.m. and resumed at 4.15 p.m.*

*Mr. Díaz González was elected First Vice-Chairman by acclamation.*

*Mr. Al-Qaysi was elected Second Vice-Chairman by acclamation.*

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

*Mr. Pawlak was elected Rapporteur by acclamation.*

### Adoption of the agenda (A/CN.4/403)

9. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/403), on the understanding that its adoption would be without prejudice to the order of consideration of the topics, which would be decided later.

*The provisional agenda (A/CN.4/403) was adopted.*

10. The CHAIRMAN, drawing attention to General Assembly resolution 41/81 of 3 December 1986, suggested that the request in paragraph 5 of that resolution should be taken up under item 9 of the agenda (Programme, procedures and working methods of the Commission, and its documentation).

*It was so agreed.*

### Organization of work of the session

[Agenda item 1]

11. Mr. YANKOV suggested that members of the Commission who were not members of the Enlarged Bureau should be permitted to attend the meetings of the Bureau as observers.

*It was so agreed.*

*The meeting rose at 5 p.m.*

## 1991st MEETING

*Tuesday, 5 May 1987, at 12.10 p.m.*

*Chairman: Mr. Stephen C. McCaffrey*

*Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

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

[Agenda item 1]

1. The CHAIRMAN said that the Enlarged Bureau had recommended that, of the seven meetings per week to which the Commission was entitled, four should be allocated to plenary meetings, to be held in the morning from Tuesday to Friday each week, and three to meetings of the Drafting Committee and/or the Planning Group, to be held in the afternoon, starting on Monday. One additional meeting could, if necessary, be held, provided conference facilities were available. Any

time saved in the consideration of a topic in plenary meetings would be allocated to the Drafting Committee or the Planning Group.

2. The Enlarged Bureau had recommended that the Commission should consider the items on the agenda in the following order:

- |  |  |
|--|--|
| 1. Draft Code of Offences against the Peace and Security of Mankind (item 5) .....   | 10 to 12 meetings  |
| 2. The law of the non-navigational uses of international watercourses (item 6) .....   | 10 meetings  |
| 3. International liability for injurious consequences arising out of acts not prohibited by international law (item 7) ..... | 8 meetings   |
| 4. Relations between States and international organizations (second part of the topic) (item 8) .....                        | 6 meetings, on the understanding that that number could be increased, if necessary |
| 5. Programme, procedures and working methods of the Commission, and its documentation (item 9) .....                         | 2 meetings   |

One meeting would be held in reserve. The Commission's report to the General Assembly would be considered and adopted in the last week of the session. The Enlarged Bureau had also recommended flexibility in the application of that timetable.

3. Mr. EIRIKSSON said that he was grateful to the Secretariat for circulating a letter he had addressed to members containing certain suggestions for restructuring the Commission's work, but regretted that some of his colleagues had apparently not received it. He therefore wished to draw attention to one point in particular made in the letter, namely the absence of any provision for an intermediate stage in the discussion of topics, between discussion in plenary and discussion in the Drafting Committee. That seemed to be important because the Drafting Committee had often had before it subjects that had not been adequately dealt with in the Commission itself.

4. The CHAIRMAN said that that point could perhaps best be dealt with in the Planning Group, which was to meet that afternoon.

5. Mr. CALERO RODRIGUES noted that the Planning Group was likely to have more work than usual at the current session, which might deprive the Drafting Committee of time it sorely needed given its backlog of work. He therefore urged that serious consideration be given to the possibility of having four afternoon meetings each week, rather than three.

6. Mr. HAYES, agreeing with Mr. Calero Rodrigues, stressed the need to adopt a flexible approach, in order to allow the Drafting Committee extra time when necessary and to make full use of the time available to the Commission.

7. Mr. BARSEGOV said that the allocation of meetings to the various topics under study proposed by the Enlarged Bureau was, in the main, well balanced. Nevertheless, for obvious practical reasons, the Commission should be able to proceed flexibly and devote more meetings than scheduled to topics whose con-

sideration was well-advanced, such as the draft Code of Offences against the Peace and Security of Mankind, if necessary devoting less time to other topics.

8. Mr. KOROMA, supporting the Enlarged Bureau's recommendations, said that they had the merit of allowing flexibility and would leave members sufficient time to study the reports submitted thoroughly, so that they could do justice to the topics considered. He noted, however, that no meetings had been allocated to the topic of State responsibility (item 2). Despite the special position in regard to that topic, he trusted that the Commission would deal with it in due course.

9. The CHAIRMAN said it was implicit in the Enlarged Bureau's recommendations that, since there was as yet no special rapporteur for the topic of State responsibility, the Commission's time could more profitably be used in the way it had recommended than by asking a new special rapporteur for that topic to submit a report at the current session.

10. Mr. KOROMA asked what the position was with regard to the draft articles on State responsibility which were before the Commission.

11. Mr. RAZAFINDRALAMBO, Chairman of the Drafting Committee, pointed out that the Enlarged Bureau had raised the question what was to be done with the 16 draft articles on State responsibility which were before the Drafting Committee. The usual practice was for the Drafting Committee to examine draft articles referred to it on any topic in the presence of the special rapporteur. For the topic of State responsibility, however, a new special rapporteur had to be appointed, and he would be called upon to say whether he confirmed referral of those draft articles to the Drafting Committee and whether he wished to defend them before the Committee. The answer to Mr. Koroma's question thus depended on the appointment of a new special rapporteur and on the decision he would take.

12. Mr. CALERO RODRIGUES drew attention to the strong tendency in the General Assembly and in the Commission itself in favour of staggering consideration of agenda items. The Commission had already taken action in that direction, since two topics on which draft articles had been adopted on first reading at the previous session would not be considered at the current session. For the topic of State responsibility, draft articles on which were before the Drafting Committee, a new special rapporteur would have to be appointed before consideration of the topic could be resumed.

13. He agreed with the Enlarged Bureau's recommendations concerning the allocation of meetings to the various topics, and on the need for flexibility. The allocation of 10 to 12 meetings to the topic of the draft Code of Offences against the Peace and Security of Mankind seemed adequate in view of the nature of the 11 draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404). He suggested that two or three of those meetings should be set aside for newly elected members to express their views on the draft code in general.

14. Mr. BEESLEY also supported the Enlarged Bureau's recommendations, including flexibility in the application of the timetable. He favoured the staggering

of topics to the greatest possible extent; it was necessary because of time limitations. Since much of the Commission's work was prepared in the Drafting Committee, more time should be given to the Committee.

15. Mr. Sreenivasa RAO said that he found the Enlarged Bureau's recommendations generally acceptable. The Commission should bear in mind the need for efficiency, in response to the concern of the General Assembly and of Governments. For example, it was difficult for outsiders to understand why the topic of State responsibility had remained for so long on the Commission's agenda. The whole process of codification was to some extent in crisis; some of the diplomatic conferences on the codification of international law in the past few years had not enjoyed the same basis of consensus as the codification conferences of the 1960s. The Commission undoubtedly had a responsibility to provide guidance to the international community in that matter, and in doing so it should think in terms of its five-year mandate, not of a 10-year or 15-year period.

16. Mr. JACOVIDES supported the Enlarged Bureau's recommendations. In view of the importance of the Drafting Committee, he thought that every effort should be made to allocate additional meetings to it.

17. The topic of State responsibility was an important one and he hoped that the Chairman would soon hold consultations on the appointment of a new special rapporteur. It should be remembered that the question of the responsibility of States for crimes against the peace and security of mankind was to be excluded from the draft code on the understanding that it would be dealt with under the topic of State responsibility.

18. Prince AJIBOLA urged that at least two of the three afternoon meetings should be allocated to the Drafting Committee, which had much more work than the Planning Group.

19. The CHAIRMAN pointed out that the allocation of three afternoon meetings to the subsidiary bodies would be applied on a flexible basis. It was expected that in many weeks all three meetings would be allocated to the Drafting Committee.

20. Mr. BENNOUNA said that, in view of the difficulties facing the conference services due to the financial crisis, the Commission should perhaps adopt the idea that had been in circulation in the Sixth Committee at the forty-first session of the General Assembly, whereby informal consultations would be held with the Chairman and the special rapporteurs concerned to enable the Commission to make progress in the consideration of particularly complex topics. For instance, the Commission could hold informal consultations with the special rapporteur to be appointed for the topic of State responsibility, in order to assist him in the work on which he would have to report at the Commission's next session in the light of the directives given by the Sixth Committee at the forty-first session of the General Assembly.

21. Mr. HAYES said that he welcomed the staggering of agenda items. With regard to item 9, the Commission should plan for the whole of its five-year term, including the current session, in deference to the wishes of the General Assembly.

22. The CHAIRMAN said that it was planned to devote the meetings on 8 and 9 July to the consideration of item 9, because the Legal Counsel would be able to be present.

23. If there were no further comments, he would take it that the Commission agreed to adopt the Enlarged Bureau's recommendations concerning the allocation of meetings and the tentative order in which the agenda items would be considered.

*It was so agreed.*

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

[Agenda item 9]

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

24. Mr. DÍAZ GONZÁLEZ (Chairman of the Planning Group) said it was proposed that the Group should consist of the following members: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Reuter, Mr. Roucounas, Mr. Thiam, Mr. Tomuschat and Mr. Yankov. The Planning Group was not restricted and other members of the Commission would be welcome at its meetings.

*It was so agreed.*

*The meeting rose at 1.10 p.m.*

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**1992nd MEETING**

*Wednesday, 6 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Prince Ajibola, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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**Drafting Committee**

1. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said it was proposed that the Drafting Committee should consist of the following members: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso,

Mr. Sreenivasa Rao, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi and Mr. Solari Tudela. Mr. Pawlak would be an *ex officio* member, in his capacity as Rapporteur of the Commission.

*It was so agreed.*

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)**

[Agenda item 5]

**FIFTH REPORT OF THE SPECIAL RAPporteur**

**ARTICLES 1 TO 11**

2. The CHAIRMAN recalled that the General Assembly, in paragraph 1 of its resolution 41/75 of 3 December 1986, had invited the Commission to continue its work on the topic

... by elaborating an introduction as well as a list of the offences, taking into account the progress made at its thirty-eighth session, as well as the views expressed during the forty-first session of the General Assembly.

He drew attention to document A/CN.4/407 and Add.1 and 2, containing the views received from Governments pursuant to paragraph 2 of the same resolution.

3. He invited the Special Rapporteur to introduce his fifth report (A/CN.4/404), as well as draft articles 1 to 11 contained therein, which read:

**CHAPTER I. INTRODUCTION**

**PART I. DEFINITION AND CHARACTERIZATION**

*Article 1. Definition*

**The crimes under international law defined in the present Code constitute offences against the peace and security of mankind.**

*Article 2. Characterization*

**The characterization of an act as an offence against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization.**

**PART II. GENERAL PRINCIPLES**

*Article 3. Responsibility and penalty*

**Any individual who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.**

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<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

*Article 4. Aut dedere aut punire*

1. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudice the establishment of an international criminal jurisdiction.

*Article 5. Non-applicability of statutory limitations*

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

*Article 6. Jurisdictional guarantees*

Any person charged with an offence against the peace and security of mankind shall be entitled to the guarantees extended to all human beings with regard to the law and the facts. In particular:

1. In the determination of any charge against him, he shall be entitled to a fair and public hearing by an independent and impartial tribunal duly established by law or by treaty, in accordance with the general principles of law.

2. He shall have the right to be presumed innocent until proved guilty.

3. In addition, he shall be entitled to the following guarantees:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) 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, in any case where the interests of justice so require, and without payment by him, in any such case if he does not have sufficient means to pay for it;

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

*Article 7. Non bis in idem*

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of a State.

*Article 8. Non-retroactivity*

1. No person may be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

*Article 9. Exceptions to the principle of responsibility*

The following constitute exceptions to criminal responsibility:

(a) self-defence;

(b) coercion, state of necessity or *force majeure*;

(c) an error of law or of fact, provided, in the circumstances in which it was committed, it was unavoidable for the perpetrator;

(d) the order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator.

*Article 10. Responsibility of the superior*

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

*Article 11. Official position of the perpetrator*

The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility.

4. Mr. THIAM (Special Rapporteur) said that his fifth report (A/CN.4/404) was devoted to the provisions constituting the introduction to the code (chap. I), dealing with the definition and characterization of offences against the peace and security of mankind, and with general principles. That part of the topic had long given rise to impassioned debates, and some doubt had been expressed as to whether he should even take up the question of general principles. His own view had been that he could not deal with the general principles with any likelihood of success until the Commission had studied the content of the code *ratione materiae*—which it had now done. But since the question of general principles had already been discussed generally at the previous session during the consideration of his fourth report, he thought no useful purpose would be served by reopening that debate and would simply refer members to his fourth report (A/CN.4/398, paras. 146-259), to the Commission's report on its thirty-eighth session<sup>5</sup> and to the topical summary of the discussion held in the Sixth Committee of the General Assembly at its forty-first session (A/CN.4/L.410, paras. 558-581).

5. He had redrafted most of the articles in chapter I as submitted in his fourth report (A/CN.4/398, part V) to take account of the comments made in the Commission and the Sixth Committee, and had added two new draft articles (arts. 7 and 11). He had also thought it useful to draft a commentary to each article, summing up the discussions to which the texts in question had already given rise.

6. As to the method to be followed in examining the fifth report, he proposed to introduce the whole of chapter I of the draft article by article in order to facilitate discussion, but thought that a separate debate on each article should be avoided; it would be preferable to discuss all the articles together.

7. Draft article 1 dealt with the definition of offences against the peace and security of mankind. In the long discussions on that subject at previous sessions, opinion had been divided between those who favoured a general definition based on a precise criterion, and those who favoured an enumeration. During those discussions, he had become convinced that no single criterion could cover all aspects of the concept of an offence against the peace and security of mankind. He had therefore opted for a definition by enumeration, especially as the topic fell within the sphere of criminal law and hence was

<sup>5</sup> *Yearbook* . . . 1986, vol. II (Part Two), pp. 49 *et seq.*, paras. 133-182.

governed by the principle *nullum crimen sine lege*. Some members of the Commission had wanted the definition also to include the idea of seriousness, but he himself found that idea implicit in it.

8. The question of characterization, which was dealt with in draft article 2, involved the very basis of international criminal law, since the text rested on the principle of the autonomy of international criminal law and on the primacy of international law over internal law. If the idea was not accepted that international law could itself characterize a particular act as a crime independently of internal law, the draft code lost its *raison d'être*.

9. Draft article 3, which dealt with the perpetrator of the offence, had been amended in the light of the comments made at the Commission's previous four sessions. One question which had always caused some confusion was whether the criminal responsibility in question was that of the individual, that of the State or both. Without ruling out *a priori* the criminal responsibility of the State, it had to be recognized that it was not yet established in positive law and that the responsibility of natural persons was distinct from it, even though there could be a connection, for example when the individual concerned was an agent of the State. The traditional responsibility of the State was perhaps based on the idea of reparation, but in no case on that of sanction, and the Commission, which had not abandoned the study of that aspect of the matter, would have to deal with it later. In those circumstances, he had dealt only with the criminal responsibility of individuals, as stated expressly in draft article 3, the previous text of which had been too vague.

10. The question of the universal offence, dealt with in draft article 4, had led to a rich and thorough discussion. The most logical solution of the problem would be an international criminal jurisdiction; but in the absence of such an institution, and pending a decision on the advisability of establishing it, an alternative solution must be sought. Several choices were open to the Commission: the traditional solution of the territoriality of criminal law, that of the personalization of criminal law and that of universality. Since the offences in question were breaches of the law of nations, the best solution in the present circumstances was still reliance on the principle of universal jurisdiction: hence the new text he had submitted, which took account of the comments evoked by the expression "universal offence".

11. With regard to draft article 5, he observed that statutory limitations were neither absolute nor general, since they were unknown to certain legal systems and, in the systems in which they existed, they did not apply to all crimes. Nor had they ever existed in international law: there was no reference to them in the Charter of the Nürnberg International Military Tribunal.<sup>6</sup> It was only since 1968 that attention had been given to the question, and not all States had become parties to the Convention on the subject adopted that year;<sup>7</sup> moreover, that Con-

vention had given rise to reservations on the part of some of the States which had acceded to it. The question of statutory limitations had recently arisen again in connection with a trial which was due to begin shortly. In his view, any distinction that might be made between war crimes—which would be subject to statutory limitations—and crimes against humanity—which would not—would not be very useful. In his third report, he had stated the principle of the indivisibility of offences against the peace and security of mankind,<sup>8</sup> which made it impossible to apply one legal rule to one category of acts and another rule to another. Thus, as he had indicated, the rule stated in draft article 5 was not yet universally applicable.

12. The discussion in the Sixth Committee had shown that draft article 6 as worded in the fourth report was not sufficiently precise, and that the jurisdictional guarantees referred to should be set out in detail. He had therefore referred to a number of international instruments, which were listed in paragraph (1) of the commentary. He wondered, however, whether the jurisdictional guarantees provided for in the new text of the article might not have become rules of *jus cogens*. The commentary cited a number of cases in which it had been held that certain essential guarantees had to be respected, even if they had not been expressly formulated. Perhaps the best course would be to enumerate the guarantees without drawing up an exhaustive list, so as not to tie the Commission's hands; hence the use of the words "In particular" in the introductory clause of the revised text.

13. Draft article 8, on the principle of non-retroactivity, differed little from the earlier text (former art. 7), and it would be for the Commission to choose between the two. The International Covenant on Civil and Political Rights (art. 15) and the European Convention on Human Rights<sup>9</sup> (art. 7) contained rather different formulations of the principle, but there was little difference in substance. The principle of non-retroactivity in international law had given rise to a number of difficulties in so far as it rested on the observance of written law. The problem was that of determining whether, in the maxim *nullum crimen sine lege*, the term *lex* should be understood in the sense of written law, or rather in the common-law sense of law. Some conventions, such as the European Convention on Human Rights, had dealt with the problem by including the general principles of law among the rules to be observed.

14. In response to criticism of the former negative formulation of draft article 9 (formerly art. 8), he had reworded the text. The first exception to criminal responsibility set out was, of course, self-defence by individuals (subpara. (a)): any connection with self-defence as mentioned in Article 51 of the Charter of the United Nations would exist only to the extent that the individuals concerned were agents of the State. As to coercion, state of necessity and *force majeure*, although

<sup>6</sup> Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>7</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly on 26 November 1968 (*ibid.*, vol. 754, p. 73).

<sup>8</sup> *Yearbook . . . 1985*, vol. II (Part One), pp. 66 *et seq.*, document A/CN.4/387, paras. 20-39.

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

those terms were sometimes differentiated in internal law, there was no essential difference between them and they were sometimes merged or used one in place of another; he had accordingly grouped them together in subparagraph (b). Moreover, in all three cases the requirements for invoking the exception were the same: the existence of circumstances involving a grave peril which could be avoided only by committing the wrongful act. Judicial precedent also required that there be no great disproportion between the interest sacrificed and the interest safeguarded and that the wrongful act should not reflect, even unconsciously, the intentions of the perpetrator. For example, the exception of coercion could not be upheld in the case of an act having racist connotations. With regard to error (subpara. (c)), the traditional rules applied; there again, the permissible limit was set by a crime against humanity. As to superior order (subpara. (d)), it was doubtful whether that was a separate exception, since the subordinate concerned could plead that he had carried out the order either under coercion or in error. It would be for the Commission to decide whether that provision should be retained.

15. Responsibility of the superior, which was the subject of draft article 10 (formerly art. 9), might be regarded as coming under the heading of complicity; but, in view of the specificity of the matter, it perhaps merited a separate provision, as in Additional Protocol I<sup>10</sup> (art. 86, para. 2) to the 1949 Geneva Conventions.

16. With regard to the official position of the perpetrator, which was the subject of draft article 11—a new provision reproducing the text of subparagraph (a) of former article 8—he drew attention to the commentary, in which he referred to the provisions of the Charter of the Nürnberg Tribunal and the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal),<sup>11</sup> as well as the Nürnberg Principles<sup>12</sup> formulated by the Commission at its second session, in 1950, at the request of the General Assembly.

17. In conclusion, he stressed that codification consisted in the preparation of draft articles. He therefore hoped that the Commission would proceed with that task, since there had already been long general debates at previous sessions on the questions dealt with in the draft articles under consideration.

18. The CHAIRMAN thanked the Special Rapporteur for his lucid introduction of his fifth report and said that it would be preferable for the Commission to concentrate on the draft articles submitted in the report, rather than reopen a general debate on the topic as a whole.

19. Mr. CALERO RODRIGUES agreed that it was desirable to focus on the 11 draft articles submitted in the fifth report (A/CN.4/404) and avoid reopening the

general debate. Nevertheless, some of the newly elected members of the Commission might wish to state their views on other parts of the draft, such as the list of offences, and allowing them to do so was more than a matter of courtesy: it would be helpful to the Drafting Committee to learn those views in order to take them into account when working on the draft articles before it. He therefore suggested that, after the debate on the draft articles contained in the fifth report, a separate discussion should be held to permit new members to express their views on other parts of the draft if they so desired.

20. Mr. NJENGA supported that suggestion, but thought it would be more logical to hear the views of the new members before discussing the articles in the report.

21. He also suggested that the relevant parts of the international instruments listed in paragraph (1) of the commentary to draft article 6 should be circulated.

22. The CHAIRMAN said that the Secretariat would attend to that matter.

23. Mr. YANKOV said that Mr. Njenga's comment was very logical, but from a practical point of view it would be better to concentrate from the start on the Commission's main task of discussing the 11 draft articles before it. If, in the course of the discussion, any member wished to speak on other issues relating to the draft code, he should of course be allowed to do so. He suggested that, before starting on a detailed discussion article by article, the Commission should hold a general discussion on the whole set of articles, during which it would be possible for any new member to raise issues not directly relating to the texts of the 11 articles in question.

24. Mr. BEESLEY said that, although he could accept any of the proposed procedures, he would prefer to see the Commission begin as soon as possible on an article-by-article discussion. Many of the new members were already familiar with the work on the draft code, for example as representatives in the Sixth Committee of the General Assembly.

25. Mr. BARSEGOV said that there should be some measure of flexibility. The new members of the Commission should, indeed, be able to express their views on the work already done, but perhaps they did not all have the same views on how to proceed. Some might wish to deal with precise questions relating to the matters dealt with by the Special Rapporteur, whereas others might prefer to speak at greater length on more general questions. With regard to the 11 draft articles, he thought it would be more rational to examine the Special Rapporteur's fifth report (A/CN.4/404) as a whole, but he would not object to consideration of the texts article by article.

26. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to focus its discussion on draft articles 1 to 11 submitted by the Special Rapporteur in his fifth report (A/CN.4/404), without precluding any member from reverting to earlier articles of the draft code.

*It was so agreed.*

<sup>10</sup> Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (*ibid.*, vol. 1125, p. 3).

<sup>11</sup> *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

<sup>12</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

27. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that new members' comments on earlier draft articles would be particularly useful to the Drafting Committee. The course which had been adopted would serve to avoid objections on their part when the revised articles came back from the Committee.

*The meeting rose at 11.40 a.m.*

## 1993rd MEETING

*Thursday, 7 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, M. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Organization of work of the session (concluded)\*

[Agenda item 1]

1. The CHAIRMAN drew attention to document ILC(XXXIX)/Conf.Room Doc.1, which reproduced the schedule of work for the current session adopted by the Commission at its 1991st meeting, on the understanding that it would be applied flexibly as required by the progress made.

### Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

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

#### ARTICLES 1 TO 11<sup>5</sup> (continued)

2. Mr. THIAM (Special Rapporteur), repairing an omission in his introduction of his fifth report

\* Resumed from the 1991st meeting.

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

(A/CN.4/404) at the previous meeting, said that draft article 7, which was a new article devoted to the *non bis in idem* rule, seemed more opportune than ever. At the previous session, some members of the Commission had been reluctant to accept the principle of the universality of an offence, arguing that the plurality of courts—or the co-operation or intervention of several courts in trying one and the same offence—might make the offender liable to several penalties, which would violate the *non bis in idem* rule. In view of the long discussion which had then taken place, and after due reflection, he had concluded that the rule could have a place in the draft code, although that would depend on whether the idea of establishing an international criminal court was adopted or not. If it were adopted, it would be difficult to invoke the rule in question, since by virtue of the primacy of international criminal law, the court would be competent, on principle, to try international crimes. In the absence of an international criminal court, however, the inclusion of the rule seemed necessary.

3. He did not think it would be useful to spend any more time on the controversies provoked by the application of that rule in internal law and in international criminal law. In the present instance the rule came not within the framework of internal law or of *droit international pénal*, which dealt with international crimes strictly speaking, but within that of *droit pénal international*, which the legal system familiar to him distinguished from the former branch of international law and which was intended to settle conflicts of criminal law between States.

4. Mr. TOMUSCHAT said that the Special Rapporteur's well-drafted fifth report (A/CN.4/404) and lucid presentation provided a good basis for a fruitful debate. He had already discussed the general issues at the Commission's 1985 and 1986 sessions, so he would confine his remarks to the draft articles submitted in the report.

5. Referring to draft article 1, he noted that it had been suggested that it might be preferable to speak of "crimes" against the peace and security of mankind rather than "offences", in which case the title of the draft code in English would have to be changed. So far as the definition itself was concerned, it would be better if it consisted solely of a reference to the list of offences against the peace and security of mankind to be included in the code. A substantive definition might create the false impression that the category of offences was not closed, whereas what was needed was an exhaustive list of offences that could not be extended by way of judicial interpretation.

6. He fully agreed with the rule stated in the first sentence of draft article 2, but considered that the second sentence would be improved if the word "prosecuted" were replaced by "punishable". That would serve to underline that two legal orders—the international legal order and rules of internal law—coexisted.

7. He welcomed the specific reference to "any individual" which had been introduced into draft article 3. That would make it quite clear that the code dealt with the criminal responsibility of individuals.



8. In draft article 4, he considered that rather more precise rules were needed, especially in view of the danger of political manipulation. The value of the code would be enhanced if it included provision for an international criminal court, to which a number of Governments had already given their agreement, and which would provide a test of the seriousness of the intentions of States. Objectiveness and impartiality in the application of the criminal law were of paramount importance, for in the absence of those qualities, the code would be meaningless. The choice not only of judges, but also of the prosecution, was important. He was not advocating *realpolitik*, but not every judicial system could be fully trusted to be totally objective and impartial *vis-à-vis* foreigners regarded as enemies of the State. That was why many constitutions barred the extradition of nationals. Moreover, it was easy to bring a charge against an individual. Being deprived of the traditional protection of immunity, cabinet ministers or civil servants might be compelled to answer an accusation that they had committed a crime against the peace and security of mankind and would become liable to arrest and detention even when performing their functions abroad as agents of the State they represented. All those considerations pointed to the fact that an international criminal court was an essential element of the system to be established under the code.

9. In any event, the system the Special Rapporteur proposed would have to be refined and co-ordinated with the existing rules on jurisdiction. The question to be decided was whether to replace, or supplement, existing régimes. Genocide, for instance, was recognized as a crime against humanity, but the relevant provisions conferred jurisdiction primarily on the State in whose territory the genocide had been committed. A distinction, or a series of distinctions, might well have to be drawn. The Special Rapporteur had stressed the indivisibility of the concept of an offence against the peace and security of mankind, but nuances could be perceived: for instance, grave violations of the rules of war in a specific instance did not affect the international community to the same extent as the launching of a war. Hence there was a need for more detailed rules on jurisdiction. Furthermore, pending the establishment of an international criminal court, a transitional régime could be introduced. The International Law Association, for example, had proposed the creation of an international commission of criminal inquiry, which would elucidate the circumstances surrounding an alleged offence against the peace and security of mankind.<sup>6</sup> Such an inquiry could serve to pin-point responsibility, while at the same time exposing the author of the offence to national and international criticism with a very useful preventive effect.

10. While he basically agreed with the rule laid down in draft article 5, his agreement was not unqualified, for that rule depended to a large extent on the seriousness of the crimes to be listed in the code, and it might therefore be necessary to revert to article 5 after that list had been

adopted. The practical difficulties of gathering evidence must also be borne in mind: indeed, the rules on statutory limitations derived to some extent from those difficulties. If evidence was taken years, or even decades, after the crime had been committed, witnesses became unreliable and no really useful trial could take place.

11. Draft article 6 had been greatly improved by the introduction of the basic guarantees for a fair trial. The Special Rapporteur had rightly taken as his guide the guarantees laid down in the International Covenant on Civil and Political Rights; that instrument, which had been adopted by the General Assembly in 1966 and to which 85 States were now parties, was the right standard to apply.

12. The provision in draft article 7 was a necessary element of any civilized system of international law and should be retained. Draft article 8, the new text of which was based on article 15 of the International Covenant on Civil and Political Rights, likewise had his support.

13. An initial question concerning draft article 9 was whether a list of exceptions to criminal responsibility was really necessary. The answer depended to some extent on whether jurisdiction would be conferred on an international criminal court or on national courts. In the former case, exceptions to criminal responsibility would have to be provided for in the rules to be applied by the court, since it could rely on no other text. In the latter case, it could be left to internal law to determine the permissible defences. Such a system could, however, seriously jeopardize uniformity in the application of the law, for judges would respond differently, according to their national laws and practices, to the same defence put forward by an accused, whose conviction might thus depend on the accidental determination of the forum. In principle, therefore, he agreed with the Special Rapporteur on the need to establish a list of defences.

14. Another question raised by article 9 was whether to include a rule to the effect that an offence against the peace and security of mankind could only be committed with intent, never negligently. The rule proposed by the Special Rapporteur with regard to error suggested that an individual could be charged with negligent acts, since error provided a defence only if, and to the extent that, the error was unavoidable. His own view was that offences against the peace and security of mankind generally presupposed that the author had acted wilfully, deliberately and in full knowledge of what he was doing. He did not exclude the hypothesis of extreme instances in which an act of negligence deserved to be characterized as an offence against the peace and security of mankind, but thought the matter called for further consideration.

15. As to the list of exceptions to criminal responsibility proposed by the Special Rapporteur, he doubted whether an act characterized as an offence against the peace and security of mankind could ever be justified on the grounds of self-defence. In particular, military activities undertaken in response to aggression by another State did not normally constitute such an offence, but war crimes could never be justified by Article 51 of the Charter of the United Nations. There again, however,

<sup>6</sup> See the Association's work on this subject in ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), pp. 421 *et seq.*, and *Report of the Sixty-first Conference, Paris, 1984* (London, 1985), pp. 263-264.

he would not categorically deny that there might conceivably be instances in which a plea of self-defence was justifiable. To be on the safe side, therefore, provision for such a plea should be retained.

16. *Force majeure* certainly did play a part in inter-State law, as well as in relations between individuals in civil and common law. If, for reasons of *force majeure*, a State failed to comply with an obligation under international law, it might be relieved of that obligation. In the case of individual criminal responsibility, however, an offence against the peace and security of mankind presupposed human conduct, whether in the form of an act or of an omission; but in the case of *force majeure* no human conduct was involved, only the forces of nature. Careful thought should therefore be given to the need to include *force majeure* as an exception; his own view was that it could be dispensed with.

17. With regard to coercion and state of necessity, he noted that the requirement that a grave, imminent and irremediable peril must exist, included in the earlier text of the article (former art. 8, subpara. (b)) submitted in the Special Rapporteur's fourth report (A/CN.4/398, part V), had been deleted. In his view, however, it was a useful requirement and should be retained.

18. He agreed with the rule on error as far as errors of law were concerned; the Commission might wish to consider at a later stage whether also to include the defence of insanity. The position with regard to error of fact was different, however, for as he had mentioned, offences against the peace and security of mankind usually presupposed criminal intent. Consequently, an error might wipe out the particularly reprehensible character of the act concerned. Supposing, for instance, that a pilot intending to drop a bomb on enemy troops dropped it instead on a city which was not a military target, and supposing further that he was misled by a navigational error, he should not be treated as a war criminal. A difficult question of principle was involved, which called for further discussion; it was important to decide whether criminal intent was a necessary element of an offence against the peace and security of mankind, so that error would relieve the offender of criminal responsibility.

19. Lastly, with regard to the exception made for orders of a Government or of a superior, he feared that the reference to moral choice might introduce a serious ambiguity into the provision.

20. Mr. REUTER, after commending the Special Rapporteur for his learning, good sense and industry, observed that only the criminal responsibility of individuals was in question at the current stage. While he welcomed that decision, he wondered whether the new text of draft article 3 was sufficient, since the question of the criminal responsibility of the State, as enunciated in article 19 of part 1 of the draft articles on State responsibility,<sup>7</sup> remained before the Commission. He would therefore prefer that the relations inevitably existing between the criminal responsibility of the individual and that of the State should not be excluded forthwith; if the criminal responsibility of the individual

called for punishment, so did that of the State. It remained to be seen whether it was possible to formulate general rules concerning punishment of the State. Personally he doubted it, and he therefore suggested that it should be specified that the new text of draft article 3 was without prejudice to any decisions the Commission might take on the question of the criminal responsibility of the State. In other words, he would be inclined to accept individual criminal responsibility applying to agents of the State even if, for one reason or another, the Commission or the Sixth Committee of the General Assembly decided not to deal with the criminal responsibility of the State.

21. He approved of the Special Rapporteur's proposed procedure of laying down the general principles and then drawing up a list of criminal acts, which would, ideally, be an exhaustive list, although that would be difficult to establish. He was not certain, however, that all the general principles would apply to each of the crimes identified. Consequently, he thought that a provision should be inserted in the general principles indicating that they applied to the different crimes listed, subject to any specification or modification relating to any one of them.

22. With regard to draft article 4—a key article, since it concerned the obligation to extradite or try the offender—the Latin title *Aut dedere aut punire* was not satisfactory: the obligation to try the offender should take precedence over the obligation to punish.

23. He interpreted paragraph 1 of article 4 as meaning that the obligation to try or extradite the offender was subject to his arrest. But what would happen if States acting in bad faith did not arrest the perpetrator of a crime because they were not under an obligation to do so? He therefore suggested—although he would not press the point—that the text of the paragraph should be amended to read:

“1. Every State has the duty to try or extradite any individual within its jurisdiction who has committed an offence against the peace and security of mankind.”

He also hoped that, failing agreement on the point, the Commission would, for the time being, refrain from pronouncing on the question of establishing an international criminal court—the solution he would prefer. On the other hand, it might already consider including in the draft code a provision limiting the competence of the international criminal court to the most serious crimes; or it might provide for the possibility of making reservations to the future instrument; or again, it might explore the possibility of extending the authority of national courts, while legally preserving their individual character, so that they could try the offences listed in the code.

24. Mr. MAHIU congratulated the Special Rapporteur on the precision, conciseness and rigour of his fifth report (A/CN.4/404).

25. Referring to draft article 1, he recalled that he had previously supported the idea of including the notion of seriousness in the general definition of offences against the peace and security of mankind. In the light of the Special Rapporteur's written and oral explanations,

<sup>7</sup> Yearbook . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

however, he was willing to support the simple broad definition now proposed, on the understanding that the offences covered, which would be the most serious offences, would be enumerated in a list.

26. Draft article 2 raised the problem of the relationship between internal law and international law, and paragraph (7) of the commentary thereto gave a clear account of the difficulty. The instrument in course of preparation could indeed be meaningful only if States applied it honestly. But that would not always be the case, for the characterization of offences against the peace and security of mankind under internal law or international law would leave many loopholes, especially if characterization under internal law were to take precedence over characterization under international law. Moreover, if the choice between national jurisdiction and international jurisdiction were left open, States would probably prefer to try in their national courts the perpetrators of the crimes coming under their internal law, for instance if that law prescribed lesser penalties. Article 2 therefore required further consideration. As to the commentary, he found it useful and interesting, but would prefer all quotations to be removed from the final version, so that it would essentially reflect the opinion of the Commission.

27. On draft article 3, his opinion was slightly different from that of the Special Rapporteur and Mr. Tomuschat, and he would prefer the article not to prejudge the content of the code. In view of the differences of opinion on the very complex question whether to deal only with the criminal responsibility of individuals or also with that of States, and in view of the link between article 19 of part 1 of the draft articles on State responsibility, adopted by the Commission on first reading,<sup>9</sup> and the draft code under consideration, it would be better to reserve the future decision and not rule out forthwith the possibility of also dealing with the criminal responsibility of States. The debates in the Commission and in the Sixth Committee of the General Assembly had shown that the question was far from being settled and that, although the Commission had decided at the first stage to confine the draft code to the criminal responsibility of individuals, that was only for practical reasons and considerations of efficiency. He therefore proposed that the Commission should revert to the former text of draft article 3 or place the words "person" and "individual" in square brackets in the new text. When the time came, and a decision had been taken, the superfluous word and the square brackets could be deleted. It would also be possible to adopt the solution proposed by Mr. Reuter and specify that the provisions of the code were without prejudice to any decisions the Commission might take concerning the criminal responsibility of States.

28. With regard to draft article 4, he was grateful to Mr. Reuter for raising the question of the Latin title. As to his remarks on the link between arrest and extradition or trial, he thought it was more a matter of drafting than of substance, which the Special Rapporteur would no doubt be able to deal with.

29. Paragraph (6) of the commentary to draft article 4 was too negative in his opinion; while he understood the

difficulties and objections that had been put forward concerning the establishment of an international criminal court, he hoped that the Commission would retain the two options proposed, since the debate remained open both in the Commission and in the General Assembly.

30. Draft article 6 was important in view of judicial practice and the polemics occasioned by trials held in the distant or more recent past. The only question that arose was whether to formulate the article very broadly, as in the former version, or in more detail, enumerating the jurisdictional guarantees which every accused should enjoy. Personally, although he found the former version too elliptical, he was not sure that it was necessary to enumerate all the jurisdictional guarantees. Thus, while he supported paragraphs 1 and 2 of the new text, he had some doubts about the wording of paragraph 3. It might be better to adopt a flexible and open formulation, even if that made it necessary to refer to the existing international conventions on the matter and to general principles of law. He had no fixed opinion on the question, and was well aware of the difficulties involved.

31. Convinced by the Special Rapporteur's written and oral explanations, he accepted draft article 7, which had its place in the future instrument; but the justification for the article would of course depend on whether an international criminal court was established or not.

32. Having been among those who had advocated a positive formulation, he could only approve of the new text of draft article 9, though he was well aware that the number and nature of the exceptions to be provided for in the code were still open to discussion. With regard to the exception of self-defence, and noting that, according to paragraph (2) of the commentary, what was meant was self-defence by the individual, he questioned whether that was really the case where acts in response to aggression were concerned. Was it not rather self-defence by the State, the nation or the people? With regard to error of law or of fact, after hearing Mr. Tomuschat's comments he would like the Special Rapporteur to clarify the meaning, nature and scope of error and its consequences.

33. As to draft article 10, he agreed that it would be useful to provide a separate basis for the responsibility of the superior and to distinguish it from the notion of complicity (para. (6) of the commentary). That would be a good solution, although he was prepared to support any formulation by which the separate responsibility of the superior could be referred to under the general theory of complicity.

34. Mr. BENNOUNA said that he would speak only on a few specific points; for the rest, he shared the views already expressed by other members of the Commission. In any case, the draft articles proposed would further the progress of the draft code considerably.

35. He had been considering the relationship between the draft code and *jus cogens*, which was a complex and controversial concept. If there was to be a universal offence, there must also be a universal rule of law. That

<sup>9</sup> *Ibid.*

was a difficult point to deal with, because of the political nature of the question and the legal complexity of a concept which had never before been a subject for the development and codification of law. That observation led him to reflect on the means of reconciling the universality of the offence and of the rule with the consensual nature of an instrument whose adoption would require the assent of States. In that connection he reminded the Commission of the difficulties encountered during the Third United Nations Conference on the Law of the Sea concerning affirmation of the concept of the "common heritage of mankind" in the text of the 1982 Convention. Two ways of proceeding had been open to the Conference: one had been to adopt the Convention by consensus, which would have been consistent with the quest for universality, but which had failed; the other had been to establish the peremptory character of the concept in the text of the Convention itself, which had been the solution adopted.

36. At the present stage of its work, the Commission also faced a difficulty caused by the need to draft principles without having a general idea of the offences to be covered by the code, some of which might be more important than others for safeguarding the peace and security of mankind. That difficulty weighed on the draft articles, and above all on the definition of the offences concerned.

37. Draft article 1 had the merit of simplicity. The absence of a consensual approach might be regretted, but the solution of enumeration was understandable. Nevertheless, the article also had the disadvantages of simplicity: would the enumeration be exhaustive or not? Everyone knew that the list of offences might get longer: the modern world was the scene of an increasing number of acts such as mercenarism and terrorism, so it was not impossible that new types of crime might appear. That being so, how could the Commission be sure that the code would cover unforeseen circumstances?

38. Moreover, certain crimes were already the subject of particular conventions: the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, and the Convention on the Prevention and Punishment of the Crime of Genocide, for example; and an *Ad Hoc* Committee of the United Nations was working on a draft convention on mercenarism. The Commission would therefore have to construct some sort of bridges between the draft code, which was of a general character, and those instruments. He had no categorical answer to that problem, but would suggest an enumeration to be followed by a phrase such as: ". . . without prejudice to any new characterizations that may be established by general rules recognized by the international community as a whole." Of course, those rules, like the code itself, would have to be of a peremptory nature.

39. The same difficulty arose with regard to draft article 4, which would play a fundamental part if the idea of establishing an international criminal court was not adopted. That idea might be intellectually tempting, but he remained sceptical about the practical possibility of setting up such an institution in the absence of an outburst of fraternity transforming international relations, and unfortunately such movements resulted more often

from suffering than from enthusiasm, as was shown by the establishment of the Nürnberg Tribunal at the end of the Second World War. The Commission should therefore go more deeply into the affirmation made in paragraph 1 of the former draft article 4, which had appeared to be a postulate as compared with the consensual character of the draft code. There again, how could a rule of *jus cogens* be reconciled with the consensual character of the future instrument? From the notion of a universal offence there followed the notion of universal prevention and punishment. Should that not therefore be more clearly affirmed by saying that an offence against the peace and security of mankind was a breach of rules recognized by the international community as a whole, from which no State could derogate?

40. Mr. BARSEGOV said that the Soviet Union's attitude to the preparation of the draft code was dictated by the ever-growing significance of international legality and the international legal order, as had been pointed out in particular in the Soviet memorandum entitled "The development of international law".<sup>9</sup> The drafting of a code of offences against the peace and security of mankind was of particular importance and current interest because of the preventive role the code would be called upon to play. Its object was, indeed, to prevent international crimes such as nuclear war, aggression, State terrorism, genocide, *apartheid*, the use of mercenaries and other crimes liable to injure civilization itself.

41. Referring to General Assembly resolution 41/75 of 3 December 1986, and in particular to the fourth preambular paragraph, he said that the Assembly was inviting the Commission to attach the greatest importance to its work on the topic in order to complete the draft code, and to continue by elaborating an introduction as well as a list of offences, taking into account the progress already made (para. 1). He was convinced of the usefulness of drawing up such a list, but thought that it presupposed the drafting of a coherent definition. It was desirable that the definition should reflect the most characteristic and significant features of those categories of acts, which attacked the very foundations of human existence, injured the vital interests of the international community and were regarded as criminal by that community as a whole. He was aware of the difficulties raised by such a definition, but hoped that other members of the Commission would agree with him on that point. The Commission could then continue its work, reserving the possibility of reverting to a more elaborate definition at a later stage.

42. In preparing the draft code, the Commission should be guided by the main instruments of international law, such as the conventions and resolutions adopted by the General Assembly relating to nuclear war, aggression, State terrorism, genocide, *apartheid*, etc., to each of which crimes he would revert later in greater detail.

43. The Special Rapporteur had rightly set out the principle of the criminal responsibility of the individual, and he himself approved of the new text of draft article 3.

<sup>9</sup> Document A/C.6/41/5.

44. The basic idea of draft article 4 was not in doubt: the principle *aut dedere aut punire* was designed to render imprescriptible the punishment of persons who had committed offences against the peace and security of mankind. But the idea expressed in the article needed to be made more precise, for as at present drafted the text raised several questions. For example, the expression “perpetrator of an offence against the peace and security of mankind” presupposed that the guilt of the person concerned had already been established and that a judgment had been rendered against him; hence he could not be tried again for that offence. Nor was it clear for what purpose he would be extradited to another State: would it be in order to be tried or to serve his sentence? It might also be asked to what State he would be extradited: the State in whose territory he had committed the offence or the State of which he was a national?

45. It sometimes happened that the problem of extradition was linked with political motives, and experience in the matter led him to suggest a new paragraph 2 worded as follows:

“2. Persons accused of having committed an offence against the peace and security of mankind shall be tried by a competent court of the State in whose territory the offence was committed.”

That principle of territorial jurisdiction, recognized in international law and widely applied in internal law, could even be regarded as a general principle of law within the meaning of Article 38, para. 1 (c), of the Statute of the ICJ; and from the point of view of general humanitarian morality, it was only right that a criminal should be punished according to the law of the country upon whose people he had inflicted suffering. In that connection he reminded the Commission of the bases laid down in the Charter of the Nürnberg Tribunal<sup>10</sup> and confirmed by the subsequent development of international law. As the Special Rapporteur had noted, however (para. (3) of the commentary to art. 4), it was not impossible that the extradition of persons charged with crimes committed for political motives might meet with difficulties. It would thus be advisable to include the following provision:

“For the purposes of extradition, offences against the peace and security of mankind shall not be considered to be political crimes.”

If there was reason to believe that, for example, a State which had organized genocide would not take the necessary steps to bring the person concerned to trial, he could be tried by the courts of the State in which he had been detained; that was fully in conformity with the principle *aut dedere aut punire*. The clause he had proposed would form paragraph 3 of draft article 4, and paragraph 2 of the text submitted by the Special Rapporteur would become paragraph 4.

46. He was in favour of strengthening the preventive character of the code and, in the present circumstances, the essential potential of the code should lie in paragraph 1 of article 4, which should be worded as clearly as possible.

47. To that provision was linked draft article 5, on the non-applicability of statutory limitations, which was one of the central provisions of the draft code. The Special Rapporteur noted in the commentary that there was no uniformity on statutory limitations, and that certain States provided in their law for a limitation applicable to the kind of offences with which the Commission was concerned. In the Soviet legal system, the non-applicability of statutory limitations to offences against the peace and security of mankind rested on intangible foundations constituted by humanitarian morality and a will to prevent any repetition of such offences in the future. As the conscience and morality of the people could not accept that the perpetrators of the most serious crimes of all should go unpunished, the Presidium of the Supreme Soviet of the Soviet Union had in 1965 adopted a special decree providing for the punishment of persons guilty of offences against the peace and security of mankind or of war crimes, irrespective of when the offence had been committed. He then quoted a passage from that decree which showed that the Soviet Union, in establishing the non-applicability of statutory limitations, had relied upon general principles recognized by international law, as stated in the Charter of the Nürnberg Tribunal and in the resolutions of the General Assembly.

48. That principle of international law was confirmed by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which had come into force in 1970. It was impossible for States which applied statutory limitations not to take that Convention into account: evidence of that was provided by the Klaus Barbie trial. If the Commission confirmed the principle in draft article 5, it must be logically consistent and supplement that article with a provision to the effect that national legislations must accept and adopt that rule of international law. The necessary provision might read:

“States are required to adopt constitutional provisions or to take any legal or other measures that may be necessary to ensure that statutory limitations do not apply to judicial proceedings or to measures of prevention and punishment relating to offences against the peace and security of mankind.”

49. With regard to draft article 6, on jurisdictional guarantees, his main concern was to ensure better co-ordination between the draft code and the relevant instruments of international law, in particular those which had acquired a universal character. Specifically, the principle of the equality of all before the law, enshrined in article 14 of the International Covenant on Civil and Political Rights, must be reflected in the code.

50. The text of draft article 7 should be more precise, in order to make it quite clear that no one could be tried twice for the same offence. Nevertheless, if the perpetrator of a crime had been prosecuted for committing an act punishable under ordinary law—murder, for instance—that did not mean that he could not be prosecuted for the same act on a different charge, such as that of committing an offence against the peace and security of mankind.

<sup>10</sup> See 1992nd meeting, footnote 6.

51. The text of draft article 8, on non-retroactivity, should be no obstacle to the prevention and punishment of acts already characterized as offences against the peace and security of mankind under the terms of conventional or other rules of international law in force.

52. Draft articles 9 and 10 injected into the draft code principles of criminal law relating to quite different categories of crime, the automatic transposition of which into the code would undermine the *raison d'être* of the instrument being drawn up. Besides, those two draft articles conflicted directly with the useful provisions proposed by the Special Rapporteur for other articles. For instance, how could there be self-defence in the case of aggression, recourse to nuclear weapons or genocide? It seemed clear that the Commission should be guided in those instances by the Charter of the Nürnberg Tribunal, which the Special Rapporteur had followed in drafting article 11.

53. Mr. BEESLEY said that he had some general observations to make in the light of the interesting statements made by previous speakers on a topic that was generally admitted to be as difficult as it was important.

54. The problems involved were not only substantive, but also procedural, and the procedural problems had to be dealt with if the code was to achieve its intended purpose. The Commission had been instructed to build an edifice without knowing on what foundation. For instance, it was essential to determine whether the Commission was contemplating the establishment of an international criminal court or whether the application of the code was to be left to national courts. That fundamental question would have to be considered when examining every article of the draft code and might even be seen as a prior condition on which acceptance of the Commission's recommendations by Governments would depend.

55. The draft code was intended to apply to individuals, but the question whether its provisions would also apply to States was going to be left open; that would appear also to leave open the question whether the courts of one State would be able to find another State criminally responsible. The Commission must try to settle that question and submit its proposed solution to States: it would then be for Governments to decide whether the proposed solution was acceptable or not. Of course, that difficulty would be removed by the establishment of an international criminal court, but so far that was not being considered.

56. The problem of the application or implementation of the code also had a bearing on the question whether a relaxed approach could be adopted to the degree of specificity of the list of offences and of possible defences. It had to be borne in mind that marked differences existed between the various legal systems on points of criminal law: for example, the presumption of innocence was not accepted in the same way in all systems. Hence the Commission would have to call upon expertise in criminal law before it completed its task; otherwise, the final product might not be accepted.

57. Another problem was that of offences not committed deliberately, which would arise if it was intended that the draft code should cover acts committed by negligence or in error. The approach to that type of offence was not at all uniform in the various legal systems. Most of them drew a distinction between civil wrongs and criminal wrongs; some established a gradation, so that in grave cases a civil wrong could become a crime.

58. Turning to the notion of non-retroactivity, the usefulness of which was undeniable, he observed that there had been cases of international tribunals applying international criminal law retroactively. The problem therefore required a cautious approach.

59. The approach to extradition varied from one State to another, particularly as to the effect of nationality. National courts certainly could not be expected to apply the law uniformly in that matter.

60. The idea of making the list of offences non-exhaustive also raised some problems. Such a list could probably be applied by an international tribunal, but not by national courts. To give but one example, one man's freedom fighter was another man's terrorist. Such concepts as aggression and genocide overlapped with notions of human rights, the laws of war and humanitarian law. Hence the Commission would have to consider whether it was going to develop an umbrella convention, leaving the more specific points to specialized instruments. In such matters as human rights, outer space and the environment, the process of codification had begun with a declaration of principles, which had later developed into substantive law. But he did not believe that such an approach was suitable for offences against the peace and security of mankind.

61. It was necessary to decide whether it was intended that the code should be applied by an international tribunal or by national courts, for that choice would have an effect on the terms in which every single article was drafted.

*The meeting rose at 1 p.m.*

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## 1994th MEETING

*Friday, 8 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Prince Ajibola, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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**Draft Code of Offences against the Peace and Security of Mankind' (continued)** (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLES 1 TO 11<sup>5</sup> (continued)

1. Mr. CALERO RODRIGUES said he regretted the fact that the unduly general term "offences" continued to be used in the English title and text of the draft code and suggested that it should be replaced by the term "crimes", as in the French and Spanish versions.

2. Noting that the draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404) were presented under the heading "Chapter I. Introduction" and that that chapter was subdivided into two parts ("Definition and characterization" and "General principles"), he suggested that the draft should be re-arranged in accordance with the usual practice, which was to divide drafts into parts and parts into chapters. He also saw no reason for separating articles 1 and 2 from the remaining articles and suggested that they should all come under a single heading, namely "General provisions".

3. Draft article 1 was quite satisfactory. Although it was not, strictly speaking, a definition, it did apply an objective criterion for determining what constituted a crime against the peace and security of mankind, as was done in criminal law.

4. Draft article 2 specified that the characterization of an act as an offence against the peace and security of mankind was independent of internal law, as was appropriate in a code that would become effective under an inter-State agreement. There was, however, no need for the second sentence.

5. Draft article 3, which defined the scope of the code *ratione personae*, now made it clear that the code would apply to "individuals". That removed any ambiguity to which the use of the term "person" in the former text might have given rise. It would have been ill-advised to extend the scope of the code to the criminal liability of States; moreover, historically, all the major trials held following the Second World War had been instituted against individuals. He nevertheless suggested that article 3 should contain a new paragraph 2 reproducing the text of draft article 11: "The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal

responsibility." That provision had a logical place in an article entitled "Responsibility and penalty".

6. In draft article 4, which dealt with the very sensitive issue of a universal offence, the proposed new title should read: *Aut dedere aut judicare*, and not *Aut dedere aut punire*. Although a State had a duty to bring the individual in question to trial, it would have a duty to punish only if the individual was found guilty. Since objections had been raised to the use of a Latin title, the Drafting Committee might replace the title by a formula expressing the duty of States to try or to extradite the individual concerned.

7. The question of a universal offence also arose in connection with instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>6</sup> under which States parties had an obligation to legislate against torture. The draft code would contain provisions that would be directly applicable to individuals; hence the question of the body that would be responsible for its implementation. The best solution would naturally be to set up an international criminal jurisdiction for the purpose. However, since many Governments were unlikely to accept that solution, the only alternative was to leave implementation to national courts. The Special Rapporteur had not prejudged the issue. He himself considered that, if the draft code did not provide for an international jurisdiction, it would have to be determined which State's legal system would be competent.

8. With regard to the wording of draft article 4, he agreed with Mr. Reuter (1993rd meeting) that it was inaccurate to refer to a perpetrator "arrested" in the territory of a State. The provision was intended to apply to a perpetrator found in the territory of a State. If he was not already under arrest, it was the duty of the State to arrest him.

9. Extradition raised the problem of the prohibition of the extradition of nationals that was contained in the constitutions of certain countries. The establishment of an international criminal jurisdiction might obviate that problem and it would then not even be necessary to use the term "extradite".

10. He suggested that draft article 4 might be amended to read:

"Every State has the duty to take all the necessary measures to ensure that persons accused of crimes against the peace and security of mankind are brought before the judicial authority competent to try those crimes under the present Code."

11. As to draft article 5, which he found acceptable, he said that limitations in criminal law were related to the gravity of the offence. Since all crimes against the peace and security of mankind were extremely serious, statutory limitations should not be applicable to them. The argument that it might be difficult to bring a perpetrator to trial after many years should not affect that principle.

12. He had doubts about the long, non-exhaustive list of jurisdictional guarantees contained in draft article 6

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

<sup>6</sup> General Assembly resolution 39/46 of 10 December 1984, annex.

and would prefer the former text, which merely affirmed the principle involved. By definition, trials would be held in accordance with procedural rules, which might be national or international. If such rules were to be international, they would have to be defined and it was at that stage that the various guarantees should be set out in detail.

13. He agreed with the principle embodied in draft article 7, but had some doubts about the way it was worded. Since the draft code was supposed to be autonomous and governed by international law, it was difficult to see how a trial could be prevented because a State had exercised its jurisdiction by applying its national law. The text of article 7 should be reworded to make it clear that it did not rule out the possibility of a second trial, only the duplication of sentences. A person who had already served a term of imprisonment for a crime would be entitled to have the time served deducted from the new sentence. That was the system provided for under the Brazilian criminal code when an offender had already served a term of imprisonment abroad for the same offence, and he believed that that approach was also followed in other legal systems.

14. As to draft article 8, he agreed with paragraph 1, but had doubts about paragraph 2, which would allow trial and punishment for an act or omission which, at the time of commission, had been "criminal according to the general principles of law recognized by the community of nations". Punishment could be inflicted only for acts which were characterized as crimes by a specific instrument. The draft code was such an instrument and only the acts to which it referred could be made punishable. In that connection, it was worth recalling the criticisms levelled against the trials of major war criminals held following the Second World War.

15. With regard to draft article 9, he suggested that self-defence should be excluded from the list of exceptions to criminal responsibility. The Special Rapporteur had previously accepted self-defence as an excuse only in cases of aggression. He himself could not imagine self-defence as justifying any of the acts to be listed in the draft code.

16. If coercion was to be considered an exception, the perpetrator of the criminal act in question had to be able to show that he would have been in "grave, imminent and irremediable peril" if he had put up any resistance. Coercion might be combined with superior order. A simple order could, of course, not rule out responsibility, but if coercion had been applied to have an order obeyed, then it was coercion and not the order which could be invoked as a justification.

17. He was of the opinion that no reference should be made to state of necessity, only to *force majeure*. In every situation involving state of necessity, the individual always had a choice, but that was not true in the case of *force majeure*. Experience also showed that the concept of state of necessity could lead to abuses. Moreover, few national systems of criminal law recognized that concept.

18. The reference to error should include only errors of fact, not errors of law. The crimes to be defined in

the draft code would invariably be very serious crimes for which no plea of error could be allowed.

19. He suggested that the list in draft article 9 should contain other exceptions relating to the age of the accused, insanity and related conditions. Should minors and insane or intoxicated persons be held criminally responsible? The matter had to be carefully considered.

20. He also believed that chapter I of the draft code should deal with attempt and complicity. In draft article 14 as submitted in his fourth report (A/CN.4/398, part V), the Special Rapporteur had treated those matters as "other offences". That position was untenable. Attempt was not a separate crime: it was the commencement of the execution of a crime; it was part of a crime. The question that arose was one of determining how much responsibility attached to the author of an attempt and how the penalty for the crime should be applied to him. As for complicity, the question was how to attribute responsibility to several persons for the same crime. In both cases, there was only one crime. Accordingly, the proper place for those questions was in the general provisions of part I, not in the part of the code which described specific crimes. Moreover, that was the approach adopted in many criminal codes. In the Italian penal code, for example, attempt was dealt with in article 56 and complicity in articles 110 *et seq.* of Book I, namely the general part of the code. A similar arrangement was adopted in the Brazilian, French, Mexican and Venezuelan codes, as well as in those of the German Democratic Republic and the Federal Republic of Germany.

21. Mr. Sreenivasa RAO said that the present topic had to be considered in the context of a predominantly State-oriented system in which international law and internal law influenced one another. The present State system did not allow the establishment of an international criminal jurisdiction that would be independent of States. The Commission should concentrate on the content of the code and on mechanisms for its implementation and decide on the format in which the code and its implementation should be presented.

22. The basic mechanism for the implementation of the code should be States and their judicial institutions, the important principle being the duty to try or to extradite. As to the content of the code, various types of conduct had already been recognized as crimes or offences against the peace and security of mankind and that list was based on a growing consensus derived from existing international treaties and conventions, General Assembly resolutions and the legislation of many countries. To that list must be added the serious offences which had recently been recognized as terroristic and which were regarded as non-political for the purposes of extradition.

23. States alone could be the mechanism for enforcing or implementing the code, since only they now had the necessary infrastructure: investigating agencies, means of gathering evidence and presenting it in court, and systems for trial and punishment. Once that was accepted, account had to be taken of the recent development of two principles. The first was that of territoriality, which did justice to the availability of evidence



and responded to the need to placate the outraged conscience of society. The second, namely the principle of “subjective-objective territoriality”, was also known as the “principle of effect” and was an extension of the first. It came into play when an offender, using the territory of one State, affected—or intended to affect—the peace, good order and security of another State or States and their peoples. That doctrine of effect had recently been incorporated in an extradition treaty concluded by Canada and India.

24. The commentaries to the draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404) often gave a detailed account of doctrinal differences without attempting to reconcile them. He would have preferred the commentaries to contain a composite statement of the concepts involved in each article; if the Special Rapporteur had to describe conflicting points of view, he should at least try to reconcile them and indicate which one he preferred.

25. Draft articles 1 and 2 appeared to suffer from the need to reconcile conflicts between the international and internal systems of law. There was, however, no need for such conflicts to be reflected in the draft code. Those two draft articles and the commentaries thereto should be re-examined from the point of view of the harmonization of the two systems of law. As to draft article 2, the principle of the avoidance of double jeopardy, which was a cardinal principle of criminal justice, had to be respected as fully as possible.

26. With regard to draft article 4, the concept of universal jurisdiction included in the former text should be retained and mentioned either in the title or in the body of the new text. The need to give priority in appropriate cases to extradition rather than the duty to try an offender, particularly where the principle of effect became relevant, should also be emphasized. Paragraph (3) of the commentary referred to the difficulty of securing extradition, especially when offences were politically motivated. That difficulty could, however, be overcome if, as had been suggested, the political plea were disallowed in the case of offences covered by the code. He also considered that the Special Rapporteur should develop the theme of the last sentence of paragraph (4) of the commentary and wholeheartedly endorsed the last sentence of paragraph (5). A number of treaties on the suppression of terrorism were being negotiated and that indicated a willingness on the part of States to surrender criminals where offences against the peace and security of mankind were involved. He noted that, in paragraph (6) of the commentary, the Special Rapporteur had asked whether the international community was ready for an international criminal jurisdiction. That question showed that he realized that the international community was not ready for such a jurisdiction. There was therefore no dichotomy or conflict in conception and international law would be implemented through internal and internationally agreed mechanisms.

27. Draft article 5 stated a very important principle and, while the common law knew no such limitations for crimes other than the natural limitations imposed by the need to secure reliable evidence, he fully endorsed that principle, which had its place in the code. It was im-

material, in his view, whether a substantive or a procedural rule was involved and there was no need to address that issue, as the Special Rapporteur had done in paragraph (1) of the commentary. If, as he assumed, the first sentence of paragraph (4) of the commentary meant that, for the purposes of the code, war crimes and crimes against humanity were the same, that point should be brought out more clearly.

28. In draft article 6, he would prefer the expression “with regard to the law and the facts”, in the introductory clause, to be replaced by “with regard to due process of law”, which was a well-known legal concept, at least in common law. He also noted that, while the Special Rapporteur had identified a number of the basic principles involved, he had not mentioned that of the burden of proof borne by the prosecution.

29. The principle *non bis in idem*, laid down in draft article 7, should be given more detailed consideration.

30. Draft article 8 likewise stated an important principle, which involved the concepts of fairness and moral culpability. If an act deemed to be an offence at a particular time had been committed wilfully and with intent, it became a crime punishable by law. In the absence of consensus on the moral culpability of conduct prior to the enactment of the code, retroactivity would of course not apply.

31. Draft article 9 required careful examination. He rejected self-defence as a proper exception to the application of the code, but considered that coercion and *force majeure*, both of which concerned the establishment of *mens rea*, could be included, as could error of law and error of fact. The reference to moral choice in the exception relating to the order of a Government or of a superior should, however, be deleted, without prejudice to the basic concept of moral culpability, which formed the very foundation of criminal law and the establishment of criminal intent.

32. Draft article 10 should also refer to the well-known concepts of “actual knowledge”, “constructive knowledge” and “contributory negligence”. Lastly, draft article 11 had a place in the code.

33. Mr. FRANCIS said that he would favour a parallel jurisdiction under the code, rather than an exclusively national or international jurisdiction. In that way, both institutions—a national tribunal and some kind of international tribunal—would bear the burden of enforcing the code. He also considered that, if the code was to have teeth, there should be no derogation from the principles it embodied. He agreed on the need to avoid any possibility of double jeopardy. It had, however, rightly been said that, if an accused had been tried for murder under national law, that should not preclude his trial for another offence, so far as its characterization under the code was concerned, arising out of the same incident. The validity of that proposition was borne out by the 1949 Geneva Conventions.<sup>7</sup>

34. One of the difficulties with which the Commission was faced stemmed from the fact that it had not yet

<sup>7</sup> Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

been decided whether the code would be applicable to States and whether, for example, the courts of one State could attribute liability to another State. If, however, the code were to apply solely to individuals, what would be the position if a head of State were brought to justice under the code as an individual? Perhaps the objectives of the code would be better served if the individual in question were not tried in his own country, where the offence had presumably been committed. It required no stretch of the imagination to foresee what would happen if a South African head of State were brought before his country's courts for acts arising out of the situation prevailing there at present.

35. It had been suggested that the international community was not ready for an international criminal jurisdiction. Such a jurisdiction did not, however, have to be a permanent one. A possible solution would be to establish *ad hoc* tribunals, thereby avoiding expenditure for permanent staff. He had in mind, for example, some arrangement along the lines provided for in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide.

36. It had also been suggested that the Commission could confine itself to producing an exhaustive list of offences against the peace and security of mankind and then leave the matter to national courts. In his view, however, it was essential not to foreclose the role of the Security Council, which should be free, in the same way as for the Definition of Aggression,<sup>8</sup> to determine whether acts other than those specified in the code constituted offences against the peace and security of mankind.

37. Turning to the draft articles submitted in the fifth report (A/CN.4/404), he noted that, in his oral introduction, the Special Rapporteur had said that he had avoided the concept of seriousness in draft article 1 (1992nd meeting, para. 7). Such a concept would, of course, be out of place in a definitional article, but it could be a separate element of the general principles set forth in part II of the draft. In that connection, he would point out that, as stated in its report on its thirty-fifth session, the Commission had already unanimously agreed on the importance of seriousness as an element in crimes against the peace and security of mankind.<sup>9</sup> Furthermore, article 19 of part 1 of the draft articles on State responsibility<sup>10</sup> provided that, under certain conditions, the most serious breaches of international obligations would constitute a crime on the part of a State, other breaches that did not attain that degree of gravity being termed delicts. When he had presented the Commission's report to the General Assembly in 1983, in his capacity as Chairman of the Commission, there had not been a single objection to that notion, and he would therefore invite the Special Rapporteur to give the matter some further thought. The words "because of their nature" in draft article 5 also referred, in his view, to the serious nature of the acts in question. Perhaps the first sentence of paragraph (1) of the commentary to

draft article 1 could be formulated in such a manner as to constitute a principle within part II of the draft.

38. He also considered that related offences such as complicity should be referred to in the general principles and that more detailed provisions on the various elements involved in such related offences should be included in the body of the draft. The same approach could be adopted with regard to exceptions.

39. Mr. KOROMA noted that the Commission's earlier drafts had been criticized for the assumption that a mechanism was not necessary to enforce the principles enunciated therein and on the ground that they made no provision for legality or due process. So far as the latter expression was concerned, he would prefer to retain the Special Rapporteur's wording in draft article 6, which seemed to him to be more neutral and appropriate, since the expression "due process of law" suggested by Mr. Sreenivasa Rao was peculiar to one system of law.

40. He agreed entirely with Mr. Calero Rodrigues that complicity and attempt, as inchoate offences, should be dealt with in the general part of the code, rather than in the part relating to particular offences.

41. The draft code dealt not with an abstract issue, but with a highly topical matter and it behoved the Commission to make every effort to complete its work in good time if it was not to be subjected to further criticism. It should therefore make recommendations for the establishment of an international criminal court, without which the offences of aggressive war, war crimes and crimes against humanity could not be prevented. It would then be for States to accept or reject those recommendations; but if they were viable and well balanced, they stood a good chance of being accepted by the international community.

42. He did not agree that the English title of the topic should be brought into line with the French and Spanish versions. "Offence" was a generic term, embracing both felonies, namely serious crimes such as murder or treason, and misdemeanours, i.e. less serious crimes. It also denoted a breach of the criminal law. On both linguistic and substantive grounds, therefore, the present English title should be retained.

43. Turning to draft article 1, he said that the true meaning of the provision could be discerned only by referring to the commentary, whereas, in his view, each article should be autonomous so that the reader could immediately seize the intent. An offence against the peace and security of mankind had two main constituent elements, seriousness and utmost gravity, and those two elements should be referred to in the body of the definition and not be left to the commentary. An added reason for making such a reference was that seriousness was a subjective concept, as the Special Rapporteur had pointed out in the commentary (para. (1)). Therein lay the danger, for public opinion was fickle. If, however, the two elements of seriousness and utmost gravity were written into a definitional article, the treatment of offences against the peace and security of mankind would no longer be left to the whims and fancies of public opinion. On that basis, he would suggest

<sup>8</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex (art. 4).

<sup>9</sup> *Yearbook* . . . 1983, vol. II (Part Two), pp. 13-14, paras. 47-48.

<sup>10</sup> See 1993rd meeting, footnote 7.

for the Special Rapporteur's consideration that draft article 1 be reworded to read:

"An offence against the peace and security of mankind is a very serious act or an act of the utmost gravity which is in violation of international law."

44. While he agreed with the thrust of draft article 2, he would suggest that it should be redrafted along the lines of article 4 of part 1 of the draft articles on State responsibility<sup>11</sup> to the effect that municipal or internal law could not be invoked to prevent an act or omission from being characterized as an offence against the peace and security of mankind. There again, he would prefer the traditional term "municipal law" to "internal law".

45. With regard to draft article 3, he considered that, in terms of both the codification and the progressive development of international law, the Commission should be ambitious and not confine the code to individuals. He saw no reason to omit all reference to the State, particularly since many States seemed to be prepared to submit themselves to appropriate proceedings, judging by events in the Commission on Human Rights and the European Commission of Human Rights. The Special Rapporteur should therefore be invited to submit a provision that would include a reference to State responsibility and the matter could then be decided by the international community. The Commission need not for the time being concern itself with penalties.

46. Draft article 4, which provided that an offence against the peace and security of mankind was a universal offence, went to the heart of the matter. The planning and execution of aggressive wars, persecution on religious or racial grounds, and war crimes deserved the attention of the international community and every State had a duty to try or to extradite any perpetrator of an offence against the peace and security of mankind. However, unless the provisions in question were backed up by an enforcement mechanism, through either national courts or an international criminal court, they would lose their deterrent effect. For the time being, therefore, the Commission should accept the proposal that a State should either try or extradite an offender, while at the same time strongly recommending the establishment of an international criminal court to try such offences. The present climate for such a proposal was propitious and it should be submitted for the approval of the international community.

47. The Special Rapporteur was to be congratulated on submitting draft article 6, since jurisdictional guarantees exemplified the common-law maxim that justice must not only be done, but also be seen to be done. Safeguarding the jurisdictional guarantees of the accused was a measure of civilization. He could not, however, agree that those guarantees should be elevated to the status of *jus cogens*.

48. The title of draft article 9 should be re-examined, and separate provisions drafted for the various defences.

49. Mr. BEESLEY said that the Commission might wish to consider the possibility of a national court on

which a judge from the jurisdiction of the accused would sit together with one or more judges from a jurisdiction whose jurisprudence differed from that both of the accused and of the national court in question. That might make for a more realistic approach to the problem of establishing an international criminal tribunal, as well as for certainty and fairness.

*The meeting rose at 1.10 p.m.*

## 1995th MEETING

*Tuesday, 12 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Gilberto Amado Memorial Lecture

1. Mr. CALERO RODRIGUES noted that 1987 was the hundredth anniversary of the birth of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission. He proposed that the informal consultative committee on the Gilberto Amado Memorial Lecture should consist of Mr. Jacovides, Mr. Koroma, Mr. Reuter, Mr. Yankov and himself.

*It was so agreed.*

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

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

ARTICLES 1 TO 11<sup>5</sup> (continued)

2. Mr. GRAEFRATH, after congratulating the Special Rapporteur on his fifth report (A/CN.4/404),

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54, is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18).

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

<sup>11</sup> *Ibid.*

said that he welcomed the basic approach of relying as much as possible on the Nürnberg Principles<sup>6</sup> and the 1954 draft code, and maintaining the distinction between war crimes and offences against the peace and security of mankind. Even if it was sometimes difficult to decide into which category a particular crime fell, that system had historic roots and brought out the fact that all the crimes covered by the draft code were considered and treated as crimes against humanity. It also had the merit of being based on common values and not depending on the establishment of an international criminal court, and it emphasized that the prevention and prosecution of the crimes in question were essential elements in strengthening international peace and security.

3. Close observance of the Nürnberg Principles also made it clear that the code dealt with the responsibility of individuals for international crimes, not with that of States. That did not, of course, preclude the possibility that an act entailing the international criminal responsibility of an individual might, if carried out on behalf of a State, also entail the international responsibility of that State. The punishment of a State official for an international crime did not relieve the State concerned of its responsibility under international law. That was clearly the position under the Nürnberg Principles and the 1949 Geneva Conventions,<sup>7</sup> and in particular under article 91 of Additional Protocol I of 1977<sup>8</sup> to those Conventions, and it might be well to include a similar provision in the draft code. There was no need to place the word "individual", in draft article 3, in square brackets; that would only weaken the article.

4. While State responsibility and the international criminal responsibility of the individual had different legal foundations, they were nevertheless closely related, since the responsibility of State officials for offences against mankind gave rise to one of the legal consequences of State responsibility for international crimes. For example, the notion of a universal offence, the fact that the State could not invoke immunity with respect to criminal acts by its officials, and the duty to extradite, all quite clearly derived from the responsibility of States for international crimes. Nevertheless, he shared the view that article 3 should be confined to individuals and avoid any reference to wrongful acts carried out on behalf of the State. Although it was probably true that most of the serious crimes listed in the draft code could be committed only by individuals in a position to exercise State authority or administrative power, there were other examples, such as the *I. G. Farben* case (see A/CN.4/398, para. 197). Consequently, it would be preferable to refer only to the responsibility of individuals in article 3, especially as the draft thus far remained silent on the criminal responsibility of other possible entities: organizations, associations, etc. If article 3 did refer only to individuals, however, the Commission might consider it necessary, when enumerating the offences, to define more precisely the individuals who could be held responsible. Perhaps it might also be necessary to distinguish between those

participating in, and those organizing or ordering, criminal activities.

5. Referring to draft article 1, he agreed that it would be preferable to give a generic definition based not only on the seriousness of the acts, but also on their effects with respect to the fundamental rules of the international community and to the survival of mankind; but he feared it might be difficult to agree on a formula of that kind which would not be open to abuse. Consequently, he could agree for the time being to the solution proposed by the Special Rapporteur, which was both simple and flexible, since it would necessarily be accompanied by a precise list of offences. Whether or not that list was exhaustive was not important; it would be exhaustive for the time being. However, nothing would stop States later on from adopting additional protocols or adding offences to the original list if they thought it necessary. Such additional protocols had become an established institution in international relations, and the same procedure had been followed in regard to the list drawn up at Nürnberg.

6. In principle, he had no difficulty with draft article 2, although the first sentence might be redrafted to state that an act which constituted an offence against the peace and security of mankind was a crime under international law, independently of national law. In any event, a provision of that kind was needed somewhere in the draft. With regard to the second sentence, he endorsed the proposal to replace the word "prosecuted" by "punishable". Perhaps, too, a paragraph could be added stipulating that States undertook to enact the necessary legislation to give effect to the provisions of the code and, in particular, to prescribe effective penalties, so as to make it clear that States were under an obligation to implement the provisions of the code and to co-operate to that end.

7. He endorsed the principle of the universal offence set out in draft article 4, which stated the duty of States to try or to extradite the alleged perpetrator of an offence against the peace and security of mankind. The new text of the article was an improvement, but something more might be needed. First, he understood paragraph 1 as stating a general duty of co-operation in the prosecution of criminals, including the collection and exchange of information and evidence; that was of paramount importance. Secondly, the draft article did not mention asylum. The 1967 Declaration on Territorial Asylum<sup>9</sup> contained a provision to the effect that States could not grant asylum to any person against whom there was serious evidence of the commission of a crime against peace or against humanity (art. 1, para. 2). That would, of course, be an important corollary to the duty to extradite, and a number of recent cases and calls for co-operation in combating terrorism showed the need to take the matter into consideration. Thirdly, the Commission should not overlook the question of the priority of requests for extradition. As a rule, persons accused of having committed a crime against peace or against humanity or a war crime should be extradited to the country in which the crime had been committed or which had suffered by it. That had been the practice, at

<sup>6</sup> See 1992nd meeting, footnote 12.

<sup>7</sup> See 1994th meeting, footnote 7.

<sup>8</sup> See 1992nd meeting, footnote 10.

<sup>9</sup> General Assembly resolution 2312 (XXII) of 14 December 1967.

least to a certain extent, since the Second World War, and it had been followed in several General Assembly resolutions, in particular resolution 3 (I) of 13 February 1946 on the extradition and punishment of war criminals and 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 (para. 5). It was very doubtful whether it would be possible to raise constitutional objections to the extradition of a criminal responsible under the code, and he did not believe that State sovereignty could be invoked legally to protect criminal behaviour constituting an offence against the peace and security of mankind. In a way, that was the essence of the statement contained in draft article 2.

8. The approach adopted by the Special Rapporteur in draft article 4 had the advantage of reflecting very closely the stand taken thus far by States in regard to such crimes. It also reflected recent trends. If States contemplated universal jurisdiction in respect of crimes such as torture, hijacking or the taking of hostages, it would be difficult to question such jurisdiction for the prosecution of offences listed in the code. There remained the danger that the same crime could be punished differently in different countries; but that was a common problem with universal jurisdiction over other crimes, which should not hinder criminal prosecution and which sometimes arose under national criminal laws. Yet that need not prevent the Commission from considering ways and means of alleviating the problem as far as possible. In any event, to rely on universal jurisdiction and keep the door open for the establishment of an international criminal court, as article 4 did, was a realistic approach that made it possible to proceed with the drafting of the code. He did not share the view that the drafting of the code depended on the decision whether or not to establish an international criminal court. That had not been the case with the 1949 Geneva Conventions, the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, or the 1979 International Convention against the Taking of Hostages.<sup>10</sup> The drafting of the code would give the Commission and States ample time to reflect on the establishment of an international criminal court.

9. He approved of the provisions of draft articles 5, 6, 7 and 8, but had some difficulty with draft article 9. First, he did not believe that it was possible to unify judicial practice in different countries or to determine the jurisprudence of an international criminal court by means of the somewhat sketchy provisions contained in the article. With regard to the various exceptions listed, there was no need for a clause on individual self-defence, since the question of self-defence could hardly arise in connection with the offences covered by the draft code. He agreed with previous speakers that the case of *force majeure* could not be cited as an excuse for committing such offences. The difficult question of the extent to which error might preclude criminal responsibility should be left to the judge. He could not accept a general rule to the effect that an error of law precluded

criminal responsibility, since most legal systems appeared to adopt the opposite view. The extent to which an error of fact was relevant depended greatly on the specific circumstances of the case, so that it did not seem possible to state a general rule on the subject. In general, the question of error would have to be decided in relation to the extent to which the error had the effect of excluding intent, and that could only be decided by the court hearing the case. The question of coercion or state of necessity came down to the effect which a superior order might have, and it would be advisable to refer to article 8 of the Nürnberg Charter<sup>11</sup> on that point. To be accepted as an exception, coercion should be of such a degree as to make free decision by the individual impossible. While he could see the relationship between coercion and the order of a superior, it might be preferable to retain a general provision on superior order, because of the importance of such an order in regard to the offences listed in the draft code.

10. In conclusion, he supported the Special Rapporteur's decision not to include attempt and complicity in the part of the draft code dealing with general principles.

11. Mr. JACOVIDES, after commending the Special Rapporteur for his fifth report (A/CN.4/404), which was as remarkable as those which had preceded it, reaffirmed the positions he had explained in his statements at the Commission's previous two sessions.

12. With regard to the English title of the draft code, he had in the past expressed the view that the word "offences" should be replaced by "crimes". In the course of its deliberations, the Commission had concluded that the draft code dealt not only with "crimes" as distinct from "delicts" in the sense of article 19 of part 1 of the draft articles on State responsibility,<sup>12</sup> but also with the most serious of such crimes. Moreover, the use of the word "crimes" would bring the English text into line with the French and Spanish. It would also be more accurate legally and more weighty politically. Consequently, he supported Mr. Calero Rodrigues's proposal (1994th meeting) that the Commission should formally propose such a change to the General Assembly.

13. The definition contained in draft article 1, while acceptable as far as it went, could be improved by the inclusion of a reference to the seriousness of the crimes in the article itself, rather than in the commentary. Of course, the more substantive question of the nature of the crimes defined in the code, to which some time had been devoted at the previous session, was still pending.

14. Draft article 2 correctly rested on the assumption of the primacy of international criminal law and was in conformity with Article 103 of the Charter of the United Nations.

15. In draft article 3, the replacement of the word "person" in the former text by "individual" related to the sensitive key issue of whether the code was to be restricted to individuals, or whether it should also cover the criminal responsibility of other entities, particularly States. The Commission had earlier expressed to the

<sup>10</sup> United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

<sup>11</sup> See 1992nd meeting, footnote 6.

<sup>12</sup> See 1993rd meeting, footnote 7.

General Assembly its prevailing opinion in support of the principle of the criminal responsibility of States.<sup>13</sup> After extensive discussion in the Commission and the Sixth Committee of the General Assembly, during which it had been made clear that the criminal responsibility of States would be dealt with under the topic of State responsibility, it had been agreed that, for the time being and without prejudice to the position of many members of the Commission, the scope of the draft code would be restricted to the criminal liability of individuals<sup>14</sup> in order to enable the Commission's work to go forward. The hope had been expressed that that compromise on the draft code would serve to expedite the work on State responsibility. Notice had been given that, if that did not prove to be the case, those members of the Commission who held strong views on the matter would revert to the question of the criminal responsibility of States in the context of the draft code.

16. He thought it necessary to remind the Commission of that compromise and understanding, in view of certain opinions on draft article 3 expressed at previous meetings. Compromises were based on give and take by each side, and he therefore found much merit in Mr. Mahiou's suggestion (1993rd meeting) that the former text of draft article 3 should be retained, or that the words "person" and "individual" should at least be placed in square brackets in the new text, to indicate that the understanding continued to apply. If work on article 19 of part 1 of the draft articles on State responsibility did not proceed satisfactorily, Governments and members of the Commission who had reason to feel strongly on the matter should not be deemed to have forfeited the right to reopen the issue in the context of the draft code. It was to be hoped that a new special rapporteur for the topic of State responsibility would be appointed soon and that he would bear those important considerations in mind.

17. Draft article 4 also dealt with a very sensitive and important point. He still believed that, to be complete, the code must include the three elements of crimes, penalties and jurisdiction. Whether it was politically feasible under present conditions to establish an international criminal court was questionable. His own view was that the Commission should aim at the optimum legal outcome, bearing in mind its mandate to develop international law progressively, without closing the door to possible compromises or other adjustments.

18. With regard to the text of article 4, a number of valid points had been raised during the debate. While having no objection to the use of the expression *Aut dedere aut punire*, he thought that the concept of a "universal offence" should not be downgraded. He also agreed that it would be more accurate to replace the words *aut punire* by *aut judicare* and that the duty of a State to arrest the offender should also be appropriately expressed. He endorsed the Special Rapporteur's suggestion in the commentary (para. (4)) that States should introduce into their internal legislation the procedural and substantive rules of the code, as well as a uniform scale of penalties. That would be a step in the right

direction, regardless of whether national or international criminal jurisdiction was eventually accepted.

19. As for draft article 5, he had no difficulty in accepting the notion of the non-applicability of statutory limitations to offences against the peace and security of mankind. For the sake of clarity, however, the words "because of their nature" might perhaps be deleted from the text of the article and be included in the commentary.

20. He had no objections to either the former or the new text of draft article 6. If there was to be an international criminal court, it would no doubt have its own rules and procedural guarantees ensuring due process; but the Special Rapporteur had been right to rely on distillation of the jurisdictional guarantees formulated in a number of international legal instruments, in case the code was to be applied by national courts. It could indeed be argued that the minimum guarantees to which every human being was entitled amounted to peremptory norms.

21. Similarly, no one could disagree with the rule against double jeopardy stated in draft article 7. That principle was firmly rooted in national criminal law, but the question arose how to apply it in international criminal law. So long as the choice between international criminal jurisdiction and national criminal jurisdiction had not been made, difficulties could arise in practice. His own preference was for an international criminal court, which would serve to avoid those difficulties. However, as long as national or parallel jurisdictions could be exercised on the basis of universality, he agreed with those speakers who had held that the crime for which an alleged offender had been convicted or acquitted must be the same as that with which he was subsequently charged if he was to be able to invoke the rule in article 7. The wording of article 7 would have to remain pending until the fundamental question as to who was to exercise jurisdiction under the code was finally settled.

22. He had spoken in the past in favour of the principle of non-retroactivity stated in draft article 8. When the rule *nullum crimen sine lege* was applied to international criminal law, the term *lex* had to be interpreted as including not only treaty law, but also custom and the general principles of law recognized by the international community. Justice had to prevail over the letter of the law, or, as Hans Kelsen had put it: "in case two postulates of justice are in conflict with each other, the higher one prevails".<sup>15</sup> When the draft code came to be completed and all the offences it covered were properly defined, that question would no longer be of practical importance. But the higher interests of the international community dictated that an element of flexibility should be preserved, so that the letter of the law could not prevail over justice. He therefore agreed that the principle set out in paragraph 2 of draft article 8 should be maintained.

23. The provisions of draft article 9 should be strictly and narrowly construed. In view of the gravity of the

<sup>13</sup> *Yearbook* . . . 1983, vol. II (Part Two), pp. 14-15, para. 54.

<sup>14</sup> *Yearbook* . . . 1984, vol. II (Part Two), p. 17, para. 65 (a).

<sup>15</sup> "Will the judgment in the Nuremberg trial constitute a precedent in international law?", *The International Law Quarterly* (London), vol. I (1947), p. 165.

crimes involved, a proper balance should be struck between the interest sacrificed and the interest safeguarded. In other words, the emphasis should be on responsibility and punishment, not on the exceptions to responsibility. He therefore urged the restoration of the former text of the article, which provided that, subject to the qualifications expressly stated, "no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind". In any case, the Drafting Committee should make an effort to arrive at a properly balanced text.

24. He reiterated his reservations regarding the Special Rapporteur's narrowing of the scope of the draft code to the "individual" (art. 3). The plea of self-defence might perhaps be logically advanced by the leaders of a State accused of aggression to relieve them of their individual criminal responsibility, but it was no less logical for those of the State suffering the aggression, subject, of course, to their behaviour.

25. He supported the substance of draft articles 10 and 11, while reserving his position on their drafting and position in the code. On the conclusion of the debate, draft articles 1 to 11 should be referred to the Drafting Committee, and it was to be hoped that the Committee would be able to deal with them fully during the current session.

26. Before concluding, he wished to speak from the heart. Seen from the point of view of the victims of gross violations of international law relating to peace and security, the project on which the Commission was engaged was much more than an academic exercise. In his own country, Cyprus, which had been the victim of a brutal military aggression and continuing occupation, massive violations of human rights had been committed, as had been amply proved by the quasi-judicial inquiry made by the European Commission of Human Rights, to which he had referred at the previous session.<sup>16</sup> The findings of that inquiry, contained in a report adopted in 1976, amounted to an indictment of the cruelties inflicted by the invading Turkish Army in 1974 and subsequently. Nearly 13 years after that documented international crime, and in spite of numerous United Nations resolutions and various decisions of other international bodies, including the Non-Aligned Movement and the Commonwealth, the situation of Cyprus remained without remedy. Indeed it had been further aggravated by illegal attempted secession and the systematic efforts of the occupying Power to alter the demographic composition of the island and impose partition and an unworkable system of ethnic separation. For a variety of reasons, the members of the international community had been either unable or unwilling to act effectively to implement the resolutions they had adopted. Cyprus was a test case for the application of international law and the effectiveness of the United Nations; for when such grave injustices were tolerated or condoned they were bound to be repeated elsewhere. "Who today remembers the Armenians?", Hitler had asked rhetorically, before launching his campaign of genocide and other grave crimes before and during the Second World War.

27. It would be naïve to imagine that the draft code, when completed, would be a panacea for the grievances of Cyprus or solve the many other similar problems existing in the world, any more than the Definition of Aggression<sup>17</sup> adopted in 1974—just before the aggression against Cyprus. He believed, however, that a respected body of experts in international law such as the Commission, if it succeeded in preparing a code providing for appropriate penalties and jurisdiction, could at least make an important contribution towards building an international legal order and deterring actual and would-be aggressors and other violators of its provisions. The international community expected no more from the Commission; but the Commission would be failing in its duty if it did less.

28. Mr. HAYES said that there was a clear need for a code of offences against the peace and security of mankind, given the areas of uncertainty, differences of view and lacunae in the international criminal law relating to war crimes and crimes against humanity. Ideally, the Commission should draft a convention providing a thematic definition of offences against the peace and security of mankind, prescribing the penalties to be imposed on persons or States committing such offences and establishing an international jurisdiction competent to adjudicate on them and to hand down and enforce penalties. In practice, however, the Commission had rightly concluded that a comprehensive and universally acceptable definition of offences against the peace and security of mankind was not currently feasible, and that it should start by determining the areas of consensus and draw up a list of crimes generally accepted as offences against the peace and security of mankind, to be supplemented by a number of principles. Furthermore, since an international criminal jurisdiction might not prove acceptable, the Commission should perhaps await the comments of Governments before deciding how to proceed on that matter.

29. Turning to the Special Rapporteur's fifth report (A/CN.4/404), he observed that draft article 1 derived from the conclusion that a thematic definition of offences against the peace and security of mankind was not possible at the present stage. While the text adequately reflected that situation, some concepts, such as that of seriousness, should be added. But it would not be appropriate to include some criteria and omit others. As to the wording of the article, he agreed that the phrase "under international law" might not be necessary. He also agreed that the list of offences should not be exhaustive.

30. In draft article 2, the second sentence did not seem necessary. But if it was to be retained, the word "prosecuted" should be replaced by "punishable".

31. Draft article 3 was also based on the assumption that it was currently impossible to provide for the criminal responsibility of States. That being understood, the article should not be confined to persons acting as servants of a State. The word "individual" should be replaced by "natural person", which was the expression commonly used inter-

<sup>16</sup> *Yearbook* . . . 1986, vol. I, p. 121, 1962nd meeting, para. 32 and footnote 10.

<sup>17</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

nationally to distinguish individuals from corporate bodies.

32. Paragraph 1 of draft article 4 assumed national jurisdiction, while paragraph 2 had been included to keep open the possibility of international jurisdiction. If the Commission decided to proceed on the basis of international jurisdiction, the article would take quite a different form, since provision would have to be made for the possibility of that jurisdiction not being generally accepted. He agreed with other speakers that the words *aut punire* in the title of the article should be replaced by *aut iudicare*. It would also be advisable to insert the word "alleged" before "perpetrator" in paragraph 1, and to replace the word "arrested" by "found". He noted that the new text of the draft article contained no reference to a "universal offence". The purpose of paragraph 1 was to establish an adequate universal jurisdiction in order to prevent offenders from taking advantage of differences in national legislation to avoid extradition. That idea appeared sufficiently important to be included somewhere in the draft code, perhaps at the end of the new paragraph 1. As for the idea of imposing an obligation to extradite or establishing priorities between applications for extradition, that was a very difficult area of law in which countries had been slow to change traditional rules, and it was to be feared that the Commission would not be able to bring about the desired changes through the provisions of the code.

33. With regard to draft article 5, like Mr. Tomuschat (1993rd meeting), he had doubts about the advisability of eliminating statutory limitations, because of the risk of a miscarriage of justice through flawed evidence. But in many national jurisdictions there were no statutory limitations for the most serious offences, such as those covered by the draft code. Moreover, in the case of such offences, the danger of flawed evidence was reduced and the adjudicating court could be left to weigh the value of the evidence, which would be better than imposing limitations. He could therefore accept article 5.

34. The new text of draft article 6 was an improvement on the former text. The opening sentence could, however, be clarified by inserting the word "jurisdictional" before "guarantees" and by replacing the word "extended" by "due". Furthermore, the words "to ensure a fair trial" should be added at the end of that sentence.

35. Draft article 7 would be useful if the code was to be implemented by national courts, in which case the criteria applied might vary. If implementation was to be by an international court, the article was unnecessary. Nevertheless, the *non bis in idem* rule was such an important safeguard that an attempt should be made to prevent individuals from being tried twice for the same offence, once by an international court and once by a national court. That could be done by giving international decisions precedence over national decisions.

36. In draft article 8, paragraph 1 could be made clearer by redrafting it to read:

"1. No person shall be convicted of an offence against the peace and security of mankind in respect

of an act or omission which, at the time of commission, did not constitute such an offence."

Paragraph 2, which in any event was difficult to draft satisfactorily, would then be unnecessary.

37. The new text of draft article 9 was an improvement on the former text. He agreed with other members of the Commission, however, that self-defence did not seem an appropriate exception where offences against the peace and security of mankind were concerned. The same applied to an error of law; even in war, the basic wrongfulness of such acts should be obvious to the perpetrator. The concepts of coercion, state of necessity and *force majeure* needed further elaboration. He agreed with previous speakers that the idea of a superior order was covered by the concept of coercion. The Commission should resist the temptation to include a provision dealing with such a controversial issue.

38. The whole of article 9 could be expressed in terms of exceptions to intent, rather than exceptions to responsibility. The concept of intent was included in all criminal codes in regard to serious offences and should be included in the draft code, reference being made to such factors as mental incapacity.

39. With regard to draft article 10, consideration might be given to the need in the part of the code on general principles for a provision on complicity in an offence and conspiracy. He had no reservations on the text of draft article 11.

40. Mr. NJENGA commended the Special Rapporteur for his lucid and thought-provoking fifth report (A/CN.4/404), which would be of great assistance to the Commission in dealing with an important and complex topic. Any constructive criticisms he might now offer on some of the draft articles did not in any way detract from his appreciation of that report.

41. He found the definition in draft article 1 inadequate, because it was purely descriptive. He did not share the Special Rapporteur's reasoning that, because of the subjective nature of what the international community might consider at any particular time to be the most serious crimes, it would be pointless to introduce the concept of seriousness into the definition. The seriousness of the crimes and the threat they represented for human society were the very essence of the draft code, which would be of little use if that element were omitted from the definition.

42. Draft article 2, which proclaimed the primacy of international law over internal law, was a fundamental provision. A number of useful drafting suggestions had been made, to which he subscribed, including the suggestion that the word "prosecuted", in the second sentence, should be replaced by "punishable". He also agreed with Mr. Koroma (1994th meeting) that the expression "internal law" should be replaced by the more appropriate term "municipal law".

43. With regard to draft article 3, he noted that, although it had been agreed that the draft code should be restricted *ratione personae* to individuals, it was nevertheless the view of the majority that States could also be held responsible; a State could, indeed, be the major author of an act against the peace and security of



mankind. Moreover, the Commission itself, during the first reading of part 1 of the draft articles on State responsibility,<sup>18</sup> had unanimously adopted article 19, which removed all doubt about the question of the criminal responsibility of States. He reminded the Commission of the statement he had made on the subject at the thirty-seventh session, in 1985.<sup>19</sup> The text now proposed for article 3 unfortunately lent itself to the *a contrario* argument that a State which specifically authorized the commission of an offence was not liable, because the article referred only to the responsibility of individuals. Admittedly, it was very difficult to bring States to account for offences against the peace and security of mankind, but some provision had to be included on the subject and he suggested that the Commission might incorporate in article 3 a clause to the effect that its provisions were without prejudice to the criminal responsibility of States.

44. He saw no valid reason for deleting the first sentence of paragraph 1 of the former text of draft article 4 and suggested that it be restored; in fact, he preferred the former text, with its title “Universal offence”. The new Latin title added nothing to the substance and could cause confusion by stating an obligation to extradite or to punish, rather than to try. As to the substance of the article, he agreed with the Special Rapporteur that, pending the unlikely event of the establishment of an international criminal court, the provisions of article 4 provided the only means of giving practical effect to the code.

45. States should be encouraged to extradite individuals who had committed offences against the peace and security of mankind, so as to avoid treatment of those crimes as political offences, and especially because the production of evidence and the conviction of the offender would be much easier in the country where the offence had been committed. Besides, in some countries, such as Kenya, criminal jurisdiction was strictly territorial. Draft article 4 should therefore place more emphasis on extradition, and if, for any reason, it was not possible—for instance in countries whose constitutions prohibited the extradition of nationals—there should be a duty not only to try but, on conviction, to impose severe penalties.

46. He found the drafting of article 5 adequate. It was worth noting that the common-law systems did not have statutory limitations in criminal law, and any distinction between war crimes and crimes against humanity in that regard was artificial: there should be no time-limit for the prosecution of such grave offences.

47. The new text of draft article 6 was an improvement on the former text, and the safeguards listed would be minimum guarantees in any court purporting to apply due process. In the highly charged atmosphere of trials for offences against the peace and security of mankind, particularly in the country where the offence had been committed, the accused needed all the guarantees he could get to ensure a fair trial. It would nevertheless be going too far to elevate those procedural guarantees to the status of *jus cogens*. He suggested the addition of

the right of appeal to the list of guarantees in the article. The International Covenant on Civil and Political Rights specified in article 14, paragraph 5, that: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.” There was a similar provision in article 8, paragraph 2 (*h*), of the American Convention on Human Rights.<sup>20</sup>

48. The rule stated in draft article 7 was common to all jurisdictions. However, the mass nature of offences against the peace and security of mankind should not be disregarded. The fact that someone had been tried and convicted—or acquitted—of a massacre of civilians in one place did not exonerate him for offences committed in another. On that point, article 29 of the Charter of the Nürnberg Tribunal<sup>21</sup> provided that if, after any defendant had been convicted and sentenced, “fresh evidence” was discovered which “would found a fresh charge against him”, such action could be taken as might be considered proper “having regard to the interests of justice”. It should therefore be made clear that the rule in draft article 7 did not preclude the trial of an accused for as many crimes as he had allegedly committed, by as many courts as were competent to try him. Of course, sentences already served could be taken into consideration in any subsequent judgments.

49. He endorsed the new formulation of draft article 8. He was, however, in complete disagreement with the new text of draft article 9, which seemed to him to undermine the spirit and the letter of the draft code. The acts covered by the code were very grave crimes, and no excuses should be allowed to exonerate their authors. Moreover, the discussion on article 9 had clearly shown that it could not be retained, at least in its present form. The correct principle was that stated in the former text: “Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. . . .”

50. He could not see how self-defence by an individual could possibly justify the commission of a crime against humanity. Coercion or state of necessity, if a grave, imminent and irremediable peril existed, might be a justification; so might *force majeure*, in which case an individual could not, of course, be held responsible for the consequences of his act. As to error, only error of fact could be admitted as an exception, because it disproved criminal intent. An error of law was no excuse, particularly in view of the nature of the offences in question. Finally, the plea of superior order, unless it amounted to coercion, had already been rejected at the Nürnberg and Tokyo trials. Those so-called defences were in fact no more than attenuating circumstances relevant in establishing the sentence.

51. The text of draft article 10 was well balanced. A superior could not be allowed to turn a blind eye to the criminal acts of his subordinates, and the examples taken by the Special Rapporteur from trials of war

<sup>18</sup> See 1993rd meeting, footnote 7.

<sup>19</sup> *Yearbook* . . . 1985, vol. I, pp. 47-48, 1885th meeting, paras. 1-2.

<sup>20</sup> The “Pact of San José, Costa Rica”, signed on 22 November 1969 (to be published in United Nations, *Treaty Series*, No. 17955).

<sup>21</sup> See 1992nd meeting, footnote 6.

criminals were entirely convincing. He also endorsed the formulation of draft article 11.

52. Mr. SOLARI TUDELA said that he approved of the method adopted by the Special Rapporteur for defining offences against the peace and security of mankind, in draft article 1, by reference to the provisions of the code in which those offences were enumerated. But in view of that method, the list of offences with which the definition was linked called for some comments.

53. During the discussion, the question had been raised whether the list would be exhaustive or not. An exhaustive list would clearly have the advantage of enabling States to be certain that only the offences listed could be regarded as offences against the peace and security of mankind. It would, however, restrict the application of the code, since it would prevent the punishment of new types of offence which might well be of equal seriousness. Mr. Francis (1994th meeting) had mentioned the possibility of finding a formula by which, although the list was exhaustive, all loopholes could be blocked if new crimes appeared: that would be done not by referring to the general principles of law, but by inviting an organ of the United Nations, such as the Security Council, periodically to review the list of offences. Thus the code itself would be accompanied by a mechanism enabling either a new court or the Security Council to extend the list of offences, it being understood, of course, that only the most serious crimes would be included. That might not be the ideal solution, but the proposal at least pointed in the right direction.

54. He also approved of the wording of draft article 2, since it was essential to establish the primacy of international criminal law over internal criminal law, failing which the Commission's efforts would be in vain.

55. In draft article 3, the Special Rapporteur had adopted a pragmatic approach by limiting the subject-matter of the code to individuals: in the present state of international law it did not seem possible to extend its field of application to States.

56. Draft article 4 called for several comments. First, he supported the amendment proposed by Mr. Reuter (1993rd meeting, para. 23), which appeared to be unanimously approved. In referring to the duty of States to extradite, it was better to speak of the accused, rather than of the perpetrator of an offence, in accordance with the terminology generally used in international conventions on the subject. Secondly, article 4 raised the problem of the laws in force in many States which prohibited extradition in certain cases; it should therefore be couched in more explicit terms. Moreover, like other provisions of the draft code, the article illustrated the need to establish an international criminal court. It was hard to imagine that a State party to the code would extradite an individual accused of an offence against the peace and security of mankind at the request of another State, unless his act had been characterized as such an offence by an international court. In the absence of such a court, the practical application of article 4 seemed hazardous.

57. The Special Rapporteur was right to enumerate a certain number of jurisdictional guarantees in draft ar-

ticle 6. Paragraph 3 might also mention the right of the accused to the services of the lawyer of his choice and his right to communicate with his lawyer after arrest, even if those guarantees were implicit in subparagraphs (b) and (c).

58. The principle of criminal law stated in draft article 8 was affirmed in several international instruments, as indicated in paragraph (1) of the commentary, to which he would like to add the American Declaration of the Rights and Duties of Man,<sup>22</sup> which was older than the Universal Declaration of Human Rights.<sup>23</sup>

59. With regard to draft article 9, it seemed difficult to accept self-defence as an exception to responsibility: an offence against the peace and security of mankind was, by its nature, one that could not be excused on grounds of self-defence.

60. In conclusion, he supported the other draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404).

61. Mr. YANKOV expressed his appreciation of the Special Rapporteur's response to the comments and suggestions made during the debates in the Commission and the Sixth Committee of the General Assembly. His fifth report (A/CN.4/404) went a long way towards dispelling any possible confusion between the present topic and that of State responsibility, as it placed more emphasis on the responsibility of individuals. In his previous reports, the Special Rapporteur had followed too closely some of the elements of article 19 of part 1 of the draft articles on State responsibility,<sup>24</sup> thereby creating some danger of confusion between the two topics, whose common ground *ratione materiae* tended to blur their dissimilarity *ratione personae*.

62. The new draft articles, being confined to the international responsibility of individuals, had the advantage of clarity and consistency. That did not mean that the link between the notion of "international crimes" within the meaning of article 19 of the draft articles on State responsibility and that of "offences against the peace and security of mankind" should be entirely ignored, although it would be dangerous to link the two notions too closely—a danger which the fifth report avoided thanks to the general principles it formulated.

63. Turning to the draft articles submitted in the report, he found the definition in draft article 1 satisfactory, at least at the present stage. That definition was general and concise, and contained an implicit reference to the offences to be listed elsewhere in the code. He believed that the list of offences should be as precise as possible and be exhaustive, subject to future revision if new crimes having the same characteristics emerged. At a later stage of the work on the draft articles, an attempt should perhaps be made to add certain essential general criteria to the definition, such as the seriousness of the

<sup>22</sup> Resolution XXX of the Ninth International Conference of American States, adopted at Bogotá (Colombia) on 2 May 1948; for the text, see Pan American Union, *The International Conferences of American States, Second Supplement, 1942-1954* (Washington (D.C.), 1958), p. 263.

<sup>23</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>24</sup> See 1993rd meeting, footnote 7.

offence, the extent of its effects and the intent of the perpetrator. The Special Rapporteur appeared to have abandoned that idea on the grounds that such general criteria were of a subjective nature. For his part, he believed that the reality of the serious common dangers to all mankind, and the fact that the international community agreed to characterize the acts in question as crimes, justified the elaboration of general criteria which it would be useful to include in the definition.

64. Draft article 2 was generally acceptable. The concept of the autonomy of international criminal law which it stated derived from the judgment of the Nürnberg Tribunal and had been confirmed by the Commission in Principle II of the Nürnberg Principles.<sup>25</sup> That concept stemmed from the more general principle of the relationship between the international legal system and the internal law of States as two systems of law which were distinct and autonomous, although not entirely isolated from each other. It followed from that principle that, as the Special Rapporteur rightly pointed out in his report, in a case of conflict between international criminal law and the internal law of a State, the *non bis in idem* rule could not be invoked (see para. (7) of the commentary to art. 2).

65. Doubts had been expressed about the need for the second sentence of draft article 2. He thought the Commission should retain that provision, which was based on Principle II of the Nürnberg Principles: it clarified the rule laid down in the first sentence and stated more explicitly the principle of the autonomy of international law.

66. The new text of draft article 3 was preferable to the former text, because it avoided all ambiguity about the content of the draft code *ratione personae*. Confining the code to the responsibility of individuals did not exclude the responsibility of States for acts which, under article 19 of part 1 of the draft articles on State responsibility, constituted offences against the peace and security of mankind. Moreover, an offence committed by an individual acting as an organ or agent of a State might also be imputable to that State; the responsibility of the individual was therefore parallel to the responsibility of the State. In the commentary to article 19 of the draft articles on State responsibility, the Commission had stated that punishment of individuals having committed offences against the peace and security of mankind “does not *per se* release the State itself from its own international responsibility for such acts”.<sup>26</sup> The fact was that, under the existing system, States and individuals were at different levels; the legal grounds for their international responsibility, the rules applicable and the mechanisms of enforcement were different. Thus the existence of two different régimes of international criminal responsibility corresponded to the reality of existing international law. An individual could indeed act as an organ or agent of a State, in which case his crime should be imputed to that State. But an in-

dividual, or group of individuals, could also act on their own account, in which case the act was not an act of the State. Those points should be explicitly stated in draft article 3 and elaborated in the commentary.

67. The new text of draft article 4 adequately set out the substance of the fundamental principle involved, namely the duty to extradite or to try by due process of law, as a logical consequence of the universal character of offences against the peace and security of mankind. It was especially necessary to affirm the duty to extradite, because by their nature such offences were politically motivated, and if that duty were not affirmed, such political offences would not lead to extradition. That exception to the general rule was justified by the universal nature of the offences, which should also prevent their perpetrators from enjoying the right of asylum.

68. The question of extradition should be considered having regard to territorial jurisdiction, the principle being that the author of an international crime must be tried and punished in the State where the crime was committed and under the laws of that State. In the case of crimes committed in the territory of several States, the competent court could be determined by agreement between the States concerned. An *ad hoc* international tribunal could be set up, as in the case of the Nürnberg and Tokyo Tribunals. Draft article 4, paragraph 2, provided for the possible establishment of an international criminal jurisdiction, but did not preclude the setting up of *ad hoc* international tribunals, which might prove easier than the establishment of a permanent international criminal court of a supranational character.

69. The duty of States to try and to punish—or to extradite—should be set out in the part of the draft code dealing with general principles, although the rules relating to competence might be placed in the part specifically concerned with questions of jurisdiction. He suggested that the title of article 4 should be “Duty to try or to extradite”.

70. He found draft article 5 acceptable. It reflected the current trends in international law, as confirmed by a number of international instruments, including General Assembly resolutions and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, by many national laws, and by judicial practice. As the Special Rapporteur stated in the commentary (para. (1)), statutory limitations constituted “neither a general nor an absolute rule”. But no matter what number of States had become parties to the 1968 Convention, it would be well for the draft code to confirm the rule of the non-applicability of statutory limitations to offences against the peace and security of mankind. On the other hand, the words “because of their nature”, at the end of draft article 5, were unnecessary and might even weaken the text: there was no need to refer to the nature of such offences in order to justify the non-applicability of statutory limitations to them.

*The meeting rose at 1 p.m.*

<sup>25</sup> See 1992nd meeting, footnote 12.

<sup>26</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 104, para. (21) of the commentary.

## 1996th MEETING

Wednesday, 13 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

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

#### ARTICLES 1 TO 11<sup>5</sup> (continued)

1. Mr. YANKOV, continuing the statement he had begun at the previous meeting, said that draft article 6 embodied an important general principle of international criminal law and would serve as a basis for the elaboration of the requirements for a fair trial. However, procedural safeguards should be as comprehensive and as precise as possible and the article should therefore contain some additional requirements based on the provisions of some of the international instruments referred to by the Special Rapporteur in paragraph (1) of the commentary and on the relevant provisions of national penal codes. Accordingly, he suggested the inclusion of a reference to the procedural rights of the accused during the preliminary examination, which in some national legal systems was part of the judicial procedure itself, and in others had an autonomous character but was linked with the proceedings; a reference to the prohibition of the use of coercion to extract confessions; and a provision safeguarding the right of appeal to a higher court.

2. The new draft article 7 was well placed within the set of general principles, even though the rule it stated was already referred to in paragraph (7) of the commentary to draft article 2, relating to conflicts between national and international criminal jurisdictions.

3. As for draft article 8, the new text submitted by the Special Rapporteur did not solve the problems raised by the wording of paragraph 2, which contained a safeguard clause concerning the general principles of law recognized by the community of nations. That notion was much too vague and might give rise to conflicting interpretations inconsistent with the fundamental rule *nullum crimen sine lege*. The offences covered by the draft code had to be defined very precisely. If an act or omission had, at the time of its commission, been recognized by the "community of nations" as such an offence, there would be no need for a provision along the lines of paragraph 2, since the act or omission would have been characterized as such at that time. In view of the fact that a provision identical with paragraph 2 was contained in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, he thought that the question should be given further consideration, for, in matters of criminal law, precision was of the essence.

4. Turning to draft article 9, he found that the new text represented a significant improvement over the former text. He nevertheless stressed that the formulation of exceptions should be precise, that the list of exceptions should be exhaustive and that, in view of the important role of intent in the commission of the offences under consideration, the number of exceptions should be limited to some very specific cases of *force majeure* and coercion, as, for example, when the perpetrator of an offence had been subjected to irresistible and unforeseen force that had deprived him of any choice, in which case he would have to establish that his life or personal safety had been threatened. Error of fact could hardly be considered an exception even in strictly qualified circumstances. Self-defence and state of necessity could also not be invoked as exceptions in the case of the offences under consideration. The Commission would therefore have to give article 9 further consideration if it was to arrive at a more precise and coherent set of exceptions. The question of extenuating circumstances should also be considered separately.

5. There had been proposals to add to the list of exceptions considerations such as age, insanity and state of health. Those proposals should be examined with the utmost care. A political leader who committed large-scale crimes against humanity might be regarded as insane. The obvious case was that of Hitler, whose sanity had been doubted by many people. In cases of that kind, it was difficult to see how a plea of insanity could be accepted as an excuse. The essential point to be borne in mind was that intent was the essential attribute of offences against the peace and security of mankind.

6. The wording of draft article 10 was based on recent treaty practice and the jurisprudence of the trials of war criminals. He pointed out that complicity was not a separate crime: under most legal systems, including that of his own country, attempt, preparation, participation, incitement, complicity and conspiracy were not regarded as separate crimes and were accordingly listed in the general part of the penal code. However, there might be cases where such preparatory acts involved a much greater public danger and could then be made punishable as separate crimes. Complicity in, or

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

preparation of, international terrorism was a case in point. Perhaps the Commission had had such considerations in mind when it had included in article 2, paragraph (13), of the 1954 draft code a provision stating that conspiracy, direct incitement, complicity and attempt constituted separate offences. He urged further consideration of that difficult problem.

7. Draft article 11 was acceptable. It was modelled on article 7 of the Charter of the Nürnberg Tribunal<sup>6</sup> and article 6 of the Charter of the Tokyo Tribunal,<sup>7</sup> as well as on Principle III of the Nürnberg Principles.<sup>8</sup> The question of compliance with a superior's orders and the possibility of admitting extenuating circumstances also needed to be considered.

8. In conclusion, he said that draft articles 1 to 11 not only were an important part of the draft code, but also constituted a good legal basis for the interpretation of the provisions on the nature of the offences, the functioning of jurisdiction *ratione personae* and *ratione materiae*, and the principle of territoriality. He was therefore of the opinion that the draft articles should be referred to the Drafting Committee. At the same time, he recommended that, in future reports, the Special Rapporteur should provide more comparative law analysis, offer more information on the historical background of specific provisions and go into greater detail on the interpretation of the terms used in some of the draft articles.

9. Mr. ARANGIO-RUIZ congratulated the Special Rapporteur, whose fifth report (A/CN.4/404) once again reflected his mastery of a particularly difficult topic. At the current stage, the draft articles on general principles were an essential element for further and more detailed consideration of the major problems of principle and method whose solution would determine how effective the code would be as an instrument for the prevention and punishment of offences against the peace and security of mankind. Three of the problems dealt with in those draft articles, in the commentaries thereto and by other speakers had been the particular focus of his attention: the definition of offences against the peace and security of mankind (art. 1); the respective roles of international law and internal law (arts. 2 and 4); and the scope of the code *ratione personae* (art. 3). Those problems were of such great importance that it might be preferable for the four draft articles to constitute part I of the draft.

10. He agreed with the Special Rapporteur's approach of not giving a general definition of offences against the peace and security of mankind in draft article 1 and of referring to the provisions that followed. Apart from offering the advantage of not requiring an extremely problematical general definition, that method met the need for certainty that was particularly acute in criminal law, as well as the need not to pave the way for unwarranted additions to the list of offences to be included in the code. Although he could see why Mr. Benouna (1993rd meeting) considered it essential, for the purpose of the characterization of the offences covered

by the code, to lay broader legal foundations than those of a mere convention, he thought that, as matters now stood, it would be wiser to establish a conventional basis. Other sources of law, such as United Nations resolutions and declarations, would naturally have a role to play; together with the purely conventional sources of law, they might gradually lead to the formulation of unwritten rules of a universal character. In the subject-matter of concern to the Commission, however, additions to the list of offences should be made in the most formal manner possible, namely by treaty, protocol or convention, since it was the certainty of law and the principle *nulla poena sine lege* that were at stake.

11. Apart from one reservation that he would explain later, he also agreed with the idea of focusing the provisions of the code on offences committed by individuals, whether agents of the State or private persons acting individually or collectively, and of leaving aside international crimes committed by States. However, he also shared Mr. Graefrath's view (1995th meeting) that the text of the code should make it clear that the responsibility of individuals was without prejudice to the responsibility of the State of which they were the agents.

12. Draft articles 2 and 4, which were closely linked, gave rise to some problems relating not so much to the articles themselves as to the general trend that had prevailed until now among Governments in connection with the relationship between international law and internal law. In view of the way in which that relationship operated in the case of instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>9</sup> which were precedents that the Commission should take into account, it had to be decided just how much importance should be attached to the notion of the independence or autonomy of international law, which, according to draft articles 2 and 4, would ensure that the code took precedence over the internal law of States.

13. In his view, international law alone, as an inter-State system, could not guarantee the law-making power and full implementation of the code; national legal systems would have to continue to be involved, whether or not it was possible to establish an international court of criminal justice—something that would be advisable for the implementation of the code. In the absence of the necessary international institutions, national legal systems would have to conduct operations to find, identify, arrest, extradite, imprison, charge, defend, try and sentence offenders and enforce penalties. Even if an international court of criminal justice were in fact set up, such action by national legal systems would be the only conceivable way of guaranteeing the implementation of the code, since an international criminal jurisdiction would not have all the services and powers necessary to hold trials and enforce sentences.

14. The fact was that, however independent and autonomous it might be, international law did not

<sup>6</sup> See 1992nd meeting, footnote 6.

<sup>7</sup> *Ibid.*, footnote 11.

<sup>8</sup> *Ibid.*, footnote 12.

<sup>9</sup> General Assembly resolution 39/46 of 10 December 1984, annex.

directly affect individuals and therefore depended on internal law in that regard: internal law was an essential complement of international law. That complementarity did not necessarily mean that internal law was subordinated to international law. It could be said that international law depended on internal law, since, even if a rule of international law gave a State certain rights and obligations, that State's ability to exercise those rights or fulfil those obligations depended on the acts and omissions of individuals, who, in a State subject to the rule of law, were governed by the rules of internal law. That was all the more true in the case of rules of international law which were intended to prevent or prosecute criminal acts by individuals who held power in a country. If the rules of international law to be enunciated in the code were to be enforced, it was therefore not enough to say that they were autonomous and independent of the position under internal law with regard to the acts and omissions to which they applied.

15. Mr. Graefrath had suggested that there should be a provision making it an obligation for States to adopt the necessary legislative measures for the implementation of the code. That had also been the intention of the drafters of the Conventions on genocide and torture, which did refer to legislative, administrative, judicial and other measures, but were far from complete on that point. It was not necessary to reject those examples rather than follow them, as Mr. Calero Rodrigues (1994th meeting) would like. The solution was not merely to affirm the autonomy and supremacy of international law or to draft more or less detailed provisions on the measures to be taken to implement the code; it was rather to affirm that States signing the code would be expressly bound to incorporate its provisions in their criminal law. Such a requirement might appear to be excessive, but the code's effectiveness would depend on it being incorporated in the legal systems of States. When ratifying the code, States would either show that they were willing to make it an integral part of their legal system, or refuse to do so and it would have to be concluded that they preferred to do without the code, which would then have a not very clearly defined place in a proudly autonomous and independent international order that would not have the means to achieve its ends. In such a case, it would not play the role of deterrence and justice referred to by Mr. Njenga (1995th meeting).

16. The optimism with which it was hoped to solve the problem by proclaiming the autonomy and supremacy of international law could be explained by the fact that doctrine had, perhaps too slavishly, followed the statements made by the eminent participants in the Nürnberg trial. Since 1945, it had been widely held that the Nürnberg experience had established the supremacy of international law as far as offences against the peace and security of mankind were concerned, as shown by the views of Pierre-Henri Teitgen, the then French Minister of Justice, and Francis Biddle, the United States judge on the Nürnberg Tribunal, cited by the Special Rapporteur in paragraph (3) of the commentary to article 2. In retrospect, however, he thought that that was where the mistake had been made. Recalling the first statement he had made on the draft code at the

Commission's thirty-seventh session,<sup>10</sup> in which he had referred to his country's responsibilities during the Second World War, he said that the precedent of the Nürnberg trial was not valid in every respect. It was valid in moral and political terms and even in terms of natural law, but not in legal terms. From the point of view of positive law, there had been no demonstration of the supremacy of international law over internal law. At Nürnberg, there had been no conflict between international law and internal law, but rather a conflict between civilization and barbarism and between the internal law of some States, which had followed basic principles of humanity and justice, and the internal law of the Nazi régime and the Fascist régime. In the 1945 London Agreement for the prosecution and punishment of the major war criminals,<sup>11</sup> the Allies had established rules of international law which applied *inter se* and under which they had been mutually bound to try certain individuals according to certain civilized principles of criminal law; but those rules had not bound them either to the State which they had occupied or to the international community as a whole. The problem of the respective roles of international law and national legal systems had not been solved at Nürnberg.

17. The concept of the supremacy of international law could not be relied upon to solve that problem, nor could the theory of the more or less spontaneous duality of functions of State bodies. The code therefore had to make it a requirement that some rules should be incorporated in national legal systems. That approach would offer the advantage of making internal criminal law perfectly suited not only to the definition and characterization of the offences, but also to the other basic principles enunciated in the draft articles under consideration.

18. The reservation to which he had referred at the beginning of his statement related to the distinction between an offence committed by an individual acting as a State agent and an offence committed by a State. That distinction was entirely relevant and reference should be made in the draft code to the responsibility of individuals, whether State agents or private persons. It should, however, be borne in mind that that distinction was sometimes of a very relative nature and that the personality of the agent and the international personality of the State were so closely linked in fact and in law that, in the case of the most serious offences, it was sometimes the *de facto* punishment of the State that made it possible to prosecute the individual. Capital punishment could, of course, not be imposed on a State; but at Nürnberg it had been because the State had, so to speak, been decapitated that it had been possible to prosecute individuals who had held the highest ranks in the State apparatus. He was therefore of the opinion that, in the case of extremely serious offences, the distinction was a relative one, although he recognized that offences committed by individuals had to be dealt with in the code, while the question of offences committed by States came under article 19 of part 1 and the provisions of parts 2 and 3 of the draft articles on State responsibility.

<sup>10</sup> *Yearbook . . . 1985*, vol. I, pp. 65-67, 1887th meeting, paras. 25 *et seq.*

<sup>11</sup> See 1992nd meeting, footnote 6.

19. Mr. ILLUECA thanked the Special Rapporteur for submitting a report (A/CN.4/404) that would enable the Commission to make headway in the formulation of the draft code. For the time being, he would comment only on some aspects of the draft articles, but reserved the right to revert to the present topic at a later stage.

20. If the code was to be an effective instrument of prevention and deterrence, it had to contain provisions on the following points: the definition and characterization of offences against the peace and security of mankind; attributability and the resulting responsibility of individuals, States and organizations; applicable penalties; and an international criminal jurisdiction. Noting that, for practical reasons, the Commission had decided to focus at the current stage on the criminal responsibility of individuals, without prejudice to the possibility of considering the question of the criminal responsibility of States at a later stage, he pointed out that, under article 19 of part 1 of the draft articles on State responsibility,<sup>12</sup> an international crime attributable to a State could, for example, result from “a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*” (para. 3 (c)).

21. With regard to draft article 3, it must be borne in mind that there were organized groups of individuals which had weapons and resources enabling them to engage in unlawful activities and which were also capable of violence. At present, there were many criminal organizations made up of drug traffickers, mercenaries, racists and other individuals who took part, as perpetrators, instigators or accomplices, in the commission of serious offences against national, ethnic, racial and religious groups which might be characterized as offences against the peace and security of mankind. In that connection, he referred to article 6 of the Charter of the International Military Tribunal,<sup>13</sup> which stated that the Tribunal “shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations”, committed crimes against peace, war crimes or crimes against humanity; to article 9, which stated that: “At the trial of any individual member of any group or organization, the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization”; and to article 10, which provided that: “In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. . . .”. He also recalled that, in its judgment, the Tribunal had referred to Law No. 10 of the Control Council for Germany,<sup>14</sup> which provided in article II, paragraph 1 (d),

that membership in categories of a criminal group or organization declared criminal by the Tribunal was recognized as a crime, and that the Tribunal had stated: “A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes.”<sup>15</sup>

22. In the light of those provisions and other more recent developments, the Special Rapporteur might amend draft article 3 so that the words “Any individual who commits an offence” would apply to any person acting either individually or as a member of a criminal organization. It was, for example, significant that, in paragraph 5 of resolution 41/103 of 4 December 1986 on the status of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the General Assembly:

Draws the attention of all States to the opinion expressed by the Group of Three in its report that transnational corporations operating in South Africa and Namibia must be considered accomplices in the crime of *apartheid*, in accordance with article III (b) of the Convention;

23. In dealing with the punishment of individuals who committed offences against the peace and security of mankind, account should also be taken of the victims, both individual and collective. In that connection, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>16</sup> provided, as one type of penalty, that fair restitution and compensation must be made to victims and, in paragraph 12, stated: “When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation . . .” It was a well-known fact that the Federal Republic of Germany, for example, had paid more than \$10 million in reparations to more than 3 million victims.

24. It should also be noted that there was a relationship between the criminal responsibility referred to in draft article 3 and the rights and duties of alleged offenders. In that connection, the Nürnberg Tribunal had stated in its judgment:

. . . individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.<sup>17</sup>

It therefore had to be asked what duties and obligations individuals now had as a result of threats of the use of nuclear weapons, assuming that such use, which would jeopardize mankind’s very survival, would be regarded as an offence against the peace and security of mankind. Persons who were opposed to the manufacture and stockpiling of nuclear weapons, for example, and who were being tried in that connection for offences against national legislation were claiming in their defence that the judgment of the Nürnberg Tribunal confirmed that individuals had international obligations which transcended their national duty of obedience to the State.

<sup>12</sup> See 1993rd meeting, footnote 7.

<sup>13</sup> See 1992nd meeting, footnote 6.

<sup>14</sup> 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)).

<sup>15</sup> See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7), pp. 76-77.

<sup>16</sup> General Assembly resolution 40/34 of 20 November 1985, annex.

<sup>17</sup> *The Charter and Judgment of the Nürnberg Tribunal. . . .*, op. cit. (footnote 15 above), p. 42.

25. Draft article 5 was in keeping with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, but it should be noted that such non-applicability was total, not partial, because in view of the universal nature of the offences under consideration it related not only to punishment, but also to the obligation of the offender to make reparation. The Commission and the Special Rapporteur should take account of the need to safeguard the right of victims of offences against the peace and security of mankind to be properly compensated. That right could not and must not be made subject to statutory limitations, as had been done in the United States of America in the case of the claim for damages which had been brought by the Unified Buddhist Congregation of Viet Nam on behalf of the survivors of the My Lai massacre and which had been denied by the Georgia District Court on the grounds, *inter alia*, that the two-year statutory limitation was applicable. That aspect of the non-applicability of statutory limitations should be clearly brought out in draft article 5 and the commentary thereto.

26. In conclusion, he referred to the concerted and systematic crime prevention and criminal justice activities being carried out by the United Nations. The Commission had had the benefit of comments on that question submitted by Governments, specialized agencies and non-governmental organizations, but it did not seem to have benefited from the assistance of the Secretariat staff responsible for organizing United Nations Congresses on the Prevention of Crime and the Treatment of Offenders. It had also apparently not established all the necessary contacts with the members of the United Nations Committee on Crime Prevention and Control. The Chairman of the Commission should, through his good offices, ensure that the Commission benefited from the views that such international criminal law experts might have on the draft code.

27. Mr. SHI said that the Commission had made considerable progress in its work on the draft code since it had resumed its discussion of the topic in 1982 after a lapse of more than 25 years. Much of the credit for that progress was due to the Special Rapporteur, to whom he expressed his appreciation.

28. The topic was both very important and very difficult. The international community of States needed an international régime for the prevention and punishment of such monstrous crimes as armed aggression, genocide and *apartheid*, and the code would meet that need: hence its importance. At the same time, the subject was a complex one because international criminal law was a relatively new and unexplored field of international law. In fact, the very existence of international criminal law as a discipline was not widely accepted in all parts of the world.

29. The preparation of the draft code, as a serious attempt at the progressive development and codification of international law, raised three fundamental issues: the offences to be covered; the nature of criminal responsibility; and the application of the code in space. In view of the realities of contemporary international relations, which were based on the sovereign equality of independent States, the Commission's task would not

be an easy one, for a number of doctrinal and practical problems were involved.

30. As to those three issues, he was of the opinion that the code should cover only crimes of a very serious nature that came within the categories of crimes against peace, crimes against humanity and war crimes; that criminal responsibility should be limited to individuals, with the criminal responsibility of States being dealt with under the topic of State responsibility; and that, with regard to the application of the code in space, universal jurisdiction appeared to offer a well-balanced solution that would reconcile other systems of jurisdiction. The establishment of an international criminal court might appear to be an ideal solution, but in practice it would prove counter-productive.

31. As far as the title of the draft code was concerned, he agreed with those members who had urged that the word "offences" should be replaced by "crimes" so that the title in English would be in line with the other languages. In Chinese, the only suitable term to use was the Chinese equivalent of the word "crimes".

32. With regard to draft article 1, he pointed out that a definition was supposed to be a specific and exact explanation of the meaning, nature and limits of the thing defined; but the wording used in article 1 was not specific and also did not provide any general criterion for the definition of crimes against the peace and security of mankind. He was nevertheless prepared to accept that provision for the time being, since he was aware of the great difficulties the Special Rapporteur faced in trying to find general criteria of an objective nature. As to the list of crimes announced in the text of article 1, its exhaustive nature would rule out the possibility of any unwarranted expansion of the scope of the code. If new crimes were to be added to the list at a later stage, that could be done by means of a new agreement.

33. Draft article 2 rightly stated the principle that the characterization of an act as a crime against the peace and security of mankind was within the realm of international law and that, as a logical consequence, such characterization was independent of internal law. That was tantamount to saying that, in the event of conflict between the provisions of the code and those of internal law, the former would prevail. The second sentence could, however, be deleted, since the first already unambiguously affirmed that the characterization was independent of the internal law of any State.

34. In draft article 3, the use of the word "individual" improved the text and gave it the desired precision.

35. Since he had said that he was in favour of the concept of universal jurisdiction, he naturally accepted draft article 4. He noted, however, that there were some differences of opinion on that point: some members of the Commission strongly supported the concept of territoriality, while others, who considered that crimes against the peace and security of mankind were always politically motivated and who were therefore mistrustful of territorial jurisdiction, advocated the establishment of an international criminal jurisdiction. As he saw it, the only solution to that divergence of views would be the adoption of the principle of universal jurisdiction, involving the obligation for States



either to try or to extradite offenders. As already stated, it was important that the provisions of article 4 should make it clear that the crimes defined in the code were extraditable. It must, however, be admitted that universal jurisdiction was no panacea and that there might be cases in which it would fail to work. For example, individuals holding power in a State which practised *apartheid* as a national policy could not be expected to be put on trial by their own courts. Nor were they likely to be extradited. Nevertheless, that might well be the only solution acceptable to the international community as a whole.

36. He could accept paragraph 2 of article 4 because he was neither a defeatist nor an opponent of an international criminal jurisdiction as such. He would even welcome the establishment of such a jurisdiction, if that were ever to happen. He supported the suggestion that the Latin title of the article should be replaced. Apart from the reasons already stated, a title in Latin would create problems in the Chinese text of the code.

37. He accepted draft article 5 without any reservation. Moreover, the non-applicability of statutory limitations to such heinous crimes as war crimes and crimes against humanity was specifically recognized in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, although few States had as yet ratified or acceded to that Convention. It was true that there might be difficulties in gathering documentary evidence, tracing witnesses and investigating facts in some cases. Nevertheless, article 5 upheld the principle that those guilty of such crimes should not go unpunished.

38. The principle of jurisdictional guarantees was common to all legal systems and recognized as an essential element of the protection of human rights in a number of international legal instruments. It should therefore be included in the code. However, he shared the view expressed by other members that draft article 6 need not contain a long and detailed list of guarantees to which a person charged with an offence was entitled. The first sentence of the new text, setting forth the general principle of jurisdictional guarantees, could, with some polishing, serve the purposes of the code.

39. He approved in principle of draft article 7, since the *non bis in idem* rule was universally recognized. However, for the reasons he had given in connection with draft article 4, he would prefer the Latin title of the article to be changed. Moreover, with regard to the situation described by the Special Rapporteur in paragraph (3) of the commentary, it should be noted that the criminal codes of some countries did not preclude the possibility of the trial of a criminal who had already been tried by the courts of another State and had served a sentence in that other State, provided that account was taken of the earlier sentence.

40. Paragraph 1 of draft article 8 stated a universally recognized principle of criminal law, but he was not sure about the propriety of referring, in paragraph 2, to "general principles of law recognized by the community of nations" as sources of international criminal law. There might be a danger of broadening the scope of the

draft code, in which case paragraph 2 might not be consistent with article 1.

41. Referring to draft article 9, he said that various legal systems accepted self-defence as an exception, but he doubted whether that was possible with regard to self-defence in the case of aggression, in view of the provisions of Article 51 of the Charter of the United Nations, which referred to "the inherent right of individual or collective self-defence" of Member States. There was also some question as to whether self-defence could be admitted as a defence in respect of crimes against humanity. For the sake of consistency and accuracy, self-defence should be omitted from the list.

42. The concepts of coercion, state of necessity and *force majeure* could be differentiated in a theoretical sense, but they all contained a common factor, namely an irresistible force beyond the will of the perpetrator. In the commentary (para. (9)), the Special Rapporteur noted that the admissibility of defences based on those exceptions depended largely on elements such as the extent to which the perpetrator invoking the exception was at fault and the proportionality between the interest sacrificed and the interest safeguarded. He therefore had no objection to the inclusion of those exceptions in the draft article.

43. With regard to error, the Special Rapporteur's commentary was convincing, and he would have no objection to the inclusion of that exception in the text.

44. In his report, the Special Rapporteur requested the Commission to take a decision on the need to retain a separate provision on superior order, since compliance with such an order was justified by coercion and error. For the reasons given by the Special Rapporteur in the commentary (paras. (20)-(23)), he would suggest that superior order be deleted from article 9. Should the Commission decide to retain that exception, at least the clause on moral choice should be deleted from subparagraph (d).

45. Draft articles 10 and 11 did not give rise to any problems.

46. Mr. EIRIKSSON said that the Special Rapporteur's fifth report (A/CN.4/404) and the discussion of it at the current session represented a breakthrough in the consideration of the topic and brought the Commission very close to the adoption of a common position on the issues involved. The Commission might, however, use novel working methods to achieve that end. Accordingly, he proposed that three of the meetings allocated to the consideration of the topic should be set aside for use later in the session and that the Special Rapporteur should be asked to submit a revised set of articles in the mean time, setting out clear choices on four main issues where difficult, but nonetheless possible, decisions must be made. He might also indicate the issues to be addressed in the commentaries to the articles. In his own view, those four issues were: (a) whether there should be a substantive definition of the crimes covered by the draft code; (b) whether the code should apply to State responsibility or simply to the responsibility of individuals; (c) whether the jurisdiction of an international criminal court should be envisaged; (d) whether attempt and complicity should be

included among the general provisions or dealt with as specific crimes.

47. In general, he was of the view that the Commission should opt for clear wording in draft articles, rather than couch them in terms which were polemical or more suitable to a commentary. As far as structure was concerned, he agreed that the code should be divided into two parts, one containing general provisions and the second listing specific crimes.

48. With regard to the draft articles themselves, and to draft article 1 in particular, he would recommend the listing of specific crimes, taking account of the comments made by various members of the Commission concerning the exhaustive nature of the list.

49. As to the question of State responsibility versus individual responsibility, he was of the view that the code should apply only to individual responsibility. Both of the above points could be dealt with by deleting draft article 3 and amending draft article 1 to read:

*“Article 1. Scope*

“The present Code applies to the crimes against the peace and security of mankind defined in part II committed by natural persons.”

The commentary would then indicate that the reason for an exhaustive listing was the concern for certainty, that the Commission envisaged that other crimes could be added later by means of additional protocols and that the restriction to individual responsibility was without prejudice to State responsibility.

50. With regard to draft article 4 and the question of establishing an international criminal court, he would propose optional international jurisdiction with residual national jurisdiction combined with an option of extradition. That would be dealt with in a comprehensive article drafted on the basis of the wording proposed by Mr. Calero Rodrigues (1994th meeting, para. 10) and the points raised by other members, including Mr. Barsegov (1993rd meeting), and Mr. Graefrath and Mr. Yankov (1995th meeting). The article would read:

*“Article 4. Enforcement*

“1. Every State shall take all the measures necessary to ensure that persons found in its territory who are accused of crimes against the peace and security of mankind are brought before a judicial authority competent for the trial of those crimes under the present Code.

“2. In the case of States which have accepted the jurisdiction of the International Tribunal on Crimes against the Peace and Security of Mankind or an *ad hoc* international tribunal established under the present Code, such persons shall be surrendered to such tribunal.

“3. In the case of any other State, the person shall, unless he is brought before the judicial authorities in its own territory, be extradited to one of the following States, listed in order of priority, following a request for extradition from such State:

“(a) the State in the territory of which the crime was committed;

“(b) the State against the territory or nationals of which the crime was committed;

“(c) the State of which the person is a national.”

51. While he was of the view that attempt and complicity should be included in the general provisions of the code, he had doubts about the inclusion of conspiracy or *complot*.

52. Draft article 2 should be deleted. He agreed with other members that the second sentence was unnecessary in any event, but, if the articles were logically structured, the first sentence was also unnecessary. There appeared to be some differences of view as to whether that sentence was designed to establish the primacy of international law or to avoid procedural conflicts. In any case, the term “characterization” was a less recognized term in English than the equivalent term in Spanish or French. If necessary, some explanation on the point should be included in a commentary, perhaps to the revised article 4.

53. In draft article 5, the words “because of their nature” should be deleted. In draft article 6, a general provision would be preferable to the examples given in the new text.

54. Draft article 7 should be amended to read:

“No person shall be tried or punished again for a crime against the peace and security of mankind for which he has already been finally convicted or acquitted.”

55. With regard to draft article 8, he endorsed the wording proposed by Mr. Hayes for paragraph 1 (see 1995th meeting, para. 36). Paragraph 2 should be deleted.

56. Draft article 9 raised doctrinal difficulties with regard to the principle of responsibility, on the one hand, and defences, on the other, questions on which the civil-law and common-law systems differed. In his view, the question of intent should be dealt with clearly in the definitions of specific crimes. References to *force majeure*, error of fact and mental incapacity would then be unnecessary.

57. The concept of self-defence was to be ruled out: in the case of aggression, it fell outside the scope of the definition itself and, in other cases, it should not be admitted as an exception. State of necessity, in so far as it was distinct from *force majeure*, was not a valid exception to responsibility. Nor was error of law. The exception of superior order should be admitted only if it fell under coercion, and could thus be deleted. Thus only coercion would remain. He would, however, be in favour of the inclusion of a reference to age.

58. Draft articles 10 and 11 were acceptable, provided that some drafting changes were made to bring them into line with the wording of earlier articles. Article 10, for example, should be linked to the question of complicity.

59. Lastly, the members of the Commission should hold consultations in order to decide whether “crimes” or “offences” should be the term used in the English text of the draft code, so as to dispose of that question once and for all.

## Co-operation with other bodies

[Agenda item 10]

### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

60. The CHAIRMAN invited Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, to address the Commission.

61. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) said that, in the 30 years since the formation of the Asian-African Legal Consultative Committee, its activities had expanded to areas such as economic relations, refugee questions, environmental issues and even political issues such as peace and security. In all those areas, the basic criterion for the Committee's deliberations was that they should have a degree of objectivity and a predominantly legal orientation; hence the Committee's continued close relationship with the Commission. It had worked closely with the Commission on topics such as the jurisdictional immunities of States and the law of international watercourses. The Committee had also tried to generate wider interest in the work of the Commission among the Governments of its region by preparing notes and comments on the Commission's reports for the use of delegations to the Sixth Committee of the General Assembly.

62. At the time of the Committee's inception, many independent or nearly independent States in Asia and Africa had been facing problems in such areas as the treatment of foreigners, border issues and international watercourses. Consequently, one of the areas selected for co-operation within the context of the Committee had been the codification of law. From 1957 to 1967, the Committee's activities had been confined to that area, to providing advice on problems submitted to it by member Governments and to the consideration of issues of common concern. During that period, the Committee had established very close relations with the Commission.

63. Since 1968, the Committee's activities had expanded considerably. One of its major activities had been the provision of assistance to States participating in the plenipotentiary conferences of the United Nations. Later, it had become concerned with economic questions and finally it had been accorded permanent observer status in the General Assembly, which had adopted a resolution<sup>18</sup> calling for closer co-operation between the United Nations and the Committee. As a result, specific areas of co-operation had been identified over the past five years, including the rationalization of procedures and the promotion of the role of the ICJ. He himself hoped to meet with the United Nations Legal Counsel in the near future to discuss co-operation between the two bodies over the next five years.

64. In the specific area of international watercourses, it had been possible at the Committee's previous session to persuade member Governments to suspend consideration of the question until the 1988 session and to

consider the draft articles being prepared by the Commission.

65. Another area of co-operation was the question of the jurisdictional immunities of States, for which the draft articles prepared by the Commission were regarded as a good working basis.

66. The Commission's current session was the last one he would attend as Secretary-General of the Asian-African Legal Consultative Committee. He would nevertheless continue to take a close interest in the Committee's activities. He informed the Commission that the Committee's next session would be held in Singapore in February and March 1988. The Chairman of the Commission would of course be invited to represent the Commission at that session.

67. The CHAIRMAN thanked Mr. Sen for his invitation to attend the Committee's next session and wished him every success in the future.

68. Mr. Sreenivasa RAO expressed his appreciation of Mr. Sen's contribution to the work of the Asian-African Legal Consultative Committee over the past 30 years. His departure marked the end of an era in the existence of the Committee. He wished him every future success.

69. Mr. THIAM thanked Mr. Sen and the Asian-African Legal Consultative Committee for the warm welcome they had extended to him at the Committee's previous session. As Mr. Sen would be stepping down as Secretary-General of the Committee, he paid tribute to his competence and human qualities and wished him every success in his new activities.

70. Mr. YANKOV, speaking also on behalf of Mr. Barsegov and Mr. Graefrath, expressed appreciation of Mr. Sen's contribution to the work of the Asian-African Legal Consultative Committee and wished him every success in his future endeavours.

*The meeting rose at 1.10 p.m.*

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## 1997th MEETING

*Thursday, 14 May 1987, at 10 a.m.*

*Chairman: Mr. Stephen C. McCAFFREY*

*Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

<sup>18</sup> General Assembly resolution 36/38 of 18 November 1981.

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLES 1 TO 11<sup>5</sup> (continued)

1. Prince AJIBOLA, referring to the English title of the topic, said that the word "crimes" would be more appropriate than "offences". The general understanding of the term "offence" was that it was of lesser gravity than a crime, which was a *malum in se* or conduct in herently criminal. Crimes were very serious offences, heinous in nature, atrocious, cruel and, in the language of common law, felonies as opposed to misdemeanours. He therefore proposed that the Commission should consider recommending to the General Assembly that the title of the topic be changed to "Draft Code of Crimes against the Peace and Security of Mankind".

2. There was still much to be done to improve the definition in draft article 1, which could be amplified to give a clearer idea of the three major categories of crimes: crimes against humanity, crimes against peace and war crimes. That should be done before tackling the list of offences, which, as other members of the Commission had already said, it might well not be possible to make exhaustive. Article 1 could be made to provide for that situation by the addition of the words "as well as any other such crime as may be adopted by the General Assembly from time to time as constituting a crime against the peace and security of mankind". That wording would give the draft the necessary flexibility and open-endedness.

3. Draft article 2 could be deleted: the autonomy of international law was so patently obvious as to require no restatement. If the Commission wished to confirm it, however, the text of article 2 could be amended to reflect more adequately the idea expressed in paragraph (4) of the commentary that "the present draft code would itself become meaningless if it did not rest on the assumption of the supremacy of international criminal law".

4. With regard to draft article 3, the question was whether the use of the word "individual" solved the problem of the content of the code *ratione personae*. He shared the view that, if the word "individual" was used in article 3, it should also be used in the rest of the draft. The fact remained, however, that replacement of the word "person" by "individual" did not solve the whole problem, for there were acts of individuals that were

also acts of the State, so that in such cases prosecution of the individual was inevitably equivalent to prosecution of the State. In other words, it might be difficult to separate some acts of individuals from acts of the State. In the 1954 draft code (art. 2, para. (1)), aggression was specifically referred to as an offence against the peace and security of mankind, while in the Definition of Agression<sup>6</sup> (art. 1) it was defined without reference to individuals. That problem clearly needed to be considered in connection with draft article 9 (d), in which superior order was made an exception to criminal responsibility, provided that no moral choice was possible for the perpetrator. The Special Rapporteur himself raised the problem in the commentary to article 9.

5. Draft article 11 also had some bearing on the question. Despite article 7 of the Charter of the Nürnberg Tribunal<sup>7</sup> and article 6 of the Charter of the Tokyo Tribunal,<sup>8</sup> the question remained whether it was the State or the individual that was liable to prosecution in such circumstances. It was also important to relate the topic of State responsibility to the present topic, otherwise the General Assembly might defer further work on the draft code until the last report on State responsibility had been submitted.

6. Another important question was that of jurisdiction, referred to in draft article 4, from which it appeared that national jurisdiction was envisaged. At the same time, paragraph 2 left the way open for the establishment of an international criminal court. It might accordingly be well to redraft paragraph 1 to read:

"1. Every State has the duty to try or extradite any alleged or suspected perpetrator of a crime against the peace and security of mankind found within its jurisdiction."

7. The establishment of an international criminal jurisdiction was not a new idea. As long ago as 1948, the General Assembly had invited the Commission to study that question.<sup>9</sup> After considering the reports of the special rapporteurs appointed to deal with the question, the Commission had decided, at its second session in 1950, that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes was both desirable and possible.<sup>10</sup> Subsequently, a number of special committees had been appointed to look into the same question, but decisions had been deferred pending agreement on a definition of aggression and the completion of work on a draft code of offences against the peace and security of mankind. He was confident that an international criminal jurisdiction would eventually be established, although perhaps not in the near future. In the mean time, he could agree to an article providing for State jurisdiction, with suitable machinery for extradition. As States might sometimes be unwilling to extradite, however, further consideration of that aspect of international law might

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

<sup>6</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>7</sup> See 1992nd meeting, footnote 6.

<sup>8</sup> *Ibid.*, footnote 11.

<sup>9</sup> See General Assembly resolution 260 B (III) of 9 December 1948.

<sup>10</sup> See *Yearbook . . . 1950*, vol. II, pp. 378-379, document A/1316, paras. 128-145.

be necessary. The only other possible solution was the setting up of *ad hoc* international criminal tribunals, and draft article 4 could be made even more flexible so as not to exclude that possibility. The 1954 draft code should be carefully studied, in particular article 2, which boldly attempted to define offences against the peace and security of mankind.

8. He could accept the content and purport of draft article 5 in general, although the words "because of their nature" seemed unnecessary and could be deleted.

9. With the exception of the words "person" and "offence" in the introductory clause, draft article 6 was commendable. But, as other members had suggested, the idea of the right of appeal in appropriate cases could be introduced. He used the words "in appropriate cases" advisedly to allow for the possible establishment of an *ad hoc*, or even a permanent, international criminal tribunal.

10. Draft article 7 should either be amended substantially to reflect the international nature of the draft code, or be deleted. If draft article 2 was accepted as it stood, emphasizing the autonomy of international law *vis-à-vis* internal law, it was only logical and legally right for international law not to take cognizance of a trial under internal law. The *non bis in idem* rule would be applicable only if an individual had to be tried under international law.

11. Since, in criminal law, all retroactive laws, whether internal or international, were unjust, the aim of draft article 8 was welcome. The provisions of paragraph 1 might, however, be regarded as being negated by the provisions of paragraph 2, for reference to the general principles of international law might cause serious difficulties. Paragraph 1 could be amended to read:

"No individual shall be prosecuted for any alleged crime which, at the time of the commission of such alleged crime, did not constitute a crime against the peace and security of mankind."

Paragraph 2 could then be deleted.

12. With regard to draft article 9, whether the crimes in question were triable by a national or an international court, some of the defences provided for might be viewed by lawyers of the common-law countries as involving issues of *mens rea* and *actus reus*. Self-defence was already recognized by international law and by the Charter of the United Nations (Art. 51). While error of fact might, in appropriate circumstances, be a defence, error of law should not be accepted, because the perpetrator, by the very nature of the crime, must appreciate its gravity.

13. As to draft article 10, he thought that complicity and intent should be dealt with in separate articles. Draft article 11 was quite acceptable.

14. Mr. SEPÚLVEDA GUTIÉRREZ said that he was impressed by the erudition and zeal of the Special Rapporteur and hoped that the Commission would be able to complete its task as soon as possible.

15. In connection with draft article 1, he thought that examination of the whole code would be facilitated if

the Commission had even a provisional list of the crimes to be covered, since the enumeration of the different categories of crimes would affect various provisions of the code. However difficult it might be to draw up that list, a start should be made as soon as possible. As to the wording of article 1, the expression "under international law" seemed to be unnecessary and to weaken the provision to some extent, by unnecessarily opening the way for controversies.

16. Draft article 2 seemed vague, at least in the Spanish version, which did not correspond exactly to the original text. First, the word *calificación*, in the title, should be replaced by *tipificación*, and in the first sentence the word *hecho* should be replaced by *acción u omisión*. The second sentence seemed unnecessary. Lastly, the article seemed incomplete: it did not say who was to characterize an act as an offence against the peace and security of mankind. True, it hinted at the establishment of an international criminal court, but was that really the object in view? As other members of the Commission had already observed, States would still play the principal part in applying the future instrument; for some time yet, it would be States that were responsible for prosecution and punishment under their national laws. Hence it was important to avoid all ambiguity until an international court was set up. There had been some talk of a transitional régime, but he would need further particulars before forming an opinion. His own view was that it should be provided that the crimes covered by the code were punishable, or should be punished, in accordance with its provisions.

17. Draft article 3, with its reference to the "individual", lacked clarity, and it would be desirable to specify that the author of an offence against the peace and security of mankind could only be a person having official functions, that was to say an agent of the State, since a private person acting on his own account would not possess the means to commit such a crime. On the other hand, the text should also mention organizations, associations and other legal persons that might be responsible for crimes against humanity. That question deserved consideration.

18. Draft article 4 should be given a title that could be used in all the official languages of the United Nations, especially as the Latin expression proposed appeared to admit of several variants. Since the rule stated in the article had already been examined at length, he would confine himself to emphasizing that extradition raised innumerable problems.

19. Draft article 5 would be improved by the deletion of the words "because of their nature".

20. The Spanish title of draft article 6, which was ambiguous, should be replaced by *Garantías procesales*. Moreover, a detailed recital of the jurisdictional guarantees accorded to the accused might offer means of evasion that would make it possible either to delay the trial *sine die* or to prevent the punishment of some criminals. There was no reason why the article should not be simplified. It would be sufficient to say that the accused was entitled to the guarantees generally provided in legal systems and that the court trying him must ensure that those guarantees were applied.

21. In draft article 8, he had reservations about paragraph 2, which was too vague and might lead to injustice. Indeed, he doubted whether there was any general principle of international law which determined, or could in future determine, the criminal character of an act or omission. The last part of the paragraph required amendment.

22. He found draft article 9 difficult to accept in its present form. The title "Exceptions to the principle of responsibility" did not correspond to the content, which listed extenuating circumstances rather than exceptions. Furthermore, some of those circumstances might prove decisive, so that crimes would remain unpunished. He therefore endorsed the criticisms made of that provision and thought it would be preferable to leave it to courts to evaluate the circumstances which extenuated or nullified responsibility. Perhaps it would suffice to indicate, if that seemed necessary, that the competent court was to examine the extenuating or absolving circumstances.

23. Draft article 10 did not raise any problems; nor did draft article 11, except that it should perhaps be placed among the initial articles, since it stated a general principle.

24. Mr. OGISO, referring to draft article 1, said he agreed with a number of previous speakers that the word "offences" should be replaced by "crimes".

25. Draft article 2 should be placed in part II, containing general principles, since it dealt with the autonomy of international law and its primacy over municipal law. With regard to the drafting of the article, the first sentence should be replaced by wording such as that of Principle II of the Nürnberg Principles.<sup>11</sup> He noted that, in paragraph (1) of the commentary to article 2, the Special Rapporteur referred to that principle as confirming the principle of the autonomy of international criminal law.

26. As indicated in paragraph (7) of the commentary to article 2, the question of dual prosecution could arise when a national court characterized an act as a punishable crime under its municipal law and the same act was so characterized under the code. In such cases, he would support the view of the Special Rapporteur that the judgment of the national court did not preclude international criminal proceedings from being instituted. Because of the autonomy of international criminal law, the *non bis in idem* rule could not be invoked against an international criminal court. As the Special Rapporteur himself indicated in paragraph (9) of the commentary, however, it was only before an international criminal court that the rule could not be invoked.

27. He approved of the Special Rapporteur's decision to replace the word "person", in draft article 3, by "individual", which removed all ambiguity concerning the content of the draft code *ratione personae*. The question of the responsibility of States should not be taken up in the code, but should be thoroughly examined during the discussions on the topic of State responsibility itself.

28. The first principle to be clarified with regard to draft article 4 was that the offences against the peace and security of mankind defined in the code should be tried and punished by an international criminal court. Logically, therefore, it was only pending the establishment of such an institution that the internal jurisdiction of States could be exercised: the Special Rapporteur confirmed that in paragraph (6) of the commentary, where he stated: "The option envisaged in paragraph 2 would obviously be more consistent with the overall philosophy of the draft." Would it therefore not be preferable to deal with international jurisdiction in paragraph 1 and national jurisdiction in paragraph 2? Moreover, as it stood, paragraph 1 appeared to suggest that arrest was a pre-condition for the State's duty to try or extradite. It might be preferable to replace the word "arrested" by "found" or "present", which were used in a number of international conventions, such as the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.<sup>12</sup> However, if the Special Rapporteur had used the word "arrested" deliberately, because of the seriousness of the offences, he would not oppose its retention.

29. As to the duty to extradite, he shared the view expressed by other members that the offences covered by the code must not be treated as non-extraditable political offences, and suggested that that rule should be expressly stated. He accordingly proposed that the title of draft article 4 be changed to "Universal offence" and that the text be redrafted to read:

"1. An offence against the peace and security of mankind is a universal offence. Any perpetrator of such an offence found in the territory of any State shall be extradited to an international criminal court for punishment.

"2. Pending the establishment of an international criminal court, every State had the duty to try or to extradite such a perpetrator found in its territory.

"3. None of the offences contemplated in the present Code shall be regarded as being a political offence."

30. With regard to draft article 5, he shared the view that statutory limitations should not apply to offences against the peace and security of mankind, in view of their seriousness. Besides, the international community had already embodied that idea in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which had entered into force in 1970. It should be remembered, however, that, during the deliberations in the General Assembly on that Convention, a number of States had stressed that the essential prerequisite for the abolition of statutory limitations was a clear definition of the crimes to which that abolition would apply, and that unfortunately the Convention did not contain such a definition. It should also be remembered that statutory limitations had existed for a very long time in most legal systems, because of the need to protect human rights and the difficulty of obtaining evidence and calling witnesses so long after an act had been committed. For those reasons, he maintained that non-applicability of

<sup>11</sup> See 1992nd meeting, footnote 12.

<sup>12</sup> United Nations, *Treaty Series*, vol. 860, p. 105.

statutory limitations should be authorized only after the nature and scope of the crimes concerned had been precisely defined. Provisions such as draft article 8, paragraph 2, which referred to the “general principles of law recognized by the community of nations”, did not satisfy that condition.

31. The text of draft article 6 could be improved. First, if the Special Rapporteur’s intention in using the words “In particular” in the introductory clause was to show that the safeguards set out were “minimum guarantees”, as understood in article 14, paragraph 3, of the International Covenant on Civil and Political Rights, he would suggest that the introductory clause be amended to read:

“Any individual charged with an offence against the peace and security of mankind shall be entitled to the following minimum guarantees extended to all human beings:”

Those minimum guarantees should then be enumerated as precisely and completely as possible, and to that end he suggested adding two further guarantees in paragraph 3 (g) of draft article 6, which provided for the right to avoid self-incrimination. The first would be that a confession made under compulsion, torture or threats, or after prolonged arrest or detention, should not be admitted in evidence; the second would be that no one should be convicted or punished if the only evidence produced against him was his own confession. Those two guarantees were recognized, for instance, in the Japanese Code of Criminal Procedure, and he believed that similar provisions were in force in many other States. As to the question of *jus cogens*, he stressed that, in view of its importance and its place in international law, that question must not be dealt with casually; for his part, he would prefer it to be left aside at the present stage.

32. In draft article 7, he proposed the addition of a second sentence reflecting the content of paragraph (9) of the commentary to draft article 2, in order to emphasize that, because of the autonomy of international criminal law, the *non bis in idem* rule could not be invoked against an international criminal court. In view of its importance, that idea should be expressed in the text of the code and not in the commentary. He accordingly suggested the addition of the following sentence to article 7:

“This *non bis in idem* rule shall apply only as between States pending the establishment of an international criminal jurisdiction.”

33. In draft article 8, paragraph 2, following the criticisms made, the earlier formula “the general principles of international law” had been replaced by “the general principles of law recognized by the community of nations”. The new wording remained ambiguous, however, since it was not clear what those principles were. The Special Rapporteur had explained that those general principles should be construed in the common-law sense. The intention would thus appear to be to include judicial precedents. He was not necessarily opposed to that, in so far as judicial precedents were evidence of the state of positive law. It remained to be decided, however, whether international criminal responsibility should be laid on an individual by virtue

of anything other than written positive law. If the Special Rapporteur’s intention in using the words “general principles of law recognized by the community of nations” was to introduce a concept of justice going beyond written positive law, which would necessarily be vague and ambiguous, he would have to reconsider his position; for that would introduce concepts that were not precisely legal into such a fundamental rule of criminal law as *nullum crimen sine lege*. It would be better to delete paragraph 2.

34. With regard to the separate rule *nulla poena sine lege*, which was not included in draft article 8, the Special Rapporteur had recognized in his fourth report that “the Commission has not yet decided clearly whether the draft under consideration should also deal with the penal consequences of an offence” (A/CN.4/398, para. 181). For his part, while recognizing the difficulties involved in laying down specific rules on the subject, he believed that the draft code should at least provide some guidelines on the rules of punishment. Alternatively, as he had mentioned at the previous session,<sup>13</sup> such guidelines could be written into the statute of the international criminal court, if it was set up.

35. The new text of draft article 9 was clearer than the former text. But it was precisely because of its succinct character that the new text required as detailed and precise a commentary as possible, which in the fifth report (A/CN.4/404) was not always the case. For example, paragraph (2) of the commentary stated that “self-defence precludes both international responsibility on the part of the State invoking self-defence and individual criminal responsibility on the part of the leaders of that State”. But nothing was said about the case in which an individual other than a leader invoked self-defence. In his fourth report, the Special Rapporteur had said: “When hostilities have broken out . . . one cannot speak of self-defence between the combatants, because the attack unfortunately becomes as legitimate as the defence . . .” (A/CN.4/398, para. 252.) That was true enough, but was it certain that non-leaders could not invoke self-defence with regard to war crimes? One example might be soldiers of an occupation force who killed innocent civilians in the face of an imminent peril to their lives. The commentary to draft article 9 did not provide an answer to that question.

36. The question of extenuating circumstances, referred to by the Special Rapporteur in paragraphs (2) and (6) of the commentary to draft article 11, related to the application of penalties, a matter which would be examined at a later stage.

37. Lastly, on the question of criminal intent, there were, as he had said at the previous session,<sup>14</sup> two essential elements of crimes against humanity: one was the mass element and the other the element of intent. The first element meant that the offence must have been committed against a group or a number of people within a group, and that it must have been organized and executed systematically. The second element, which was

<sup>13</sup> *Yearbook . . . 1986*, vol. I, pp. 112-113, 1961st meeting, para. 23.

<sup>14</sup> *Ibid.*, p. 113, para. 24.

even more important, meant that the offence, even if characterized by massiveness, could not be regarded as a crime against humanity unless it had been committed with intent to destroy a national, ethnic, racial or religious group. But, although the expression "with intent" had been used in paragraph 1 of draft article 12 as submitted by the Special Rapporteur in his fourth report (*ibid.*, part V), it was only in regard to genocide. He therefore suggested that the draft code should include a general provision specifying the requirement of intent for all crimes against humanity.

38. Similarly, it had been proposed at the previous session that serious damage to the environment should be included in the draft code. There again, the decisive consideration was whether there had been criminal intent to destroy the environment. Without criminal intent there was no criminal responsibility. For example, there might be an accident in a nuclear power plant which caused widespread and serious damage to the environment in neighbouring States. The question of the liability of the author State towards the injured States would certainly arise under international law, but not that of individual criminal responsibility, unless there had been criminal intent on the part of those concerned.

39. Personally, he would prefer the two elements of massiveness and intent to be mentioned under the heading "General principles", since they were essential elements of crimes against humanity. But if the Special Rapporteur would prefer to take up that question later, in connection with the definition of a crime against humanity, he could agree to that course.

40. As to methods of work, he agreed with Mr. Eiriksson (1996th meeting) that the best way to make progress would be to ask the Special Rapporteur to redraft the articles, taking into account the views expressed by members and, in particular, to submit new texts for the controversial articles as soon as possible, so that the Commission could examine them carefully and refer them to the Drafting Committee.

41. Mr. REUTER said that, having listened with attention and interest to the statements made by other members of the Commission, he wished to explain his views on two points, although he must do so with certain reservations, since at the present stage in the discussion he did not know the feeling of the Special Rapporteur.

42. Referring first to the question of the balance of the future code, he observed that the present draft contained, on the one hand, provisions defining a certain number of crimes, and on the other hand, provisions concerning criminal procedure: he wondered what importance the Commission attached to those two aspects of the draft. As to procedure—which was of considerable importance since it concerned nothing less than the legal consequences of the crimes in practice—the ideal solution would certainly be to set up an international criminal court. In view of the need to prepare a draft that would be acceptable to the greatest possible number of States, however, many members of the Commission, including himself, were prepared to abandon that option in favour of universal jurisdiction. But to establish universal jurisdiction might not be as

easy as it appeared; the Commission should study the question thoroughly and be as precise as possible, injecting international law into the internal legal systems called upon to apply the code. On the other hand, the Commission might be in danger of overloading the draft and causing opposition to it, although it had always tried to find compromise solutions.

43. For example, it might be asked who was under an obligation, in what respect, and towards whom. Was the duty of States to deliver persons accused of offences against the peace and security of mankind to be understood as a duty to extradite? As had been shown by the expulsion of Klaus Barbie from Bolivia, States sometimes resorted to means other than extradition to deliver an accused to the judicial authorities of another State. Hence, if the Commission preferred to leave the matter indefinite, it would no doubt use a term such as "deliver", or an even more neutral word. But it might wish to be more precise, in which case two comments were called for. First, the reason why States had so far hesitated to accept such heavy obligations as the duty to try or to deliver an alleged offender was that the choice given them was often merely theoretical, since they must have sufficient information to be able to institute legal proceedings. Furthermore, did the Commission wish to impose obligations on States that would bind them to one another, or was it prepared to take the step that separated it from the sphere of human rights?

44. On another question of procedure, article 7 was drafted in such a way that it could be applied even in the absence of relations between two States. If a criminal sentenced to imprisonment escaped to another country, where he was again brought to trial, convicted of a capital offence and executed, that would be a violation of the code if article 7 created rights in favour of individuals; but if it did not, there would be no violation of the code, since there would be no injury to another State, the two States having simply exercised their competence in turn. Draft article 6 raised the same problem: did it create rights for the individual to be tried or rights for States? Could a State refrain from trying a person on the pretext that it had insufficient evidence, but refuse to deliver him to another State? An example would be the situation of a State party to the European Convention on Human Rights<sup>15</sup> which expelled terrorists in order to deliver them to the courts of another country, without observing the normal jurisdictional procedures: the persons concerned would have suffered a wrong and, after exhausting local remedies, would apply to the European Court of Human Rights, which might then condemn the State in question. Consequently, the clearer or the less clear the draft code, the more or the less acceptable it would be to States. For instance, one member of the Commission had observed that the draft should contain a provision making it an obligation for States to co-operate with one another: such a clause was indeed necessary, but how far could the Commission go without being imprudent? Again, it had been suggested that priority should be given to the principle *ratione loci*; but did the Commission wish to say so clearly? Was the object to draft an international

<sup>15</sup> See 1992nd meeting, footnote 9.



code of procedure to regulate problems arising from the obligation to try or to deliver?

45. Secondly, he feared that the question whether or not the application of the code should be limited to the responsibility of individuals might give rise to misunderstanding. While he shared the view of those members of the Commission who believed that State crimes should not be left out of account, he would remind them that article 19 of part 1 of the draft articles on State responsibility<sup>16</sup> was in the nature of a blank cheque, in that it established the concept of a State crime without stating the general rules by which that type of crime would be governed. He recognized that the Commission could not do otherwise, and even accepted the idea of having no statutory limitations for crimes of that type or of providing for different periods of limitation applicable to less serious breaches of international law. He also recognized that a crime was of concern to a wider circle of States than an ordinary delict; but the idea of inflicting a penalty on a legal person—in the present case, a State—was very serious and caused him some difficulties. He therefore reserved his position on that point.

46. The position taken by the Special Rapporteur on self-defence seemed to him to be perfectly normal. If a head of State was tried for aggression and if the State of which he was head could invoke self-defence—which was more than a justifying circumstance, since it nullified the crime—it was obvious that he could not be punished for the crime of aggression. For instance, supposing that two States, after having fought a war and suffered heavy losses, ended by making peace; that the individuals who had been the leaders of those States during hostilities took refuge abroad; that neither the Security Council nor the General Assembly, nor even another State, had spoken of aggression; and that each of the former belligerent States nevertheless claimed to have been the victim of aggression and asked that the former commander-in-chief of the other State be delivered to it to be tried for aggression: was it conceivable that an individual could have committed the crime of aggression if it was not established that the State to which he belonged had in fact committed the same crime? In such a case what authority would attach to a decision of the Security Council, a resolution of the General Assembly or a judgment of the ICJ establishing aggression? Would national courts be automatically bound by such a decision?

47. From those considerations he concluded that, if the Commission were to deal only with the crimes of individuals in the draft code, it must still not overlook the fact that most, if not all, of the crimes covered were State crimes in the first place. Those comments might make it easier to understand the question of self-defence, but he recognized that they, in turn, raised new problems. Thus he was not sure that the suggestion he had made at the 1993rd meeting, to the effect that it should be stated that draft article 3 was without prejudice to any decisions the Commission might take on the question of the criminal responsibility of the State, would meet all the concerns he had mentioned.

48. Mr. FRANCIS supported Mr. Ogiso's proposal (para. 29 above) to add a new paragraph to draft article 4, specifying that the concept of a political offence could not be invoked as a defence for the crimes included in the draft code. That was a point which he himself had stressed at the previous session,<sup>17</sup> but had omitted to mention in his statement at the present session.

*The meeting rose at 1 p.m.*

<sup>17</sup> *Yearbook* . . . 1986, vol. I, p. 148, 1965th meeting, para. 44.

## 1998th MEETING

*Friday, 15 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)**

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

ARTICLES 1 TO 11<sup>5</sup> (*continued*)

1. Mr. BOUTROS-GHALI said that, instead of reviewing the draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404) and the comments made by members of the Commission, he would simply make a few general remarks.

2. In the conclusion to his fourth report (A/CN.4/398, para. 259), the Special Rapporteur had stated: "It will undoubtedly be noted that the texts and judicial decisions analysed are . . . too closely linked to

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

<sup>16</sup> See 1993rd meeting, footnote 7.

the circumstances of the Second World War." Since 1945, however, there had been dozens of conflicts, such as wars of decolonization, localized wars and civil wars, which had broken out in various parts of the world and in which offences against the peace and security of mankind had been committed. Although it might be said that such armed conflicts had not contributed anything new as far as judicial practice was concerned and that the decisions adopted by certain people's courts were based more on politics or morality than on the law of nations, such conflicts did give rise to a new kind of problem that required the adoption of new rules. Offences against the peace and security of mankind were changing not only as a result of technological advances, but also—and more serious still—as a result of the emergence of new ideologies or ideologies that were being revived. The use of defoliants during the Viet Nam war and the mobilization of children in one of the countries at war in the Middle East were only two examples of such changes. Such developments put the offences under consideration in a new light and the Commission should carefully examine the resulting legal consequences.

3. He also noted that, although the draft code involved only two actors, namely the State and the individual, it focused primarily on the individual: the question of State crimes would be dealt with in another convention. There were, however, movements and groups separate from States which represented new forces that were sometimes more powerful than States. While he was aware that that question could be dealt with in draft article 14 as submitted in the fourth report (*ibid.*, part V), which covered "conspiracy", he was of the opinion that a specific provision should be devoted to such new entities.

4. The Commission had not paid sufficient attention to developments which were outside the inter-State system, but influenced it, and vice versa. It seemed to be looking at the present through the eyes of the past without considering new modern-day developments for which legal solutions had to be found. The establishment of a permanent or *ad hoc* international criminal jurisdiction had to be envisaged if the code was to have an infrastructure and be an instrument capable of taking such developments into account.

5. With regard to the various categories of offences dealt with in the articles of chapter II of the draft (*ibid.*), the Commission should refer to certain scientific studies of war and try to be more imaginative and even more daring—although that might not be in keeping with the legal tradition—in order better to understand those new developments. In that connection, he was of the opinion that, just as the economic system had largely become independent of the inter-State system, so some offences against the peace and security of mankind would also increasingly be beyond the reach of State authorities. Transnational realities would prevail in the field of crime as they had done not only in the case of the economy, but also in many other areas at the international level. That was a dimension of the problem on which the Commission should focus its attention.

6. Mr. THIAM (Special Rapporteur) said that he wished to reply, at least in part, to some of the comments made by Mr. Boutros-Ghali, who might already have been called away from the Commission to assume other obligations by the time the discussion was summed up.

7. The question of criminal organizations had been considered at the Nürnberg trial and had been resolved on that occasion. The case of each criminal organization had thus been dealt with separately and, once their criminal nature had been established, it had been their members, not the organizations themselves, who had been prosecuted. He did not think that such organizations could be regarded as subjects of law in the same way as individuals and States, particularly since they differed greatly from one another: a national liberation movement had nothing in common with a group such as the Mafia. The criminal responsibility of legal persons was, moreover, open to question, but the responsibility of each member of an organization could be established.

8. Prince AJIBOLA said the discussion clearly showed that there were certain lacunae in the draft code which would require the Special Rapporteur's close attention. In the first place, there was the question of classification. It had been recognized that certain offences against the peace and security of mankind could be committed by an individual or a group of individuals. There was, however, another category of offences which in effect involved acts by States. That element could no longer be ignored and the Commission should give the matter further thought.

9. Another issue to be resolved was that of jurisdiction. The Special Rapporteur had been at pains to provide a sufficiently flexible mechanism embodying both international criminal jurisdiction and internal criminal jurisdiction; but there was also the possibility of an *ad hoc* international criminal jurisdiction, as illustrated by the Nürnberg Tribunal. That point therefore required clarification. The Commission would also have to consider the admittedly complex issue of extradition if the code was to have teeth.

10. Yet another point which the Special Rapporteur should consider and one to which many members of the Commission had already referred was whether the word "offences" in the English title of the topic should be replaced by "crimes".

11. All those areas had political connotations and were of major importance. Issues such as non-retroactivity, jurisdictional guarantees, complicity, intent, fair trial and double jeopardy were, however, supplementary to the main theme of the draft code. Accordingly, it was necessary first to erect the structure, after which the elements could be defined.

12. He noted from the records of previous sessions of the Commission that, once the Commission had completed its work on a topic, there had been a tendency, if some problem which had a political connotation was involved, to defer a decision on the matter until it eventually died a natural death. History, however, was being made now and it behoved the Commission to produce something that could be successfully implemented. The

informal written proposal submitted by Mr. Eiriksson regarding draft articles 1 to 8 was relevant in that connection and should also be examined.

13. The CHAIRMAN, speaking as a member of the Commission, said that he particularly appreciated the efforts made by the Special Rapporteur to respond to the wishes of members, especially regarding the need for a set of general principles. Many of his comments on the draft code had been covered by other members or raised by himself at previous sessions, and he would therefore not repeat them.

14. He agreed that the English title of the topic should be amended to refer to “crimes” against the peace and security of mankind and considered that the General Assembly could be requested to endorse that change for the reasons already stated, mainly by Prince Ajibola (1997th meeting).

15. The present topic was particularly sensitive and required great care. It had been suggested during the discussion that States should not be allowed to derogate from the provisions of the code. Even if States did not ultimately adhere to the code, however, the unique nature of the Commission’s mandate meant that the product of its work—to which courts and foreign ministries often looked for guidance—would, to some extent at least, be viewed as a codification of the law in the area in question, particularly in the light of the precedent set by the Nürnberg Principles.<sup>6</sup>

16. An allied and extremely important question concerned the inseparability of the code, on the one hand, and the means of enforcing it, on the other. In his view, the Commission should make it clear that the provisions governing the implementation of the code were part and parcel of the code itself, for, if the adoption of any instrument resulting from the Commission’s work was not universal, there was a danger that States might try to pick and choose, deciding what constituted a crime and how to enforce any penalties as and when they saw fit. That point also underlined the desirability of establishing an international criminal jurisdiction. Although the idea might not be very attractive to all States, it was, as the Special Rapporteur had rightly pointed out, a test of the seriousness of the intentions of States with regard to the code. The Commission should see whether States were willing to meet that test and to agree to the establishment of such a jurisdiction. It should therefore try to obtain a decision from the General Assembly on the point. If it did not obtain such a decision, as was probable, it should not exclude the possibility of attempting to elaborate the statute of an international criminal jurisdiction at an appropriate stage in its work on the topic. In that connection, the proposals by Mr. Beesley (1994th meeting), which provided a possible middle way between an international criminal jurisdiction and the jurisdiction of national courts, deserved serious consideration.

17. He had grave doubts about exclusive reliance on the doctrine of universal jurisdiction, which would, in his view, create more chaos than order and had not proved very successful in the past. Moreover, the extent

of universal jurisdiction in the modern world was not at all clear. He was also not sure that the territoriality doctrine, to which one member of the Commission had referred, provided an answer. It was, of course, possible to envisage a reference to courts in the territory in which the act had been committed or in the State of the defendant’s nationality; but in the case of *apartheid*, for example, there would be no sense in trying an individual in the territory in which the act had been committed. That again underlined the need to place emphasis on the establishment of an international criminal jurisdiction.

18. He did not in general favour a non-exhaustive list of offences, since different national jurisdictions might then interpret and apply the code in different ways. However, if a tribunal were set up and if it provided the sole means whereby the code would be implemented, a non-exhaustive list might be feasible, for such a list would not be open to varying interpretations and additions. In view of the extreme gravity of the offences to be covered by the code, however, he would prefer it if every effort were made to draw up an exhaustive list. There was nothing to prevent States which adhered to the code from adding a protocol to cater for any offences that might emerge after the code had been adopted. He therefore agreed that paragraph 2 of draft article 8 should be re-examined, since it could have the effect of reopening an otherwise closed list of offences.

19. Draft article 2 made him think of the perennial debate between the monists and the dualists. Was there one system of law which encompassed both international and national law or were there two independent systems? Not all States or scholars agreed with the monists that, in cases of inconsistency, international law prevailed over internal law. That point related to his earlier remark regarding the authoritative nature of the Commission’s work on the code, even if the code were not adopted. In that connection, he also agreed with Mr. Graefrath (1995th meeting) and Mr. Arangio-Ruiz (1996th meeting) on the desirability of including a provision in the code requiring States to enact national legislation to implement the code. That would remove any doubts regarding the direct enforceability of the code in national courts.

20. He welcomed the fact that, in draft article 3, the Special Rapporteur had replaced the word “person” by “individual” and also thought that a similar change should be made in other articles, such as article 6. He was inclined to agree with the Special Rapporteur’s response concerning the new situations to which Mr. Boutros-Ghali had referred. While he also thought that it would be regrettable if the code was not a forward-looking instrument, he saw no apparent reason why offenders could not be handled as individuals, or possibly under doctrines such as that of complicity.

21. With regard to the exceptions to the principle of responsibility set out in draft article 9, it had rightly been noted that what were really involved were extenuating circumstances. He also agreed that some of the exceptions could more appropriately be taken into account at the penalty stage.

22. Intent, in his view, should be a requirement for a crime under the code, given that the code’s main pur-

<sup>6</sup> See 1992nd meeting, footnote 12.

pose was to serve as a deterrent. There would thus be little point in making unintentional conduct criminal. The requirement of intent could perhaps be embodied in draft article 3.

23. He agreed that there was a place in the code for the exception of self-defence, but only in very limited circumstances. As had already been noted, if, for example, a leader of State A ordered an armed attack on State B in the exercise of the right of self-defence under Article 51 of the Charter of the United Nations and in response to an earlier act of aggression by State B against State A, then State A would not be regarded as an aggressor and the leader who had ordered the action carried out in the exercise of the right of self-defence could not be tried under the code on the ground that he had ordered or committed an act of aggression. The question, therefore, was how properly to circumscribe the exception of self-defence. On the other hand, if it were decided to implement the code by means of an international criminal jurisdiction, he would be far readier to leave the question of the application of such defences to that jurisdiction.

24. Speaking as Chairman and referring to the timetable for the consideration of the present item of the agenda, he said that the Special Rapporteur might wish to sum up the discussion on the topic in the course of the following week.

*Following a brief procedural discussion, it was so agreed.*

*The meeting rose at 12.45 p.m.*

## 1999th MEETING

*Tuesday, 19 May 1987, at 10 a.m.*

*Chairman: Mr. Stephen C. McCaffrey*

*Present: Prince Ajibola, M. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)**

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

[Agenda item 5]

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

#### ARTICLES 1 TO 11<sup>5</sup> (continued)

1. Mr. RAZAFINDRALAMBO said that, as he was speaking near the end of the debate, he would confine himself to giving his opinion on certain questions which he found important and making a few drafting suggestions.

2. The first question was that of the nature and legal character of an offence against the peace and security of mankind. While it was difficult to include in a general definition all the characteristic elements of the various categories of offence to be covered, the definition proposed by the Special Rapporteur in draft article 1, which referred to the list of offences to be included in the code, might provoke criticism and be denounced as the easy way out. Many speakers had stressed the disadvantages of referring to a list, since, in view of the principle *nullum crimen sine lege* and the rigorous nature of criminal law, such a list ought to be exhaustive, whereas the development of international criminal law made it impossible to rule out subsequent modification. The Special Rapporteur himself did not exclude the possibility that other offences might be added to the list if they came to be regarded as criminal according to the general principles of law recognized by the community of nations (draft article 8, para. 2). Consequently, if it was recognized that other offences might subsequently be added to the list, they would have to satisfy precise criteria defined in advance in the code, since otherwise legislators would be obliged to resort to the dubious method of proceeding by analogy.

3. Moreover, the meaning and scope of some of the general principles stated in chapter I of the draft, such as the exceptions to the principle of responsibility (draft article 9), depended on the basis of responsibility itself, that was to say the constituent elements of the offence, the sum of which generated that responsibility. He therefore believed that the draft code should contain a provision setting out the constituent elements of an offence against the peace and security of mankind. The Commission already had a definition of an international crime in article 19 of part 1 of the draft articles on State responsibility,<sup>6</sup> which there was all the more reason not to disregard because, in the great majority of cases, the responsibility of the State was perceived behind the responsibility of its agents. That definition had the merit of containing the moral and the material elements of criminal responsibility, and the third, or legal, element could be added without difficulty, since it resulted from a breach of the conventions in force or of the laws and customs of war.

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

<sup>6</sup> See 1993rd meeting, footnote 7.

4. Taking article 19 as the starting-point, an offence against the peace and security of mankind could thus be defined in the following terms:

“A deliberate breach of an international obligation essential for the protection of fundamental interests of the international community, constituted by acts calculated to endanger world peace, to cause intentional harm to the human person or status, or to infringe the laws and customs of war, is an offence against the peace and security of mankind.”

That definition was broadly similar to the one already proposed by some members. By emphasizing the intentional nature of an offence against the peace and security of mankind, it would clarify the scope of certain exceptions to the principle of responsibility based on the absence of criminal intent. Of course, it would be for the Drafting Committee to put the text into final form.

5. The second question—that of the content of the code *ratione personae*—had been provisionally settled by the Commission’s decision to confine the draft to the criminal liability of individuals,<sup>7</sup> pending replies from Governments to its request for opinions concerning the criminal responsibility of States. Until those replies had been received, the Commission should be cautious in its choice of terms relating to the content *ratione personae*. It should not give the impression that only individuals could commit offences against the peace and security of mankind; in that respect, the former text of draft article 3 seemed preferable. Moreover, as he had already mentioned, in the great majority of cases the responsibility of the State for offences against the peace and security of mankind was engaged by individuals acting as its agents. To borrow an expression from civil law, it was “responsibility for the act of another”, or responsibility of the “principal”, which gave rise to a civil action before a criminal court. Thus the Commission should also concern itself with the interests of the victims, by including a provision which would supplement criminal responsibility with the corresponding civil responsibility and which, besides regulating public prosecution, would regulate the conditions for a civil action. Such a provision seemed all the more necessary because, according to the general principles of criminal law, justifying circumstances, while they eliminated criminal responsibility, had no effect on civil responsibility. It remained to be seen whether the Commission wished to adopt such a rule; if it did, it should be framed in a special provision devoted to civil actions.

6. The third question—that of the application of the code with respect to time—had two aspects: first, the non-applicability of statutory limitations to the offences; and secondly, the non-retroactivity of criminal law. Generally speaking, he endorsed the Special Rapporteur’s positions on those points, as set out in draft articles 5 and 8.

7. With regard to statutory limitations, the Special Rapporteur seemed mainly concerned with their non-applicability to prosecutions, leaving aside the question of penalties. It was true that that question could be dealt with in a later part of the code devoted to the theory of punishment; but it might be asked whether it would not

be better placed among the general principles. Moreover, since general criminal law recognized the principle of the interdependence of public prosecutions and civil actions, it might be well to specify that civil actions were not subject to statutory limitations either. The confirmation of that principle would be of great importance in connection with State responsibility.

8. As to the principle of non-retroactivity, its application in international law was not as easy as in general criminal law. For international law was by nature a declaration and recognition of the customary rule, and in principle it only established the existence of a rule of law: it did not make conventional law. Thus one could understand the concern which had led the Special Rapporteur to draft paragraph 2 of article 8, leaving it to the Drafting Committee to decide whether that principle should be embodied in a separate paragraph.

9. The fourth question—that of the competent jurisdiction and the *non bis in idem* rule—was closely connected with that of the content of the code *ratione personae*. For if the criminal responsibility of the State was eventually to be included, it was difficult to imagine that the implementation of the code could be entrusted to national courts. It was true that, for the time being, the Commission had to work on the basis of the criminal responsibility of the individual; but, in order not to prejudge the solution finally adopted for that problem, it should be indicated at the beginning of draft article 4 that that provision was without prejudice to the establishment of an international criminal jurisdiction.

10. The competence of national courts to try offences covered by the code raised several problems. The first was the question whether the obligation under article 4 to try the alleged offender or to extradite him included his prior arrest, or whether, as had been proposed, it would be sufficient to require that the person concerned was in the territory of the State—whether its real territory or its fictional territory, such as the territorial sea or a ship. The second problem was the plurality of national jurisdictions and its corollary, the *non bis in idem* rule. The statement of that rule in a provision of the code could only be supported. In draft article 7, however, it would be better to speak of punishment for an act, rather than for an offence, since the term “offence” might cover acts which were not necessarily identical with those for which the alleged perpetrator of the crime had already been prosecuted before a court of another State.

11. The first option open to the State being trial, the second was extradition—clearly formal, rather than disguised, extradition. But given the diversity of judicial systems, the principle of extradition might be opposed by some States; hence the importance of draft article 6 on jurisdictional guarantees. Once the principle of those guarantees was accepted, it appeared that extradition upon application by the State in which the offence had been committed should be made mandatory. On the other hand, it did not seem possible to let the alleged offender choose his own judge, since that would be contrary to the peremptory character of the rules of jurisdiction. To cover cases of multiple applications for extradition, an order of priority seemed desirable; but that question, like other questions of procedure, could

<sup>7</sup> Yearbook . . . 1984, vol. II (Part Two), p. 17, para. 65 (a).

be dealt with in a protocol. It would also be well to include, as advocated by Mr. Sreenivasa Rao (1994th meeting) and Mr. Ogiso (1997th meeting), a provision specifying that the crimes listed in the code were not to be regarded as political crimes, as was provided in article VII of the Convention on the Prevention and Punishment of the Crime of Genocide. Lastly, the alleged offender should be denied the right of asylum, in accordance with paragraph 7 of 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.

12. The fifth question was that of the extent of responsibility. It was a complex notion, which presupposed that the constituent elements of the crime were all present and established, the absence of one of those elements being sufficient to nullify criminal responsibility. In draft article 9, the Special Rapporteur had proposed various exceptions to the principle of responsibility. Those exceptions could be divided into two groups, according to whether they were considered *in personam* or *in rem*. The first group comprised physical or moral coercion and error of law or of fact, to which insanity might be added; those were causes of non-responsibility due to the absence of criminal intent. The second group consisted of justifying circumstances: self-defence, state of necessity or *force majeure*, and the order of a legitimate authority such as a Government or a superior. It might therefore be advisable to draft two separate provisions entitled "Causes of non-responsibility" and "Justifying circumstances", the second of which, unlike the causes *in personam*, nullified civil responsibility. The causes of non-responsibility and the justifying circumstances would probably not apply equally to all categories of offences against the peace and security of mankind; but it seemed difficult to indicate in article 9 to which category of offences any particular notion affecting criminal responsibility applied: it would be for the court to appraise such application.

13. Some members of the Commission considered that the concepts of attempt and complicity should be placed among the general principles, since they were concepts of a general character which affected the degree of criminal responsibility. The autonomy of international criminal law did indeed require that the court should not be bound to refer to concepts of internal law in that context, but should have special rules, even if they must be based on principles of general criminal law. It would be well, however, if, in accordance with contemporary trends in criminal law and as proposed by the Special Rapporteur in draft article 14 as submitted in his fourth report (A/CN.4/398, part V), attempt and complicity were treated as separate offences with respect to the penalty applicable.

14. He had not taken up certain provisions of the draft articles because, in the main, he had no objection to them. On the question of the implementation of the code, he recognized that, if it took the form of a multilateral convention, its provisions would be immediately enforceable and directly applicable by national courts, without any need to incorporate them in national law. Nevertheless, he was inclined to support the proposal that the final clauses should affirm the

obligation of States parties to the convention to take the necessary legislative measures to ensure the application of its provisions and, especially, to apply effective penal sanctions. It would also be useful to confirm the principle of the obligation of States to co-operate, as stated in General Assembly resolution 3074 (XXVIII) (see para. 11 above).

15. Mr. BARSEGOV said that, at the present stage, he wished to make a few remarks on the question of intent and to comment on statements by other members.

16. For the particular category of crimes which were offences against the peace and security of mankind, it was important to give a proper definition of intent and motive, since otherwise crimes might go unpunished. But it did not appear that the Commission had really adopted that course. For to conclude, as the Commission had done in its report on its thirty-eighth session, that "motive was essential for the characterization of an act as a crime against humanity",<sup>8</sup> was not in conformity with the Convention on the Prevention and Punishment of the Crime of Genocide or with the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Similarly, the definition of the content of a crime against humanity given by the Special Rapporteur in his fourth report (A/CN.4/398, para. 25) was imprecise, and wrongly assimilated intent to motive. To determine the intent was in fact to determine the purpose for which the act was committed, to determine whether its author consciously wished to achieve a criminal result or whether that result had occurred against his will. Motive, on the other hand, concerned the reasons and considerations which had led the author of the act to commit it. It was true that the concepts of intent, premeditation, motive and purpose partly overlapped and could easily be confused. Nevertheless, they produced well-defined legal consequences, so that it was important to determine the place of intent and motive in the whole group of offences against the peace and security of mankind.

17. In criminal law, intent and motive, as subjective factors, formed part of the elements serving to characterize the act, together with the object and the subject of the act, the criminal consequences and the links of cause and effect. But was it admissible to transpose all those elements automatically to the definition of the offences covered by the code, without taking account of the specificity of each of them? Were intent, and especially motive, necessary elements for establishing criminal responsibility and determining its limits? In international law, doctrine cast doubt on the possibility of that transposition, and even the writers who accepted it did so with reservations. For instance, in his manual of public international law, Mr. Reuter said:

The first condition for international responsibility of the State is the existence of a wrongful act, that is to say an act contrary to the international obligations of that State.<sup>9</sup>

The content of the international obligation violated, the wrongful act and the extent of the violation were defined by the result. Mr. Reuter further stated:

<sup>8</sup> *Yearbook* . . . 1986, vol. II (Part Two), p. 45, para. 88.

<sup>9</sup> P. Reuter, *Droit international public*, 5th ed. rev. (Paris, Presses Universitaires de France, 1976) (*collection Thémis*), p. 218.

...some obligations are defined by the final result of the operation to which they relate . . . the object of other obligations is certain conduct with a view to a result;<sup>10</sup>

The breach of an international obligation was linked, in the first case, to the result; in the second case, it was linked to the incompatibility of acts which must be clearly defined. But in both cases the elements were objective, or could be objectively established. With regard to the subjective elements, Mr. Reuter observed:

Jurisprudence has been led to introduce subjective elements into the mechanisms of responsibility to a certain extent.

Thus, in certain cases, jurisprudence cannot disregard the intentions which directed a punishable act.<sup>11</sup>

18. In the practice of international law, it should be noted that, of all the crimes against humanity, genocide was the only one in the definition of which the word "intent" was used, namely in article II of the Genocide Convention. In its resolution 96 (I) of 11 December 1946 on the crime of genocide, the General Assembly had affirmed that genocide was a crime under international law "for the commission of which principals and accomplices . . . whether the crime is committed on religious, racial, political or any other grounds—are punishable": "intent" was not taken into account. After a historical interpretation of the preparatory work which had led to the drafting of the Genocide Convention, he added that the word "intent" had been embodied in the text of that instrument under the regrettable influence of certain States which had wished to limit its field of application, and that it was interpreted therein as a subjective element necessary for the definition, without which there could be no crime. It need hardly be said that the efficacy of the Convention was thereby considerably reduced.

19. Examining the question of intent as a constituent element of the definition of the crime of genocide, the Special Rapporteur, in his fourth report (*ibid.*, para. 29), started from the principle that genocide could be considered "from two angles: its purpose and the number of victims involved". But in the case of genocide, as in that of *apartheid*, it was not admissible to go by the intention of massive and systematic destruction. For the mass nature of the crime presupposed precisely the purpose of destroying a group of persons, even if genocide was considered from its first manifestations, when a group was partly eliminated or when isolated but systematic murders were committed. Thus it could not be accepted that the gravity of genocide could be determined only by the subjective intent of the perpetrator, for that would leave him a loophole to escape responsibility. The history of the crime of genocide, in all known cases without exception, showed that authors of that crime had always publicly denied intent—which was expressed in secret documents in veiled terms such as "the final solution"—arguing against the evidence of the facts that they had acted in the interests of the State or of national security, and never hesitating to destroy the evidence of their responsibility. But it was the facts that presupposed the intent, which manifested itself in the result and the massive and systematic nature of the crime, in other words by elements which could be objectively established. To say that the essence of a

crime against humanity was its intent would be to deprive the definition of its essential constituent and the rule of law of its main social function, since the danger of genocide lay precisely in the result and not in the intention.

20. It did not seem necessary to raise the question of intent in order to show the need for a rigorous definition, for objectivity and for sound administration of justice to be assured. It was true that premeditation or intent constituted a normal element in ordinary criminal law, in the sense that inattention or negligence could explain how an act which might have been regarded as a crime had really been committed without intent to commit it. But how could it be accepted, for example, that the use of nuclear weapons of mass destruction had been ordered by negligence or inattention, when the consequences were known to everyone? How could it be accepted that millions of people had been murdered by negligence?

21. In the case of genocide, as in that of *apartheid*, the acts in question, far from being spontaneous, were planned and directed to specific purposes: for that reason they were punishable. Although they were acts of mass destruction organized by a State, directed by a Government and executed by the army, the police, the gendarmerie or criminal organizations, the criminal conduct of the individual who had committed a crime against humanity was not thereby eliminated, and his intention was none the less evident. Besides the intentions and purposes of the State which committed a crime against humanity, there could certainly be private intentions and motives of the individuals who were its executives. But the intentions of those executing the will of the State could only be added to the general political intention of the State itself: they could not replace it. To maintain the contrary would be absurd, since the massive elimination of people could then be presented as a series of isolated murders committed by individuals in their private capacity. That would be a denial of genocide and was, incidentally, the thesis of the lawyer defending Klaus Barbie in the trial at Lyons. What was more, experience showed that a State having organized genocide could, if political events turned to its disadvantage, show its will to punish—or to appear to punish—some particular person as an individual criminal, in the hope of evading the political and criminal consequences of the act and the accusation of genocide.

22. The main purpose of the definition of the crime was to make it possible to establish a correspondence between, on the one hand, the manifestations and content of the act committed and, on the other, the elements of the definition of the crime provided in the corresponding rule of law. In establishing that correspondence between the individual act and genocide as a crime against humanity, it was important to take account of all the circumstances in which the act had taken place. In other words, to define the responsibility of a given individual it was necessary to take into consideration the place, the act itself and the way it fitted into the general crime of genocide. The act of the individual must therefore be compared with the acts of others responsible for the crime of genocide. For it would never be possible to define the crime of genocide by

<sup>10</sup> *Ibid.*, p. 37.

<sup>11</sup> *Ibid.*, p. 220.

establishing the existence of murders as isolated, independent acts. If the acts were considered as a whole, however, it became possible to isolate a common element, namely the elimination of members of a given group.

23. It followed that the question of complicity was of particular importance as an essential element of crimes against humanity such as genocide and *apartheid*. For those crimes, the existence of an objective link between the criminal act and its consequences provided an objective basis for criminal responsibility, by making it possible to establish not only that the consequences were due to the incriminated act, but also that they resulted from a deliberate intention. In other words, the intent was determined by the establishment of a group of identical acts, organized and directed from a single centre. To commit an act characterized as a crime against humanity unintentionally, by inadvertence, negligence or error, was, by the very nature of the act, impossible. Deliberate intention and motive were basic elements of the crime of genocide and were shown objectively by the establishment of the acts. In the case of genocide, it was even sufficient to establish the act and its consequences; there was no need to establish intent. In any case, the burden of proof should certainly not be on the victims of the crime.

24. All those comments on intent as a subjective element in the definition of the crime of genocide were also applicable to the crime of *apartheid*. In the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, that crime was defined, in article II, as

inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

There was no mention of intent. It was only in one of the elements of the definition of the crime of *apartheid*, in article II, subparagraph (b), that the word "deliberate" appeared:

deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

All the other elements of the definition of the crime consisted of the description either of concrete acts, or of acts committed in order to obtain particular results, that was to say acts which could be objectively established. As to motive, article III of the Convention provided that:

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State . . .

That article clearly ruled out all possibility of invoking any motive to deny or limit responsibility. That was how the question of motive should be treated in the draft code of offences against the peace and security of mankind: such treatment was absolutely imperative if the action taken against genocide, *apartheid* and other crimes against humanity was to be effective.

25. The Special Rapporteur and other members of the Commission were obviously wondering whether it was possible to extend the criterion of intent to all crimes against humanity and all offences against the peace and security of mankind. Not only was that procedure unjustified, but the questions of intent and motive should

be settled and interpreted in the draft code on the basis of the international instruments which defined the scope of the crimes, since otherwise the Commission would be adopting a subjective perception of certain elements of them.

26. It should also be noted that the definition of the crime of genocide partly corresponded to that of the crime of *apartheid*, and that the link between those crimes was clearly stated in the preamble to the *Apartheid* Convention, which said that

. . . in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of *apartheid* constitute a crime under international law . . .

Similarly, in a whole series of resolutions, the General Assembly had characterized the policy and practice of *apartheid* as crimes against humanity, going so far as to ask whether there was not a substantive link between the crime of *apartheid* and the crime of genocide. Accordingly, an *ad hoc* Working Group of Experts, consisting of international lawyers, had applied the Nürnberg Principles<sup>12</sup> to the crime of *apartheid* and had recommended that the Convention on the Prevention and Punishment of the Crime of Genocide should be revised to include the crime of *apartheid*.

27. From those considerations, a number of conclusions could be drawn. The Commission should not follow the definition of genocide by introducing the element of intent into the definition of all offences against the peace and security of mankind; on the contrary, it should interpret the element of intent, as found in the Convention on the Prevention and Punishment of the Crime of Genocide, not as an element necessary for proving the will of the criminal to annihilate a people, but as a pursued purpose which could be established objectively in the light of the acts committed. If the Commission adopted the criterion of intent, it would probably be a presumption of guilt, but the burden of proof would still be on the victim. Consequently, the draft code should include a provision based on article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which excluded all possibility of invoking any motive to justify that crime.

28. The Commission's work on the draft code had originated in the Charter of the Nürnberg Tribunal<sup>13</sup> and in General Assembly resolution 177 (II) of 21 November 1947 on the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. That Charter had taken up the fundamental ideas set out in instruments such as the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land,<sup>14</sup> the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,<sup>15</sup> and the 1928 Kellogg-Briand Pact.<sup>16</sup> Thus the Charter of the Nürn-

<sup>12</sup> See 1992nd meeting, footnote 12.

<sup>13</sup> *Ibid.*, footnote 6.

<sup>14</sup> See J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918).

<sup>15</sup> League of Nations, *Treaty Series*, vol. XCIV, p. 65.

<sup>16</sup> General Treaty for Renunciation of War as an Instrument of National Policy, of 27 August 1928 (*ibid.*, p. 57).



berg Tribunal certainly had a solid foundation, although the legal bases must sometimes be evaluated from a historical viewpoint. That was why, since May 1945, the Allies had declared that genocide was an offence against the peace and security of mankind and had subscribed to the principle that persons guilty of that crime must be punished. The post-war trials had provided the first examples of practical application of the rules and principles of international law stated on that subject.

29. While retaining the legal essentials of the Charter of the Nürnberg Tribunal, the draft code should therefore define new parameters, propose solutions depending on qualitatively different elements and take account of the realities of the modern world; and a general part of the code should reflect principles that were in conformity with the current development of international law and the awakening of humanity to those issues, which would be the best guarantee of the code's effectiveness.

30. With regard to draft article 5 as submitted by the Special Rapporteur in his fifth report (A/CN.4/404), it had been said during the discussion that the principle of the non-applicability of statutory limitations should not apply to all offences under the code without distinction, since some of the acts in question came under general criminal law. Other speakers had maintained that offences against the peace and security of mankind should be considered as belonging to a separate category of crimes, to which special legal rules and principles should apply, independently of the correspondence between national laws. On that point, the Special Rapporteur was right to emphasize, in the commentary to draft article 2, the principle of the autonomy of international criminal law, which was the key element for settling the questions that arose in subsequent draft articles, including that of the non-applicability of statutory limitations. It was true that, in internal law, the periods of limitation depended on the gravity of the crime. But in the case in point, in view of the exceptional gravity of the crimes to which the code would apply, the preventive function of the non-applicability of statutory limitations was of special importance; and the discussion had confirmed the rightness of the position taken by the Special Rapporteur in draft article 5.

31. Members of the Commission who still doubted the possibility of proving the guilt of an accused after a certain length of time should consider the example of the Klaus Barbie trial, at which there had been no lack of witnesses and irrefutable evidence had been produced 40 years after the acts in question. It had also been said that the Commission saw that problem from the viewpoint of the past. He saw that comment as an encouragement to re-examine matters even more meticulously, so that the blood-stained past should not later become a nightmare. Pierre Mertens had written that one would have to be blind not to see that the impact of the Nazi crimes made itself felt beyond territorial and temporal frontiers.<sup>17</sup> The purpose of the rules of international law on the subject was precisely to prevent such crimes from recurring in the future, and

the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity constituted a means of prevention.

32. International law had its own functions and its own lines of progressive development, and in relations between States one could not and must not seek to establish at all costs a strict analogy with the national practice of States. Ulrich Scheuner had said in 1939 that too great an influence of national law on international law would put the latter in danger and that it was sound and salutary for the law of nations not to take root too deeply in national law. According to Scheuner, the strength of the law of nations lay in the common ideas which nations, however different their internal régimes and concepts of law, recognized as necessary and salutary in the sphere of international life.<sup>18</sup>

33. In conclusion, he urged the Commission to fulfil its mandate for the progressive development and codification of international law by confirming the rules in force, strengthening the principle of the non-applicability of statutory limitations to offences against the peace and security of mankind and establishing the obligation of States to take the necessary legislative measures to prevent and punish those offences.

34. Mr. ROUCOUNAS said that he would confine his comments to draft articles 2, 4, 5, 6 and 9 submitted by the Special Rapporteur in his fifth report (A/CN.4/404).

35. In draft article 2, the Special Rapporteur seemed to have been concerned to preserve the autonomy of international law and exclude the possibility of internal law being contrary or indifferent to the code. In reality, besides "characterization", article 2 was also concerned with "incrimination": the object in view was not only to keep clear of internal law, but also to show that the Commission had carefully considered the material basis on which incrimination rested and that it wished to ensure that the law was guaranteed by uniformity. For although it was not for the Commission to tell national legislators how to proceed in applying the code, the interaction between international law and internal law could not be overlooked. For the time being, in the case of an international crime, it was internal law that determined the competent court and the penalty applicable; hence the need to assess that interaction and to preserve it, but also perhaps to make it more explicit by means of a second paragraph, which would specify the effective relationship between the provisions of the code and internal law.

36. With regard to draft article 4, the Special Rapporteur had devoted much attention to the very difficult problem of extradition. First of all, the Commission should take account of the fact that certain acts which would probably be covered by the code, such as genocide, *apartheid* and the hijacking of aircraft, were already incriminated under international conventions in force. It should then consider whether the solutions adopted in those conventions were suited to the needs of the code. At a later stage in its work, it could consider

<sup>17</sup> P. Mertens, *L'imprescriptibilité des crimes de guerre et contre l'humanité* (Editions de l'Université de Bruxelles, 1974), p. 11.

<sup>18</sup> U. Scheuner, "L'influence du droit interne sur la formation du droit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, p. 199.

drafting an annex providing in detail for extradition machinery. For the time being, the Commission should not lose sight of the international agreements already in force on the subject. Paragraph 2 of article 4 might therefore appear unnecessary; it would not be so if the Commission informed the General Assembly that it was willing to study the question of an international criminal jurisdiction if requested to do so. He would be in favour of such action.

37. Should draft article 4 provide that States parties must take the necessary steps to carry out extradition? That was questionable, for in drafting the code the Commission should be as much concerned with the interests of the individual prosecuted as with those of the international community. Extradition procedure included certain guarantees, mainly judicial, which the Commission should endeavour to provide for the accused. Moreover, such a vague provision would probably not induce Governments to take the desired measures; the scope of their international obligations should be more precisely stated.

38. He did not know how far collective and governmental mentalities had evolved over the past 10 years, but he noted that, in the sphere of positive international law, the difficulties raised by extradition were enormous. One way the Commission could overcome those difficulties would be to include in the draft code a provision which, based on existing international instruments, would meet at least two ends: first, it should enable the code to serve as an extradition treaty for States which did not accept the institution of extradition unless it was provided for in a treaty; secondly, it should add the offences covered by the code to the crimes covered by the bilateral or multilateral conventions in force. Of course, the question whether such a provision would be binding or not remained to be discussed.

39. Another solution would be to provide that the perpetrator of an offence against the peace and security of mankind must be extradited regardless of the motive for which he had acted. By that method, which had already been adopted in the Convention on the Prevention and Punishment of the Crime of Genocide and in the 1977 European Convention on the Suppression of Terrorism,<sup>19</sup> the Commission would rule out the exception of the political offence, which was regularly invoked before courts called upon to decide extradition cases. Lastly, the Commission would have to examine the relations between extradition, political asylum and non-discrimination.

40. He approved of the suggestions made by the Special Rapporteur regarding draft article 5 and noted the statement made in the commentary (para. (4)) that "it is not always easy to draw a distinction between war crimes and crimes against humanity". The difficulties were not only practical, but also theoretical and scientific, and they were not confined to article 5. Hence the need for a separate provision on the non-applicability of statutory limitations to the offences covered by the code, and for more consistency and conformity with General Assembly resolution 3 (I) of 13 February 1946

on the extradition and punishment of war criminals and with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

41. It was right that the draft code should contain a provision such as draft article 6, for the Commission should provide Governments with uniform rules on the guarantees to be enjoyed by the accused. Where there was an international instrument already in force, such as the International Covenant on Civil and Political Rights, the Commission should follow its provisions without undue modification, again with a view to consistency. It could also, in the commentary, explain the guarantees accorded by reference to the decisions of the Human Rights Committee: through its study of individual communications and its discussions with the States whose periodic reports it examined, that Committee could provide a pertinent interpretation of the provisions of the Covenant relating to jurisdictional guarantees. Lastly, draft article 6 should be supplemented by a provision ensuring the protection of a detained person from the moment of his arrest.

42. With regard to draft article 9, if the Commission wished to deal with justifying circumstances in that provision, he would prefer not to make any definite pronouncement on the point, since the opinion one might form on it depended on the point of view adopted and the legal system considered. As a general rule, justifying circumstances were enumerated exhaustively, since they nullified the objective elements of criminal responsibility. But it was also true that, in some criminal codes, those circumstances intersected and merged, and were difficult to distinguish from one another. That being so, the inclusion in the draft code of such notions as *force majeure*, state of necessity and coercion, which would not always have the same content in all countries, would make it necessary to accompany the article by a full and precise commentary explaining the meaning attached to the prescribed exceptions.

43. He understood the difficulties encountered by the Special Rapporteur in dealing with self-defence and noted that, in the commentary (para. (1)), he had confined the scope of that notion to the meaning attached to it in Article 51 of the Charter of the United Nations.

44. As to state of necessity, that notion reflected internal criminal codes, but it also included the idea of military necessity, which had been the subject of many provisions, from the 1863 "Instructions" of Francis Lieber,<sup>20</sup> to the 1949 Geneva Conventions<sup>21</sup> and their 1977 Additional Protocols.<sup>22</sup> He noted, however, that the development of that notion had been distinctly limited and that recent texts referred only to "imperative" military necessity. Again, a study of the jurisprudence of military courts showed that state of military necessity was not accepted as a justifying circumstance. The Commission should therefore pronounce on the content of that notion.

<sup>20</sup> *General Orders No. 100*, Adjutant General's Office, 1863, reissued as *Instructions for the Government of Armies of the United States in the Field* (Washington (D.C.), U.S. Government Printing Office, 1898).

<sup>21</sup> See 1994th meeting, footnote 7.

<sup>22</sup> See 1992nd meeting, footnote 10.

<sup>19</sup> Council of Europe, *European Convention on the Suppression of Terrorism*, European Treaty Series No. 90 (Strasbourg, 1977).

45. In nearly all the prosecutions of individuals accused of war crimes since the Second World War and, more generally, at international conferences and in codification work, consideration had been given to exonerated from responsibility by reason of superior orders. In the 1954 draft code (art. 4), the Commission had reproduced the provisions of article 8 of the Charter of the Nürnberg Tribunal,<sup>23</sup> adding one phrase based on the findings of that tribunal and relating to the moral choice of the author of the incriminated act. Having regard to the principle and not to the exception, a superior order was not a justifying circumstance. At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held at Geneva from 1974 to 1977, some participants had tried to find a solution to that very important question, and the Conference had had before it a text whose object was to specify the right of refusal to obey, the principle of non-exoneration of the accused from criminal responsibility and the exception to non-exoneration. After the rejection of that text, which covered the whole problem—the rule itself and the conditions for admissibility of the exception—two interpretations had been advanced: some participants had held that the law in force remained applicable; others, whose opinion he did not share, had maintained that the way was open to oppose non-exoneration from responsibility by positive law. In those circumstances, it might be asked whether it was sufficient to consider the exceptions, as the Special Rapporteur had done, without examining the problem as a whole; and it might be thought that the Commission should devote a separate article to superior orders, since the code envisaged regulation going beyond humanitarian law and covering a whole range of situations.

46. On the actual substance of the question, he thought there were some cases in which the wrongful order had no bearing on the legal situation of the subordinate; others in which it was contrary to the internal law of the State of which he was a national; and yet others in which it was contrary to international law but not covered by internal law—not to mention the unlikely case in which the internationally wrongful order was lawful at the national level. Mr. Tomuschat (1993rd meeting) had raised the problem—both legal and practical—of the relationship between error and knowledge of the law. No doubt there might be borderline cases which should be discussed: the criminality of military personnel, for example, depended on the notion of proportionality, which was gradually finding a place in the law of war. But where offences against the peace and security of mankind were concerned, it did not seem that the problem of knowledge of the law arose in such an acute form, since the particularly odious nature of the crimes in question could not escape any reasonable person. Legal doctrine and some judicial decisions even spoke of “manifest wrongfulness”; and one writer went so far as to propose the notion of “manifest criminality” as being more flagrant than “manifest wrongfulness”.

47. The problem had a second facet: the case in which the order was wrongful and the subordinate, although knowing it to be wrongful, had to obey. It might happen that the author of the incriminated act invoked either ignorance of its wrongfulness and the obligation to obey, or the latter obligation only. True, it was not easy to find national legislation providing only for absolute obedience, and laws generally had more nuances; but that was a further reason why the Commission should consider the exception to the rule of responsibility. On that point, the Special Rapporteur had introduced, in draft article 9, subparagraph (d), the reservation of moral choice, a concept used by the Nürnberg Tribunal and reproduced in the 1954 draft code (see para. 45 above). That concept raised serious problems, however. As orders constituted a kind of coercion, the moral choice was not linked to the impossibility of disobeying an order that was in conformity with internal law but contrary to international law, nor to the possibility of deciding to die for not having carried out a wrongful order or to carry out a wrongful order in order not to die. For the subordinate, moral choice meant knowing that he was participating in an international crime when it was possible for him to refuse to obey the order given.

*The meeting rose at 1.05 p.m.*

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## 2000th MEETING

*Wednesday, 20 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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### Two thousandth meeting of the International Law Commission

1. The CHAIRMAN, declaring open the Commission's 2000th meeting, recalled that its first meeting had been held at United Nations Headquarters, Lake Success, New York, on 12 April 1949 under the chairmanship of Mr. Manley O. Hudson, the members then present being: Mr. Alfaro, Mr. Amado, Mr. Brierly, Mr. Córdova, Mr. François, Mr. Hsu, Mr. Koretsky, Sir Benegal Rau, Mr. Sandström, Mr. Scelle, Mr. Spiropoulos and Mr. Yepes.

2. The Commission's 1000th meeting had been held at the Palais des Nations, Geneva, on 16 June 1969 under the chairmanship of Mr. Nikolai A. Ushakov, the members then present being Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Rosenne, Mr. Ruda,

<sup>23</sup> *Ibid.*, footnote 6.

Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor and Mr. Yasseen.

3. He could not let the occasion of the 2000th meeting pass without noting that the Commission had endured over the years. He need not dwell on its accomplishments, which were widely known and recognized.

4. Lastly, he noted that 1987 also marked the fortieth anniversary of the adoption by the General Assembly on 21 November 1947 of resolution 174 (II), establishing the Commission.

**Draft Code of Offences against the Peace and Security of Mankind' (continued) (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)**

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLES 1 TO 11<sup>5</sup> (continued)

5. Mr. ARANGIO-RUIZ, continuing the comments he had made at the 1996th meeting on the provisions of draft articles 2 and 3, stressed that it was not enough to affirm the autonomy or supremacy of international law or to introduce a provision expressly imposing upon States the general obligation to take all the legislative, administrative and judicial measures necessary for the implementation of the code. For one thing, the very constitution of a State might be affected, as would be likely in the case of Italy; and, for another, it would be inadequate, for the purposes of the draft code, merely to enjoin States to take such measures, for that would do little more than impose upon States an obligation to achieve a result (*obligation de résultat*). That was probably the most common type of obligation in international law. In the case of the vital and important rules embodied in the draft code, however, it would not be enough to enjoin States to adopt the necessary internal measures.

6. If the code was to become a living piece of law, and if courts were to be able to apply it directly to individuals, the rules it embodied must, through an explicit provision of the international instrument containing the code, become an integral part of the internal law of each of the States parties to that instrument. Such a provision was absolutely essential.

7. Those considerations applied whether or not an international criminal court was established. The need to make the code part of the legal systems of States existed in both cases. Once the code had become an integral

part of the internal criminal law of States, a decisive step would have been taken in the uniform application of its provisions both with regard to the characterization of offences and with regard to the general principles of substantive and procedural criminal law.

8. He agreed with the comments made at the previous meeting by Mr. Barsegov and Mr. Roucouas on the important issue of the subjective and objective elements of certain crimes; that issue would have to be dealt with in greater depth. In that connection as well, the only way to ensure that the code would be implemented was to make it part and parcel of the internal law of States. In the area covered by the draft code, there could be nothing less than a uniform criminal law that was internationally agreed on and imposed as such. The substantive and procedural rules embodied in the principles set forth in the code would thus automatically become rules and principles of the criminal law of States and national authorities would then be automatically and directly involved in the implementation of those rules. To claim that such a goal was too ambitious would be tantamount to saying that the very idea of the draft code was too ambitious.

9. Mr. ILLUECA, noting that, with a few changes, draft article 1 reproduced the text of article 1 of the 1954 draft code, said that the formulation of that provision was a basic requirement if the Commission was, as it had been invited to do by the General Assembly in its resolution 41/75 of 3 December 1986, "to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating an introduction as well as a list of the offences" (para. 1).

10. According to some jurists, international criminal law was a hybrid discipline that borrowed both from international law and from criminal law, and it was quite true that, as a result of that duality, the development of international criminal law as a separate branch from international law had given rise to drafting and conceptual problems. It must, however, be recognized that, since the formulation of the Nürnberg Principles,<sup>6</sup> new rules of international criminal law had developed prohibiting certain types of conduct which were contrary to the fundamental interests of the international community and which were, as the Special Rapporteur stated in paragraph (1) of the commentary to draft article 1, "crimes which affect the very foundations of human society".

11. From the technical point of view, the draft code thus had to be based on international criminal law and he was therefore of the opinion that, in draft article 1, the words "crimes under international law" should be replaced by "international crimes". In support of that proposal, he recalled that the term "international crimes", as used in the 1949 memorandum by the Secretary-General on the Charter and Judgment of the Nürnberg Tribunal,<sup>7</sup> had been favourably welcomed and that section 3 of part III of that memorandum, relating to "international crimes in general", stated:

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. I (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

<sup>6</sup> See 1992nd meeting, footnote 12.

<sup>7</sup> See 1996th meeting, footnote 15.

When laying down that individuals are liable to be punished for crimes against international law, the Court did not give any precise definition of international crimes. . . .

He also recalled that, in his memorandum, the Secretary-General had analysed the international crimes listed in article 6 of the Charter of the Tribunal by dealing successively with the first group of international crimes (crimes against peace), the second group (war crimes) and the third group (crimes against humanity). The term “international crimes” had not been used only in that memorandum: it was also to be found in the writings of eminent jurists.

12. The text of draft article 1 might therefore be amended to read:

“Article 1. *Definition*

“The international crimes defined in the present Code constitute offences against the peace and security of mankind.”

13. The way in which the Special Rapporteur had stated Principle II of the Nürnberg Principles in draft article 2 gave rise to some problems which had nothing to do with the dispute between those who advocated the monist doctrine and those who advocated the dualist doctrine of international law in referring to the relationship between internal law and international law. Some of those problems involving form and substance might be avoided if the word “act” were deleted. The first sentence of article 2 could then read: “The characterization of the international crimes defined in article 1 is independent of internal law.”

14. As to draft article 3, he would not go into any further detail on the point of view he had expressed in his earlier statement (1996th meeting) but he would draw attention to the importance of the comments made by Mr. Boutros-Ghali (1998th meeting) concerning the criminal nature of organizations as subjects of international criminal law. It must not be forgotten that the Charter and Judgment of the Nürnberg Tribunal, as well 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*, all referred to the criminal nature of non-State groups, organizations and institutions. That point would have to be given further consideration by the Special Rapporteur and the Commission.

15. Draft article 4, which highlighted the need for the establishment of an international criminal jurisdiction, could be endorsed without reservation: only a few changes would have to be made in paragraph 1 to take account of the comments made during the discussion. With regard to the question of extradition, Mr. Roucouas (1999th meeting) had provided further clarifications on some important and complex problems. He himself would add that, when a State holding the perpetrator of an international crime decided not to try him, the obligation to extradite also stemmed from the 1967 Declaration on Territorial Asylum,<sup>9</sup> which provided that States should not grant asylum to “any person with respect to whom there are serious reasons for considering that he has committed . . . a war crime or

a crime against humanity” (art. 1, para. 2), and from the 1951 Convention relating to the Status of Refugees,<sup>9</sup> which expressly stated that its provisions did not apply to persons accused of international crimes (art. 1, sect. F).

16. Draft article 7 provided for the application of the rule *non bis in idem*, whereas the Charter of the Nürnberg Tribunal<sup>10</sup> rejected that rule, stating in article 29:

. . . If the Control Council for Germany, after any defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under article 14 hereof [Committee for the Investigation and Prosecution of Major War Criminals] for such action as they may consider proper, having regard to the interests of justice.

That point would require further discussion, because it was open to question whether or not it was justified to provide for the possibility, in the case where new evidence was discovered that would constitute a fresh charge, of reopening a case that had already been tried in order to prevent an international crime from going unpunished.

17. Mr. AL-KHASAWNEH said that the Special Rapporteur had skilfully reformulated the draft articles in order to take account of the reactions to the previous texts in the Commission and in the Sixth Committee of the General Assembly. The inclusion in the draft of so many alternatives and options and the frequent use of safeguard clauses nevertheless showed that political considerations had a great impact on major issues such as the criminal responsibility of States and the establishment of an international criminal jurisdiction, as had been pointed out by the Special Rapporteur as early as 1985 when, in introducing his third report at the thirty-seventh session, he referred to “the difficulties of the topic, which lay at the meeting-point of law and politics and therefore touched everyone’s sensibilities and deepest convictions”.<sup>11</sup>

18. There was, however, a risk of being over-sensitive to political considerations. It was, of course, essential that the final text should command wide acceptance and Mr. Jacovides (1995th meeting) had rightly recalled that, like politics, international law-making was the art of the possible. Yet the possible was not necessarily what appeared at first glance to be politically less controversial or more in conformity with the opinions expressed in the Sixth Committee.

19. There was, for example, no reason to assume that a State would be more willing to have one of its nationals—let alone one of its agents—tried by a foreign court than by an international criminal court. Yet it was precisely that assumption that had had the effect of relegating the idea of international criminal jurisdiction to a residual place in favour of the concept of universal jurisdiction, which, on closer inspection, might not prove easier to implement.

20. Similarly, shifting the emphasis away from the criminal responsibility of States to that of individuals

<sup>9</sup> United Nations, *Treaty Series*, vol. 189, p. 137.

<sup>10</sup> See 1992nd meeting, footnote 6.

<sup>11</sup> *Yearbook* . . . 1985, vol. 1, p. 6, 1879th meeting, para. 5.

<sup>8</sup> General Assembly resolution 2312 (XXII) of 14 December 1967.

would not necessarily commend the code to wider acceptance by States. The Commission's experience showed that the only verifiable acceptance, namely the number of signatures and ratifications by States, would depend on a number of extraneous factors, of which the debates and documents of the Sixth Committee could not give any satisfactory indication.

21. The draft code, which thus reflected some hesitations about questions involving political considerations, nevertheless tended to attach only marginal importance to the fact that the exercise of progressive development and codification now being carried out was also an exercise in penal legislation. In that connection, it was true that the work in progress did raise important questions of justice and morality, for the difficulties involved in reconciling law and justice took on particular significance when the subject-matter was criminal law.

22. Before discussing those difficulties, he wished to refer to some aspects of the way in which the penal nature of the present task facilitated or hampered the Commission's work. For example, the requirement of precision in penal drafting provided a satisfactory yardstick against which texts could be examined. Moreover, the jurisdictional guarantees set out in draft article 6 as submitted by the Special Rapporteur in his fifth report (A/CN.4/404) were common to all schools of law and legal systems, so that it should be relatively easy to define responsibility and exceptions thereto. It was also fortunate that questions such as the presumption of innocence, the requirement of intent and the individuality of penalties were part of what was sometimes described as "settled law".

23. Other more fundamental questions relating to the concept of criminal responsibility were, however, far from settled. It was, for example, doubtful whether a broad interpretation of the term *lex* in the maxim *nullum crimen sine lege* would do away with the inherent tensions between justice and law or, in other words, between natural law and positive law. It was open to question whether statutory limitations were the result of the technical problems involved in obtaining evidence or of the divine blessing of forgetfulness and forgiveness. He also had doubts about paragraph (2) of the commentary to draft article 1, which stated that "the reaction to an act by the international community at a given time and the depth of the reprobation elicited by it are what makes it an offence against the peace and security of mankind". To give but one example, only a few decades previously the erection of military fortifications in breach of treaty obligations would have been regarded as an offence suitable for inclusion in the code, whereas, at present, such an action would be regarded as an offence suitable for inclusion in the present topic lay not only at the meeting-point of law and politics, but also at the meeting-point of law and justice.

24. Turning to the principle *aut dedere aut punire*, in connection with which he agreed that the word *punire* should be replaced by *judicare*, he said that he had no objection to the use of Latin. The problem, as he saw it, was that a procedural formula was being elevated to the rank of a principle of substance. Accordingly, the wording of draft article 4 should be amended in the

following ways. First, provision should be made for a system of priorities to avoid conflicts of jurisdiction and competing applications for extradition. Secondly, as just stressed by Mr. Arangio-Ruiz, it should be specified that States were under an obligation to incorporate the provisions of the code into their internal legal systems and that, in so far as possible, penalties should be uniform. Thirdly, with regard to the question of asylum, he suggested the adoption of the compromise formula embodied in a number of recent conventions, such as those dealing with so-called "aerial offences", the taking of hostages and crimes against internationally protected persons. Fourthly, with regard to jurisdictional guarantees, he suggested that the Commission should follow the 1979 International Convention against the Taking of Hostages,<sup>12</sup> which differed in that respect from earlier conventions. Fifthly, the effect of the rule *aut dedere aut judicare* on the existing web of extradition treaties should be carefully considered, particularly with a view to ensuring that States which had a stronger jurisdictional claim than others, but which did not have an extradition treaty with the State in whose territory the alleged offender had been found, were not discriminated against simply by virtue of the absence of such a treaty.

25. If a system of universal jurisdiction was to operate properly, the international community as a whole had to consider that persons accused of certain acts had excluded themselves from society by committing those acts. Thus a group of States which shared the same ideals and interests might quite easily decide that piracy, for example, was a threat to their shared ideals and interests and that it warranted the exercise of universal jurisdiction. However, no such easy decision could be made by an international community which was both universal and heterogeneous; hence the admittedly disappointing conclusion that drug traffickers were perhaps the only group which might be the subject of undisputed universal jurisdiction. He therefore urged the Commission to give draft article 4 further consideration before adopting it.

26. He agreed with the speakers who had said that, for the sake of logic and clarity, the wording of paragraph 1 of draft article 4 should be brought into line with that of the corresponding provisions of the conventions to which he had referred earlier.

27. He also agreed with the proposal to delete the words "because of their nature" at the end of draft article 5, but hoped that the principle underlying those words would be explained in the commentary.

28. With regard to draft article 6, he noted that the term "judicial guarantees" was used in at least one place, namely the third sentence of paragraph (6) of the commentary, to describe what was meant by "jurisdictional guarantees" in the title and text of the article. In other instruments, however, the terms used were "minimum guarantees" or "fundamental guarantees". The Special Rapporteur might wish to consider whether all those terms were synonymous, in which case the choice between them would be a matter of legal taste.

<sup>12</sup> See 1995th meeting, footnote 10.

29. As for the title of the draft code, he noted that the problem with regard to the use of the term “offences” existed only in English. It did not, for example, affect the Arabic text.

30. Mr. PAWLAK recalled that, during the Second World War, his country had suffered enormously as a result of the policies and crimes of the leaders of Nazi Germany. He was therefore firmly convinced of the need for a universal instrument such as the draft code on which the Commission was now working.

31. As to the title, he agreed that the term “offences” should be replaced by “crimes”, which better reflected the nature and content of the draft code.

32. He also agreed with the new text of draft article 3, in which the word “person” had been replaced by “individual”. That amendment removed any ambiguity as to the scope of the code *ratione personae*. It would, however, require some changes in the other articles, and particularly in draft articles 6 and 8, where the word “person” would also have to be replaced by “individual”.

33. Draft article 4 was one of the most crucial provisions of the entire draft, since it dealt with the problem of the implementation of the code. The new text provided a practical solution to that problem, but that approach might give rise to difficulties, as the Special Rapporteur had recognized in the commentary. In that connection, he drew attention to the principles embodied in the 1945 London Agreement,<sup>13</sup> to which was annexed the Charter of the Nürnberg Tribunal, and in the Charter of the Tokyo Tribunal.<sup>14</sup> Those principles fully took account of the provisions of the 1943 Moscow Declaration<sup>15</sup> concerning the return of war criminals to the countries where they had committed their crimes. He therefore suggested that the general rule to be embodied in article 4 should be formulated along the following lines:

“Perpetrators of crimes against the peace and security of mankind shall be tried and punished in the country in which their crimes were committed, according to the laws of that country.”

34. Such a provision would not only give effect to the principle of territoriality, which was fully recognized by the criminal laws of many countries, including his own, which had embodied it in article 3 of its Penal Code, but would also be in keeping with 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, paragraph 5 of which stated:

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

<sup>13</sup> See 1992nd meeting, footnote 6.

<sup>14</sup> *Ibid.*, footnote 11.

<sup>15</sup> Declaration on German Atrocities, signed at Moscow on 30 October 1943 by the United Kingdom, the United States of America and the Soviet Union; for the text, see United Nations, *The Charter and Judgment of the Nürnberg Tribunal*. . . . (see 1996th meeting, footnote 15), p. 87, appendix I.

Perpetrators whose crimes had not been committed in a particular country or had been committed in several countries could be prosecuted by a group of countries setting up a joint jurisdiction, as had been done at Nürnberg and at Tokyo at the end of the Second World War.

35. In draft article 4, paragraph 2, he would prefer the negative wording proposed by the Special Rapporteur to be replaced by a positive formulation, such as: “Interested States may also establish an international criminal jurisdiction.”

36. Neither the application of the principle of territoriality nor collective trials could, however, solve all the problems involved in prosecuting the perpetrators of crimes against the peace and security of mankind. It was therefore also necessary to apply the principle of universal repression, which was recognized in the legal systems of many countries. In Poland, it was enshrined in article 115, paragraph 2, of the 1969 Penal Code, which stated that Polish courts would apply Polish penal law if the perpetrator had committed an offence outside Polish territory that was punishable under an international agreement to which Poland was a party. That general principle of universal repression, which was also embodied in a number of international instruments, such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, might be stated in the following terms:

“Every State has the duty to try any perpetrator of a crime against the peace and security of mankind committed in its territory or elsewhere or to extradite him to the State where he has committed the crime.”

He was also not convinced that draft article 4 had to include a reference to the question of arrest. Perhaps the term “detention” might be used, as in the Charter of the Nürnberg Tribunal.

37. As he had already stressed, the implementation of the code was the most important issue at stake. In that connection, he drew attention to the principle of good faith. As early as 1966, when listing the principles of treaty interpretation, the Commission had pointed out that: “The first—interpretation in good faith—flows directly from the rule *pacta sunt servanda*.”<sup>16</sup> He stressed that point because he was aware of the difficulties involved in matters such as extradition, means of obtaining evidence, contradictory judgments and a uniform scale of penalties. He nevertheless believed that, once the draft code became a binding international treaty, it would be implemented in good faith according to international legal practice.

38. Turning to the list of offences, he drew attention to the need to avoid including almost every conceivable violation of international law. It was necessary to concentrate on the fundamental issues and use a general definition of the specific characteristics of international crimes as a criterion for inclusion in the list. The code should not only reflect the present state of the conscience of the international community, but also point

<sup>16</sup> Paragraph (12) of the commentary to article 27 of the final draft articles on the law of treaties adopted by the Commission at its eighteenth session, *Yearbook* . . . 1966, vol. II, p. 221, document A/6309/Rev.1, part. II.

the way for the development of international law. Crimes against the peace and security of mankind might therefore be characterized as acts which seriously jeopardized the most vital interests of mankind, violated the fundamental principles of *jus cogens* and threatened individual nations, ethnic groups, civilization and the right to life. Perhaps the Special Rapporteur could also consider the relationship between the provisions of the draft code and those of article 19 of part 1 of the draft articles on State responsibility.<sup>17</sup> He would also not object if the list of international crimes included "ecocide", as a reflection of the need to safeguard and preserve the environment, as well as the first use of nuclear weapons, colonialism, *apartheid*, economic aggression and mercenarism.

39. In conclusion, he recalled that, in the last pre-ambular paragraph of resolution 41/75 of 3 December 1986, the General Assembly had stressed the urgent need for the elaboration of the draft code. He therefore requested the Special Rapporteur to indicate, in summing up the present discussion, whether he would consider the possibility of preparing draft articles on crimes against peace, crimes against humanity, war crimes and related offences for the Commission's next session.

40. Mr. DÍAZ GONZÁLEZ commended the Special Rapporteur for his remarkably consolidated fifth report (A/CN.4/404), which took account of the comments made not only by members of the Commission at its previous session, but also by representatives in the Sixth Committee at the forty-first session of the General Assembly.

41. He could agree to draft article 1, but, for the reasons just stated by Mr. Illueca, he thought that the words "crimes under international law" should be replaced by "international crimes".

42. Although draft article 2 rightly embodied the sacrosanct rule *nullum crimen, nulla poena sine lege*, the Commission still had to find the best way of drafting a provision on the characterization of acts as offences against the peace and security of mankind.

43. He preferred the former text of draft article 3, which would make it possible to establish the criminal responsibility of States, particularly since the Commission had adopted on first reading article 19 of part 1 of the draft articles on State responsibility,<sup>18</sup> and of criminal organizations.

44. Draft article 4 was the corner-stone of the entire draft, for a code of offences against the peace and security of mankind would be pointless if it did not provide for machinery for the enforcement of penalties or, in other words, for the establishment of an international criminal jurisdiction. All the proposals concerning the form which such a jurisdiction might take were acceptable, but by far the best solution would be to set up an international criminal court or, as a last resort, a criminal division of the ICJ. He found the title of article 4 inappropriate, not because it was in Latin, which was the language of the law *par excellence*, but because it did not take account of practical realities: the point was not

to punish or extradite, but rather to try or extradite. That was why the text of paragraph 1 was unsatisfactory. A State must not merely arrest the alleged perpetrator of an offence against the peace and security of mankind found in its territory: it also had an obligation to mount a search for him in order to arrest him and then try or extradite him. It would, however, be more accurate to replace the word "perpetrator" by "alleged perpetrator", since the situation to which reference was being made had taken place prior to trial.

45. He had no problem accepting draft article 5, but thought that the words "because of their nature" were unnecessary.

46. With regard to the Spanish title of draft article 6, the words *Garantías jurisdiccionales* should be replaced by *Garantías procesales* or by *Garantías judiciales*.

47. Draft article 7 seemed to establish the supremacy of internal law and therefore contradicted draft article 2, which established the supremacy of international law over internal law, a rule that was already recognized in international law and in internal law. In the text itself, it would be preferable to use the words "alleged offence" and to replace the words "penal procedure of a State" by "penal procedure provided for in the present Code".

48. In draft article 8, paragraph 2, he proposed that the words "and punishment" should be deleted, for the person in question might be acquitted. He also suggested that the words "the community of nations" should be replaced by "the international community".

49. Draft article 9 appeared to refer to extenuating or absolving circumstances, rather than to exceptions to the principle of responsibility. In that connection, he agreed with the comments on intent and motive made by Mr. Barsegov (1999th meeting), which had shed light on the various objective and subjective factors that entered into the definition of offences against the peace and security of mankind.

50. Of all the exceptions listed in draft article 9, he might be able to agree to self-defence in the case, for example, of an act of aggression, but there could be no question of self-defence if the intent had been to commit aggression. Similarly, error of fact or of law could not be invoked if intent to commit genocide had been established. The Commission should take great care on such points and carefully study extenuating or absolving circumstances, many of which would have to be ruled out in the case of the offences covered by the code. Could a State justify a policy of *apartheid* by exercising its right to self-defence against a community living in its territory? Could it claim that responsibility in that regard lay only with the head of State? Could a State's police force be unaware that, in implementing such a policy, it was committing a crime against humanity?

51. He had a few drafting comments to make with regard to the Spanish text of the draft articles, and, in co-operation with the other Spanish-speaking members of the Commission, he would make available to the secretariat a document containing the corrections to be made.

52. Mr. BEESLEY commended the Special Rapporteur for the way in which he had taken account of

<sup>17</sup> See 1993rd meeting, footnote 7.

<sup>18</sup> *Ibid.*



the comments made on the present topic in the Sixth Committee of the General Assembly.

53. The proposal he had put forward at the 1994th meeting had drawn upon the procedures of the ICJ and had been made on the assumption that it might be unrealistic to base the Commission's work on the expectation that an international tribunal would be established. The proposal had been that the possibility should be considered of enforcing the code through national courts to which would be added a judge from the jurisdiction of the accused, as well as one or more judges from jurisdictions whose jurisprudence differed from that of both the accused and the national court in question. Such a procedure would not only internationalize the proceedings in a way that might be acceptable to the international community, but also provide some guarantee of impartiality and ensure the necessary interaction of the different legal systems. It would serve to ensure that the rights of the accused, as well as the interests of the international community as a whole, were protected. It might also provide a meeting-ground for those who advocated the establishment of an international criminal tribunal and those who thought it very unlikely that such a tribunal would be established. It would also make for certainty and uniformity in the application of the law.

54. His proposal had been prompted by differences in the jurisprudence of national jurisdictions in the field of criminal law. Matters such as the presumption of innocence had been settled by the draft code, but other matters had not. He had in mind, for example, the obligation to inform the accused of his rights at the time of arrest, the rules applicable to the questioning of the accused, trial by jury, the rules of evidence and of extradition, the right to bail and the writ of *habeas corpus*. Furthermore, while there was common ground in the Commission with regard to the rule on non-retroactivity, there was no such common ground with regard to an exhaustive or non-exhaustive list of offences. In that connection, the worst thing, in his view, would be to agree on a rule of non-retroactivity coupled with an open-ended list of offences, the effect of which might be to cause some national jurisdictions to add to the list, thereby making it retroactive in effect.

55. The questions of superior orders and *mens rea* showed that jurists from different jurisdictions invariably reflected their own legal system. With regard to superior orders, it was clear from the cases cited by Leslie Green in his 1976 study<sup>19</sup> that countries such as Belgium, Canada, France, the Federal Republic of Germany, Ghana, Israel, the Netherlands, Norway, Poland, the United Kingdom and the United States had all rejected the defence of superior orders. On that issue, therefore, the Commission was on sure ground and could be reasonably certain of the results that would be achieved. *Mens rea*, on the other hand, was regarded by some as equivalent to motivation, whereas, in English law at least, it was something different. To illustrate that point he read out certain excerpts from *Halsbury's Laws of England*, drawing particular attention to paragraphs 3, 4, 6 and 7 of part I, section I.

Those passages underlined the relevance of the concept of *mens rea* in many countries whose jurisprudence, like Canada's, had its origins in that of the courts of what had formerly been the British Empire, with its attendant safeguards such as trial by jury and *habeas corpus*. They also underlined the need to take account of the fact that jurisprudence was not uniform in all parts of the world. For all those reasons, he considered it essential to draft an instrument that could be implemented universally and in the utmost good faith.

56. Turning to the title of the topic, he said that he would prefer the word "crime" to the word "offence", since the latter was often used to denote relatively minor offences. A possible alternative might be the term "capital crime".

57. He agreed that the code should provide that States must take the necessary steps to incorporate its rules into their own internal law. Canada, whose law did not provide for the automatic application of international instruments, had had to legislate to that effect in almost all such cases. The 1947 United Nations Act, for example, had been passed to take account of the Charter of the United Nations and to enable Canada to implement the decisions of the Security Council. As Canada was not the only country in that position, the code should impose a similar obligation on all States so that none could later plead its constitution as a defence.

58. On the question whether the list of offences should be exhaustive or non-exhaustive, he said that Canadian criminal law, for its part, had never been concerned with the establishment of such a list: depending on the case and as society had changed, certain acts had been made punishable by law, while the punishable nature of other acts had been abolished. In the case of the draft code, the answer might lie in an annex which could later be amended.

59. As to whether the code could be applied to crimes committed both by individuals and by States, it would be difficult to envisage a workable procedure whereby one State could find another State guilty in the absence either of an international tribunal or at least of some mixed tribunal that would include judges from other jurisdictions. He therefore considered that the Special Rapporteur was right to confine the scope of the code for the time being to the individual.

60. With regard to draft article 1, although he understood the Special Rapporteur's point of view concerning the idea of seriousness (para. (2) of the commentary), he would like that idea to be mentioned in the code at some point.

61. As to draft article 2, it was important to note that the code would be meaningless if it was not based on the assumption of the supremacy of international criminal law; hence the need for a provision inviting States to legislate to that effect. He agreed with the Special Rapporteur (para. (7) of the commentary) that to use the *non bis in idem* rule to oppose international prosecution would be a negation of international criminal law and, in practice, would completely paralyse the punitive system based on the code. That point therefore required serious consideration.

<sup>19</sup> L. C. Green, *Superior Orders in National and International Law* (Leyden, Sijthoff, 1976).

62. He also agreed that draft article 4 was the essence of the entire draft code, but he did not agree with the use of the word "perpetrator", which seemed to imply a presumption of guilt. It would be better to refer to the "accused" or to the "individual charged with the offence".

63. There was an apparent omission in draft article 6 on jurisdictional guarantees, for it made no reference to legal capacity; but, in the modern-day world, children were in fact taking part in fighting. And what of insanity, which constituted a defence in many jurisdictions?

64. Mr. KOROMA said that, without in any way wishing to criticize the Secretariat, he regretted that only one summary record had been made available so far. The task of members would be facilitated if they could refer to the summary records as the Commission's discussions progressed.

65. He continued to believe that the title of the draft code should be retained as it stood. *Black's Law Dictionary* showed that "offence" was a generic term embracing both felonies and misdemeanours. It was possible that the title could be amended at a later stage to refer to "crimes", but, until it had been agreed which offences constituted offences against the peace and security of mankind, the title should stand.

66. He did not agree that draft article 5 was superfluous. It was true that certain jurisdictions imposed a statutory limitation for criminal offences. However, in the case of extremely serious offences, such as genocide, war crimes and crimes against humanity, it should not be possible to invoke statutory limitations in order to prevent prosecution, no matter how long the period of time involved.

67. He did not understand why an argument had arisen regarding the primacy of internal law or international law and the adoption of the code under internal law. Different States obviously had different ways of incorporating international law into their internal law. The main point was to agree on what was acceptable to all States and, then and only then, for States to decide how to translate the code into their legislation.

68. The thesis argued by Mr. Barsegov (1999th meeting) regarding *mens rea*, which he endorsed, had its justification in the outcome of the Nürnberg Trial, when the defences of superior orders and duress had been rejected because of the magnitude of the crimes involved. Genocide and crimes against humanity could also not be excused on the ground that there had been no intent to commit the offence. Nor, in his view, could lack of capacity or insanity constitute a defence in the case of offences against the peace and security of mankind. Children, to whom reference had been made, might be capable of murder, but they could not commit genocide without the support of the State. That was why such defences had been rejected whenever they had been invoked.

69. Mr. BEESLEY said that, in his earlier statement, he had not been arguing for or against any particular point, but had merely wished to draw attention to the fact that systems of jurisprudence differed on such

issues as *mens rea* and an exhaustive list of offences. The Commission would ignore that fact at its peril.

70. Mr. Sreenivasa RAO said he did not think that there was any wide divergence of views in the Commission on the question of *mens rea*, given the nature of the crimes involved. Crimes such as *apartheid*, genocide and the use of nuclear weapons placed the whole of mankind in jeopardy and there was therefore no justification for extrapolating from ordinary internal law concepts. The Commission could be guided by the principles of ordinary criminal law, but it should be very careful about applying them to international situations.

71. It had rightly been said that there was no need for the Commission to become involved in the implementation of the code. As he had already pointed out (1994th meeting), the Commission's first aim should be the formulation of rules that would command the broadest possible agreement. It should then be left to individual States to decide how best to implement the code. Mr. Beesley's suggestion, which looked to the practical realities, was an innovation that merited consideration. The Commission had made good progress and neither *mens rea* nor the implementation of the code should detain it any longer.

72. Mr. CALERO RODRIGUES said he agreed with Mr. Koroma that the word "offence" in the title of the draft code was correct. It was, however, also imprecise, for it was a general term which covered not only crimes, but also minor offences, whereas the draft code dealt solely with the category of offences known as crimes.

73. Mr. BARSEGOV said that the comments he had made at the previous meeting on the question of intent and motive had nothing to do with the particular characteristics of his own country's legal system. The subjective element of intent, whether or not it could be invoked under internal law in the case of ordinary crimes, could not be invoked in the case of offences against the peace and security of mankind. Contrary to what some people might think, international law was not merely a transposition of internal law to external relations.

*The meeting rose at 1.05 p.m.*

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## 2001st MEETING

*Thursday, 21 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)**

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

ARTICLES 1 TO 11' (concluded)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

2. Mr. THIAM (Special Rapporteur) thanked the members of the Commission for their contribution to a debate notable for its richness and depth. Starting with general considerations, he noted that some English-speaking members had proposed that, in the title of the topic, the word "offences" should be replaced by "crimes", whereas others, who were less numerous, would prefer the title to remain unchanged. While he did not feel qualified to settle that question, it seemed to him that the word "offence" was indeed a generic term and that the word "crime" denoted a particular class of offences, namely the most serious. No doubt the Drafting Committee could settle that question.

3. There had been much discussion on the question of intent, which of course arose in both internal law and international law. In internal law, offences were divided into two or three categories, according to the legal system concerned. French law, for example, distinguished between *contraventions*, *délits* and *crimes*, and, depending on the category of offence considered, intent might or might not have to be established; a *contravention* could, indeed, be committed unintentionally, whereas a *délit* and a *crime* presupposed a guilty intention. But there were exceptions: it might happen that a *contravention* constituted a *délit*, for example in the case of a traffic accident involving death. Similarly, assault and wounding which caused death unintentionally was treated as a crime. Offences against the peace and security of mankind were, in principle, the most serious crimes, and it must therefore be accepted *a priori* that they involved intent. But the question remained what was the content of the intent? Some took the view that motive and intent were the same and that to determine, for example, whether an act of genocide had been committed, it was necessary to examine the feeling of the author of that act to ascertain his motive for committing it. Others considered that it was not the motive for the act that was important, but its mass, systematic character. Those two theses had different consequences: in the first case, there could be an offence against the peace and security of mankind even if the rights of only one human being had been violated; in the

second case, it was the mass and systematic character of the offence which caused it to be characterized as an offence against the peace and security of mankind. It was difficult to decide between the two theses, but a problem arose concerning the burden of proof: for in the first case, the accuser must establish intent, whereas in the second, the mass nature of the act presupposed a guilty intention. In fact, those questions were very often left to judges, who decided according to the circumstances of the case. Moreover, the position of the judge in criminal law and his "inner conviction" were well known.

4. The question had been raised whether complicity and attempt should be included among the general principles or treated as separate offences. The research he had carried out on the criminal codes of many countries showed that complicity and attempt were sometimes incorporated in general principles and sometimes treated as separate offences; there was no authoritative doctrine on that point and it was really more a matter of form than of substance. The Commission could therefore reserve the question, or leave it to the Drafting Committee to decide where to place those two notions in the code.

5. If there was one point on which there was total agreement, it was the quality of seriousness: offences against the peace and security of mankind were the most serious offences, and all questions linked to that fact were merely matters of form. Should the notion of seriousness be stated in the definition, in the general principles, or in the commentaries? There again, the Drafting Committee could decide.

6. On draft article 1 there had, from the outset, been two opposing views, one favouring a definition by enumeration and the other a definition based on a general criterion. Since the discussions which had taken place over the years in the Commission and in the Sixth Committee of the General Assembly had shown that the first view was dominant, he had thought it preferable to revert to his initial proposal of a definition by enumeration, which was, moreover, the method most commonly used in criminal law. In any case, if a reference to general principles was considered unnecessary, there would be no need for a general definition either, since such a reference would make it possible to draw up a declaratory list, but not an exhaustive one.

7. But there was one possibility which seemed to have the support of the majority. Since criminal law had to be strictly interpreted, neither general criteria nor methods such as analogy would be used to characterize an act; to be characterized as an offence against the peace and security of mankind it would have to appear on a list and the list would have to be exhaustive. That did not mean that the list could not be revised as international society evolved, in the same way as criminal and civil codes were revised in internal law. To overcome the reluctance to adopt such a definition by enumeration, he pointed out that it was an accepted principle of the Commission that, for any topic studied, definitions should always be provisional until the work was completed. He therefore believed that a definition by enumeration would be preferable, it being understood that it would be provisional, that it could always be improved and that, once the list of offences against

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the texts, see 1992nd meeting, para. 3.

the peace and security of mankind had been drawn up, the Commission would decide on the definition to be finally adopted.

8. Referring to the expression "crimes under international law" in draft article 1, he pointed out that it had already been used in Principle I of the Nürnberg Principles<sup>6</sup> and in article 1 of the 1954 draft code. The reason why that expression was justified was that, in reality, international crimes did not all have the same source: there were international crimes by nature, that was to say crimes coming directly under international law because the international community as a whole regarded them as crimes, and international crimes which had been made crimes under a convention concluded for the purposes of prosecution and punishment. Personally, he was not unduly attached to the expression "crimes under international law"; he thought it would be better to let the Drafting Committee settle that issue.

9. Draft article 2 raised the problem of the autonomy of international criminal law, which had two aspects, one concerning affirmation of the principle of the autonomy of international criminal law and the other its implementation.

10. The autonomy of international criminal law, which was a corollary of the autonomy of general international law, was a principle to which there was no objection. The question arose, however, what was the real source of international criminal law: conventions, or general principles of law? That was not a new subject of debate. In practice, the most frequent case was that a rule existed, which was not yet formulated, but was applied as a customary rule; then at some particular time written law—in other words a convention—confirmed its existence. It was then that the question of the source of the rule arose; it was a difficult question, but purely theoretical, and the answer mattered little for the drafting of the code.

11. The other aspect of the problem—that of the implementation of international criminal law—was more interesting and more important. The organs of States were undoubtedly responsible for such implementation, but it was there that methods differed: there was the method of direct application of international conventions, as in the common-law countries, and the method of indirect application, by way of ratification or approval; and lastly, States could declare, when acceding to an international convention, that the accession entailed automatic application of the instrument in their territory. It was not an easy problem to solve and the Commission would have to decide either to leave each State free to choose the method, or to provide that accession to the code required automatic incorporation of its provisions in internal law. The best course, however, might be to complete the first part of the work, which consisted in defining the acts to be condemned, before passing on to the second part, which would deal with the modalities of application of the code.

12. Draft article 3 on individual responsibility raised very difficult problems, for two separate subjects of law were involved: the individual as a natural person and the State as a legal person. It was clearly impossible to apply

the same rules to those two subjects, so the questions should be taken up *seriatim*. For the time being, therefore, the content of the draft code *ratione personae* was confined to natural persons, that was to say individuals. But that was where article 19 of part 1 of the draft articles on State responsibility<sup>7</sup> came in and the ambiguity of the word "crime" appeared. The language of internal law was not rich, and that of international law even less so, since it had recourse to terms borrowed from internal law which changed their content when they passed into the sphere of international law. For example, in the French legal system, a *délit* had both a civil content and a criminal content, and the same word was used to denote those two entirely different notions. The same applied to the word "crime" in international law, which had two different meanings, depending on whether it was applied to individuals or to States. In article 19 of part 1 of the draft articles on State responsibility, the word "crime" did not have a criminal content: it had a totally different content, namely a civil one, as could be seen from the commentary to the article.<sup>8</sup> For instance, in paragraph (59) of the commentary, a clear distinction was made between the criminal responsibility of the individual and the international responsibility of the State; similarly, paragraph (21) distinguished between the criminal responsibility of the individual acting as an organ of the State and the international responsibility of the State itself. Of course, those two kinds of responsibility could be linked in internal law when they derived from an act which could generate both criminal and civil responsibility, and it might be thought that that also applied in international law to a crime committed by an individual acting as an organ of the State. But since paragraph (44) of the same commentary showed that the theory of criminal responsibility of the State was not yet dominant, the Commission would do well not to prejudge that question in the draft code, especially as States themselves, to judge from their comments,<sup>9</sup> did not favour it. Accordingly, he was willing to amend draft article 3 by adding a new paragraph to read:

"The foregoing provision does not preclude the international responsibility of a State for crimes committed by an individual in his capacity as an agent of that State."

As to the criminal responsibility of the State itself, the Commission could indicate in the commentary that the criminal responsibility of the individual, as provided for in article 3, was without prejudice to the question of the criminal responsibility of the State for an international crime, explaining the reasons which had led it to take that position.

13. The discussion on draft article 4 had been concerned with choice—the choice between establishing an international criminal court and providing for universal jurisdiction. But in fact there was no choice: it was not a question of conferring exclusive jurisdiction on a future

<sup>7</sup> See 1993rd meeting, footnote 7.

<sup>8</sup> *Yearbook . . . 1976*, vol. II (Part Two), pp. 96 *et seq.*

<sup>9</sup> See the views of Member States and intergovernmental organizations received pursuant to paragraph 2 of General Assembly resolution 40/69 of 11 December 1985 and circulated to the General Assembly, at its forty-first session, in document A/41/537 and Add.1 and 2.

<sup>6</sup> See 1992nd meeting, footnote 12.

international criminal court, or of thereby excluding the jurisdiction of national courts. The two systems would have to be combined. Some members of the Commission had spoken in favour of establishing an international criminal court, but it remained to be seen whether it would ever come into being. Moreover, that solution also raised serious problems. For example, who would be responsible for conducting prosecutions? Would a department of public prosecutions be set up that was independent of States? And supposing that that were possible, how would that department prosecute wanted persons who were in the territory of sovereign States? If it had no authority there, and the task was entrusted to the magistrates of a State's internal legal order, would there not be duplication of functions? Lastly, if the international court was to be part of the United Nations system, it would be necessary to amend the Charter: were Member States prepared to do so?

14. He was not overlooking the difficulties caused by the rule of territoriality. It was true that that rule had been applied after the Second World War for the trial of a number of war crimes. But the draft code covered a whole group of offences, not only war crimes. For instance, the crime of genocide could be committed in time of war or of peace. It could also be committed by a State in its own territory: in that case, how was the rule of territoriality to be applied? Would a State which had committed the crime of genocide try itself? To all those questions was linked the question of localization: some crimes could be localized, others could not. That was why the 1945 London Agreement<sup>10</sup> had provided for a multiple system. In the preamble, it had laid down the principle of territoriality in the following terms:

And whereas the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

and in article 6 it had laid down the principle of international criminal jurisdiction and personal competence by providing:

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

15. The discussion on choice was therefore pointless: the international reality must be taken into account. It was true that the establishment of an international criminal court represented an ideal to be attained; but other principles must not be excluded. That was why he had chosen a flexible system, in which the rule of extradition, while making it possible to give preference to territorial jurisdiction, did not exclude international jurisdiction or even personal competence. With regard to extradition, he was willing to specify in draft article 4 that the offences covered by the code were common crimes, not only with respect to extradition, but also with respect to the rules of detention. Such a provision need not be detailed, for extradition, as understood in the draft code, was an international obligation of States

on the same level as the obligation to try the offender. That being so, draft article 4 would not give rise to any objection on principle and the drafting problems could be entrusted to the Drafting Committee.

16. Draft article 5 did not appear to meet with any objections and he agreed to add a provision indicating that the rule of non-applicability of statutory limitations applied to all the offences; it would indeed be impossible to make a distinction between war crimes and crimes against humanity.

17. It was true that he had not taken up the problem of pardon and amnesty, although he knew that certain tribunals established after the Second World War had affirmed that the crimes they had to try could not be pardoned or amnestied. The Commission could consider later whether it should include a provision to that effect in the draft code.

18. Positions differed on draft article 6, and they had changed over a period of time. At the outset, he had submitted a single provision and it had been at the request of some members of the Commission that he had later submitted a non-exhaustive list of the most important guarantees, to which he was currently invited to add others, such as the right of appeal or preliminary inquiry. The problem that arose was one of drafting, except perhaps in regard to the right of appeal. He had thought of that guarantee, but had not included it in the draft article submitted in his fifth report (A/CN.4/404) because he had been dissuaded by the possibility of establishing an international criminal court, which would be a supreme court like the Nürnberg Tribunal, the Charter<sup>11</sup> of which, in article 26, provided:

The judgment of the Tribunal as to the guilt or the innocence of any defendant shall give the reasons on which it is based, and shall be final and not subject to review.

He need hardly point out that, in matters of general international law, the judgments of the ICJ were also final and not subject to review. In internal law, some systems did not recognize the right of appeal in criminal cases, except that judgments rendered in assize courts could be quashed for breach of a rule of law. It would therefore be for the Commission to decide whether the right of appeal was a fundamental matter or not. Generally speaking, he thought that, since the Commission was dealing with international law, it would be better to avoid procedural rules.

19. He noted that there had been no objections of principle to draft article 7 and agreed to add a provision reading:

“The foregoing rule cannot be pleaded in bar before an international criminal court, but may be taken into consideration in sentencing if the court finds that justice so requires.”

20. Draft article 8 also seemed to meet with approval in principle, although some members had questioned whether paragraph 2 should be retained. After mature consideration he thought that that paragraph should indeed be deleted: if the list of offences was exhaustive, that provision, which derived from the history of the

<sup>10</sup> See 1992nd meeting, footnote 6.

<sup>11</sup> *Ibid.*

establishment of the Nürnberg Tribunal, might conflict with the course the Commission had decided to follow.

21. As to draft article 9, if the Commission decided to recognize exceptions to the principle of responsibility, it must at the same time recognize that those exceptions could not apply to crimes against humanity in general, but only to war crimes.

22. With regard to the distinction that one member of the Commission had made between justifying circumstances and causes of non-responsibility, he agreed that it existed in some legal systems and was based on the fact that justifying circumstances, if established, wiped out the offence—such as in the case of self-defence—whereas causes of non-responsibility, such as *force majeure*, only eliminated responsibility, letting the offence subsist. As that distinction existed only in some legal systems, however, he had preferred to group together under a single heading all the exceptions, which in any case eliminated responsibility, whether as justifying facts or for some other reason.

23. To meet the concern of some members of the Commission regarding self-defence, he pointed out that that excuse could be invoked only in cases of aggression, as he had explained in his fourth report (A/CN.4/398, paras. 251-252). If a State carried out an action in the exercise of its right of self-defence, since that right was recognized, it could not be prosecuted: the offence was obliterated.

24. With regard to the other exceptions, he thought that, since some of them must be recognized in the case of States—and part 1 of the draft articles on State responsibility did provide for circumstances precluding the wrongfulness of an act, in particular *force majeure*, state of necessity and self-defence—they must also be recognized in the case of individuals. It would be intolerable if an individual who had committed a wrongful act was subject to criminal prosecution whereas the State on behalf of which he had acted was absolved of responsibility. On that point he referred the Commission to the cases mentioned in his fourth report. It would be for the Drafting Committee to solve the drafting problems and he would willingly assist in that task.

25. The question of error was a difficult one, because error resulted from lack of caution or attention by the author of the act. Some members of the Commission wished to distinguish between error of law, which would not be accepted as a justifying circumstance, and error of fact, which would be so accepted. On the problem of error of law, he referred to the decision of the United States military tribunal in the *I. G. Farben* case, cited in his fourth report (*ibid.*, para. 208), in which the tribunal had accepted that a military commander might in some cases be mistaken about the interpretation of the laws of war. It remained for the Commission to decide whether error of law should be systematically excluded in the case of crimes against humanity. As to error of fact, there were cases in which it seemed that it should be accepted. He reminded the Commission of a recent incident in which aircraft of one State had attacked a ship of another State and the question had arisen whether it was an intentional act or an error of fact: if error of fact

was ruled out in that case, it would be necessary to recognize that there had been an act of aggression, with all the consequences that entailed. Thus there were cases in which error of fact must be accepted, and error had its place in the draft code as an exception to the principle of responsibility, although it was necessary to consider the question whether it should be regarded as a cause of non-responsibility in all cases, or as an absolving excuse.

26. In conclusion, noting that the Commission was in agreement on the essentials of the draft articles submitted in his fifth report (A/CN.4/404) and that only problems of form remained to be settled, he suggested that the draft articles be referred to the Drafting Committee on the understanding that the Committee would take into consideration all the written and oral proposals made concerning them.

27. The CHAIRMAN thanked the Special Rapporteur for his comprehensive summary of the discussion and suggested that draft articles 1 to 11 be referred to the Drafting Committee.

28. Mr. NJENGA said that certain issues raised by the Special Rapporteur should be clarified before the draft articles were referred to the Drafting Committee. For example, he did not agree with the Special Rapporteur on the question of the right of appeal, which was provided for not only in the International Covenant on Civil and Political Rights (art. 14, para. 5), but also, implicitly, in Additional Protocol I<sup>12</sup> (art. 75, para. 4 (j)) to the 1949 Geneva Conventions. He could understand the objection to the right of appeal in the case of an international court, or even in the case of an *ad hoc* tribunal of the type advocated by Mr. Beesley (1994th meeting); but the position was very different when it came to national courts, where the right of appeal, when allowed, was a fundamental right which could not be denied. The point was especially important because of the different approaches to it adopted by different countries.

29. Mr. THIAM (Special Rapporteur) said that he had not rejected the right of appeal; if a national court was called upon to try the alleged perpetrator of a crime, it would do so under internal law and rules of procedure, including the right of appeal. The only case in which it would be difficult to recognize that right was when an international tribunal was called upon to try the accused.

30. Mr. BARSEGOV, referring to the distinction he had made in his earlier statement (1999th meeting) between intent and motive—a distinction that was recognized in all legal theory—observed that the Special Rapporteur had dealt only with intent and that the question seemed to call for more thorough examination, since the Commission was not in agreement. He would like to know the Special Rapporteur's position on motive, and emphasized that motive had not been recognized as an exception by the Nürnberg Tribunal or in the International Convention on the Suppression and Punishment of the Crime of *Apartheid* or the Definition of Aggression. He therefore questioned whether there

<sup>12</sup> *Ibid.*, footnote 10.

was agreement on that point and whether the Drafting Committee could deal with it.

31. After a brief exchange of views in which Mr. ARANGIO-RUIZ and Mr. Sreenivasa RAO took part, the CHAIRMAN suggested that the Commission should refer draft articles 1 to 11 as submitted by the Special Rapporteur in his fifth report to the Drafting Committee for consideration in the light of the debate and of the subsequent exchange of views.

*It was so agreed.*<sup>13</sup>

32. Mr. EIRIKSSON observed that the discussion had shown the need to review the Commission's working methods. He trusted that the matter would soon be taken up by the Planning Group.

*Mr. Díaz González, First Vice-Chairman, took the Chair.*

**The law of the non-navigational uses of international watercourses (A/CN.4/399 and Add.1 and 2,<sup>14</sup> A/CN.4/406 and Add.1 and 2,<sup>15</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

### THIRD REPORT OF THE SPECIAL RAPPORTEUR

#### CHAPTER III OF THE DRAFT:<sup>16</sup>

#### ARTICLES 10 TO 15

33. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/406 and Add.1 and 2), as well as the six articles of chapter III of the draft submitted therein, which read:

#### CHAPTER III

#### GENERAL PRINCIPLES OF CO-OPERATION, NOTIFICATION AND PROVISION OF DATA AND INFORMATION

##### *Article 10. General obligation to co-operate*

States shall co-operate in good faith with other concerned States in their relations concerning international watercourses and in the fulfilment of their respective obligations under the present articles.

##### *Article 11. Notification concerning proposed uses*

If a State contemplates a new use of an international watercourse which may cause appreciable harm to other States, it shall provide those States with timely notice thereof. Such notice shall be accompanied by available technical data and information that are sufficient to enable the other States to determine and evaluate the potential for harm posed by the proposed new use.

<sup>13</sup> For consideration of draft articles 1, 2, 3, 5 and 6 proposed by the Drafting Committee, see 2031st and 2032nd meetings, and 2033rd meeting, paras. 1-26.

<sup>14</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>15</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>16</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

##### *Article 12. Period for reply to notification*

1. [ALTERNATIVE A] A State providing notice of a contemplated new use under article 11 shall allow the notified States a reasonable period of time within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State.

1. [ALTERNATIVE B] Unless otherwise agreed, a State providing notice of a contemplated new use under article 11 shall allow the notified States a reasonable period of time, which shall not be less than six months, within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State.

2. During the period referred to in paragraph 1 of this article, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that are available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use without the consent of the notified States.

3. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the contemplated use or the attainment of an agreed resolution under paragraph 3 of article 13.

##### *Article 13. Reply to notification: consultation and negotiation concerning proposed uses*

1. If a State notified under article 11 of a contemplated use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying State's depriving the notified State of its equitable share of the uses and benefits of the international watercourse, the notified State shall so inform the notifying State within the period provided for in article 12.

2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.

3. If, under paragraph 2 of this article, the States are unable to adjust the determinations satisfactorily through consultations, they shall promptly enter into negotiations with a view to arriving at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the contemplated use to eliminate the causes of harm, adjustment of other uses being made by either of the States and the provision by the proposing State of compensation, monetary or otherwise, acceptable to the notified State.

4. The negotiations provided for in paragraph 3 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and interests of the other State.

5. If the notifying and notified States are unable to resolve any differences arising out of the application of this article through consultations or negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute-settlement provisions of the present articles.

##### *Article 14. Effect of failure to comply with articles 11 to 13*

1. If a State contemplating a new use fails to provide notice thereof to other States as required by article 11, any of those other States believing that the contemplated use may cause it appreciable harm may invoke the obligations of the former State under article 11. In the event that the States concerned do not agree upon whether the contemplated new use may cause appreciable harm to other States within the meaning of article 11, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 13, with a view to resolving their differences. If the States concerned are unable to resolve their differences through negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the

absence thereof, in accordance with the dispute-settlement provisions of the present articles.

2. If a notified State fails to reply to the notification within a reasonable period, as required by article 13, the notifying State may, subject to its obligations under article [9], proceed with the initiation of the contemplated use, in accordance with the notification and any other data and information communicated to the notified State, provided that the notifying State is in full compliance with articles 11 and 12.

3. If a State fails to provide notification of a contemplated use as required by article 11, or otherwise fails to comply with articles 11 to 13, it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article [9].

*Article 15. Proposed uses of utmost urgency*

1. Subject to paragraphs 2 and 3 of this article, a State providing notice of a contemplated use under article 11 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 13, proceed with the initiation of the contemplated use if the notifying State determines in good faith that the contemplated use is of the utmost urgency, due to public health, safety, or similar considerations, and provided that the notifying State makes a formal declaration to the notified State of the urgency of the contemplated use and of its intention to proceed with the initiation of that use.

2. The right of the notifying State to proceed with a contemplated new use of utmost urgency pursuant to paragraph 1 of this article is subject to the obligation of that State to comply fully with the requirements of article 11, and to engage in consultations and negotiations with the notified State, in accordance with article 13, concurrently with the implementation of its plans.

3. The notifying State shall be liable for any appreciable harm caused to the notified State by the initiation of the contemplated use under paragraph 1 of this article, except such as may be allowable under article [9].

34. Mr. McCaffrey (Special Rapporteur) said that his third report (A/CN.4/406 and Add.1 and 2) consisted of four chapters and two annexes. Chapters I and II and annexes I and II had been included largely as background information. Chapter III formed the core of the report, since it contained the draft articles he was submitting to the Commission for discussion and action at the present session. Chapter IV was an introduction to the subtopic of exchange of data and information, on which he intended to submit draft articles at the next session. A general discussion on that chapter at the present session, time permitting, would assist him in preparing those draft articles.

35. Chapter I of the report contained a brief summary of the status of the Commission's work on the topic, while a more extensive account could be found in his preliminary report<sup>17</sup> and in his second report (A/CN.4/399 and Add.1 and 2). At its thirty-second session, in 1980, the Commission had provisionally adopted six articles (arts. 1 to 5 and X), together with a provisional working hypothesis as to what was meant by the term "international watercourse system" (see A/CN.4/406 and Add.1 and 2, paras. 2-3).

36. In his first report,<sup>18</sup> submitted to the Commission at its thirty-fifth session, in 1983, the previous Special Rapporteur, Mr. Evensen, had submitted a complete set of draft articles in the form of an outline for a draft convention, the revised text of which, submitted in his

second report at the thirty-sixth session, in 1984, comprised 41 draft articles. The Commission had decided at its thirty-sixth session to refer articles 1 to 9 of the revised outline to the Drafting Committee, which was considering them now because, owing to lack of time, it had been unable to do so earlier (see A/CN.4/399 and Add.1 and 2, paras. 15-30).

37. Chapter II of the report under discussion contained information on procedural rules relating to the utilization of international watercourses. Section A briefly reviewed the relevant features of a modern system of water resource management and discussed three examples. Two were taken from federal practice in the United States of America, namely the legislation of the State of Wyoming and the Delaware River Basin Compact, simply because the details on them had been readily available to him. However, they did provide an indication of how modern planning processes could work with regard to the management of water resources. The third example was particularly apt for the purposes of the present discussion, since it was that of an international treaty on an international watercourse, namely the Convention between Mali, Mauritania and Senegal relating to the status of the Senegal River (Nouakchott, 1972).

38. Section B of chapter II dealt with the relationship between procedural rules and the doctrine of equitable utilization. The principle was so flexible and general in character that it was difficult for individual States to apply. A set of procedural rules was therefore necessary. Every State needed information on other States' uses of a watercourse, so as to be able to determine whether its own intended utilization was in keeping with the principle in question. The purpose of the procedural rules set out in the draft articles submitted in chapter III was to ensure that information and data on the uses of a watercourse by other States were available to the State planning its own uses, thereby enabling it to take such data and information into account and avoid any breach of the equitable utilization principle.

39. The draft articles in chapter III fell into two categories. The first, consisting only of draft article 10, covered the general obligation to co-operate. The second category, comprising draft articles 11 to 15, set out rules on notification and consultation concerning proposed uses, which could best be considered together.

40. Draft article 10 set out the general duty of States to co-operate in their relations concerning international watercourses and in the fulfilment of their respective obligations under the draft. Such a duty to co-operate was supported by a broad range of authority. In that regard, he cited in his report international agreements (A/CN.4/406 and Add.1 and 2, paras. 43-47), decisions of international courts and tribunals (*ibid.*, paras. 48-50), declarations and resolutions adopted by intergovernmental organizations, conferences and meetings (*ibid.*, paras. 51-55) and studies by intergovernmental and non-governmental organizations (*ibid.*, paras. 56-58). More particularly, reference was made to the resolution entitled "The pollution of rivers and lakes and international law", adopted by the Institute of International Law at its Athens session, in 1979, which set out the obligation of States to co-

<sup>17</sup> *Yearbook* . . . 1985, vol. II (Part One), p. 87, document A/CN.4/393.

<sup>18</sup> *Yearbook* . . . 1983, vol. II (Part One), p. 155, document A/CN.4/367.



operate “in good faith with the other States concerned” (*ibid.*, para. 58). That resolution went on to specify the duty of States to provide data concerning pollution, to give advance notification of potentially polluting activities and to consult on actual or potential transboundary pollution problems. Clearly, that duty was the outcome of the general obligation of States to co-operate in their relations concerning international watercourses.

41. Draft article 10 stipulated that it was the duty of States to co-operate in good faith with other “concerned States”, a term he had used so as to avoid both the expression “watercourse States”, and the expression “system States”. It would be for the Commission to decide on the final wording.

42. With regard to draft articles 11 to 15, he had also cited international agreements (*ibid.*, paras. 63-72), decisions of international courts and tribunals (*ibid.*, paras. 73-75), declarations and resolutions adopted by intergovernmental organizations, conferences and meetings (*ibid.*, paras. 76-80) and studies by intergovernmental and non-governmental organizations (*ibid.*, paras. 81-87).

43. Draft article 11 dealt with notification concerning proposed uses. The first sentence required a State contemplating a new use of an international watercourse which could cause appreciable harm to other States to provide those States with “timely notice” thereof. As explained in paragraph (7) of the comments on the article, the term “timely” was intended to require notification sufficiently early in the planning stages to permit meaningful consultation and negotiation, if necessary. The criterion of “appreciable harm”, which was explained in paragraph (5) of the comments, had its origin in draft article 9 as submitted by the previous Special Rapporteur, which was still before the Drafting Committee.

44. It should be noted that the “comments” on each draft article were simply an explanation of his own reasons for including certain terms and provisions in the text. When the time came for the final adoption of each article, the Commission would as usual attach its own commentary, which would contain not only an explanation of the content, but also references to international instruments, judicial precedent and other supporting material.

45. Draft article 12, stating the rule on the period for replying to notification, contained two alternatives for paragraph 1. Alternative A stated that the notifying State must allow the notified States “a reasonable period of time” within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State. Alternative B spoke instead of “a reasonable period of time, which shall not be less than six months”. Paragraph 2 of the article stipulated that co-operation was required between the parties concerned during the period referred to in paragraph 1, and paragraph 3 set out the duty to negotiate in good faith.

46. Draft article 13 dealt with the reply to notification, and consultation and negotiation concerning proposed uses. The duty to consult, set out in paragraph 2, was intended to enable the States concerned to confirm or ad-

just the determinations made by the notified State under paragraph 1. Paragraph 3 laid down the duty to negotiate, and paragraph 4 specified that the negotiations must be conducted in good faith. Paragraph 5 stated that, if the consultations and negotiations failed, the parties must have recourse to “the most expeditious procedures of pacific settlement available” or, in the absence thereof, to “the dispute-settlement provisions of the present articles”. He had included that proviso because he proposed to include provisions on dispute settlement in the draft at a later stage. It should be emphasized that paragraph 1 called for the notified State to make two separate determinations in order to trigger the notifying State’s obligations under paragraph 2: (a) that the contemplated use would, or was likely to, cause the notified State appreciable harm; (b) that such use would, or was likely to, result in the notifying State’s depriving the notified State of its equitable share.

47. Article 14 concerned the effect of failure to comply with articles 11 to 13. Paragraph 1 dealt with the failure of the proposing State, in other words the State contemplating a new use, to notify the other States concerned. Paragraph 2 related to the case of failure by a notified State to reply to a notification within a reasonable period. Paragraph 3 was intended to encourage compliance with the notification, consultation and negotiation requirements of articles 11 to 13 by making the proposing State liable for any harm to other States resulting from the new use, even if such harm would otherwise be allowable under the equitable utilization principle.

48. Draft article 15 covered cases in which the proposed use of an international watercourse was a matter of the utmost urgency, owing to public health, safety, or similar considerations, and in which failure to act by the notifying State would have potentially disastrous consequences. In such an event, paragraph 1 allowed the notifying State to proceed with the contemplated use. Under paragraph 2, that right of the notifying State was subject to the obligation to comply fully with the requirements of article 11 and to engage in consultations and negotiations with the notified State. Paragraph 3 specified that the notifying State would “be liable for any appreciable harm caused to the notified State by the initiation of the contemplated use”.

49. In conclusion, he proposed that the Commission should first discuss draft article 10 by itself, and then proceed to take up draft articles 11 to 15 together. If enough time was available, the Commission could then engage in a general discussion of the subject-matter of chapter IV, on the exchange of data and information. As to future work on the topic, he envisaged submitting one further report, or possibly two if necessary, and hoped that the Commission could complete the first reading of the draft at its 1989 session.

50. After a brief procedural discussion in which Mr. BARSEGOV, Mr. CALERO RODRIGUES and Mr. Sreenivasa RAO took part, the CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt the Special Rapporteur’s proposal as to procedure, on the understanding that members, particularly newly elected

members, would be free to raise any general questions, especially during the discussion of draft article 10.

*It was so agreed.*

*The meeting rose at 1 p.m.*

## 2002nd MEETING

*Friday, 22 May 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Mr. A-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome to Mr. Ago, a Judge of the International Court of Justice, who in the past had made an invaluable contribution to the Commission's work, particularly when he had been Special Rapporteur for the topic of State responsibility.

### The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)

[Agenda item 6]

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

2. Mr. BEESLEY said that, before discussing the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2), he wished to make a few general observations and refer to the earlier work on the topic, including the Special Rapporteur's first two reports. The topic had been on the Commission's agenda since 1971 and progress on it had been slow, not only because the subject was complex, but also because three changes of special rapporteur had had to be made. The work of all four of them was to be commended. The present Special Rapporteur had shown an excellent grasp of the problems to be overcome and his recommendations were sound. Accordingly, the Commission was in a position to make headway on the topic.

3. In 1984, the Commission had had before it a draft framework agreement consisting of 41 articles prepared by the previous Special Rapporteur, Mr. Evensen, and had referred articles 1 to 9 to the Drafting Committee, where they were still to be discussed. The present Special Rapporteur had, from the start, proposed that those articles should be dealt with by the Drafting Committee without further debate in plenary, and that the general organizational structure of the draft prepared by his predecessor should be followed for the purposes of the subsequent articles.

4. Notwithstanding his view that draft articles 1 to 9 should be left with the Drafting Committee, the Special Rapporteur had, in his second report (A/CN.4/399 and Add.1 and 2), discussed difficult questions raised by those articles and had also submitted five draft articles on the procedures to be followed by States when new uses were proposed for the waters of an international watercourse.

5. At its previous session, the Commission had not been able to consider in full the second report, which dealt with four important points. The first concerned the definition of an "international watercourse". At the outset of its work on the topic, the Commission had been divided as to the meaning of the term "international watercourse". It had been decided not to use the term "drainage basin", and the alternative term "international watercourse system" had also given rise to controversy. In 1980, the Commission had appeared to move closer to a broad definition of an international watercourse when it had adopted a note "describing its tentative understanding of what was meant by the term 'international watercourse system' ". Accordingly, Mr. Evensen had been able to incorporate the substance of that understanding in article 1 of his original draft, in 1983, an article entitled "Explanation (definition) of the term 'international watercourse system' . . .".

6. There had, however, been some criticism in the Commission regarding the use of the word "system", and Mr. Evensen had abandoned it in his revised draft, in 1984, using instead the shorter expression "international watercourse". However, due to the persisting differences of opinion regarding the meaning of the latter expression, the present Special Rapporteur had recommended in his second report (*ibid.*, para. 63) that article 1 be withdrawn from the Drafting Committee and that the Commission proceed on the basis of the provisional working hypothesis which it had accepted in 1980. Obviously, the problem would have to be faced sooner or later, and all attempts to limit the scope of application of the principles embodied in the draft articles should be resisted. The drainage basin concept, or the system concept, was supported by the best expert opinion, and the interdependence of waters made it highly desirable that a system-wide approach should be taken.

7. The change made by Mr. Evensen from the drainage basin concept to the concept of an "international watercourse system" could provide a suitable basis for developing a coherent and rational body of general principles on international watercourses, without impinging upon those watercourses that were regulated by their own particular régimes.

<sup>1</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

8. Support for the drainage basin or system approach was reflected in the provisions of the 1978 Agreement between the United States of America and Canada on Great Lakes Water Quality,<sup>3</sup> article I of which defined the expressions “boundary waters of the Great Lakes System”, “Great Lakes Basin Ecosystem” and “tributary waters of the Great Lakes System”, terms that were found in the substantive articles of the Agreement. He therefore considered it desirable for the “system” concept to be retained, but would not press the point unduly. The fact that the word “system” was not used in article 1 of Mr. Evensen’s draft did not preclude an interpretation that would make the draft articles applicable to the furthest limits of a drainage basin, if circumstances so warranted.

9. The “shared natural resource” concept, which had originated in article 6 of Mr. Evensen’s initial draft, in 1983, had met with strong objections from some members of the Commission. Mr. Evensen had therefore revised article 6 and replaced that concept by the formula “the watercourse States concerned shall share in the use of the waters”. That change was not regarded as significant by the present Special Rapporteur, who had stressed in his second report that it had “not resulted in the elimination of any fundamental principles from the draft as a whole” (*ibid.*, para. 74). Since that view was shared by many members of the Commission, it was to be hoped that the matter was no longer controversial.

10. Another disputed question was whether to include in the draft a list of factors to be taken into account in determining what constituted “equitable utilization”. Mr. Evensen had included such a list in article 8 of his draft, and the text had made it clear that the list was not exhaustive. The present Special Rapporteur, during the Commission’s consideration of his second report, had supported a compromise position, namely that the Commission “should strive for a flexible solution, which might take the form of confining the factors to a limited indicative list of more general criteria”.<sup>4</sup>

11. Personally, he thought that the question whether or not to include such a list was not a major issue, but that a list should be given in the commentary if it was to be omitted from the text of the article. A list of that kind was needed as a useful guide in applying the somewhat vague language of the fundamental principle of equitable utilization. It was also worth noting that a list of factors had been included in the corresponding provision of the Helsinki Rules adopted in 1966 by the International Law Association,<sup>5</sup> rules which had been widely recognized as useful.

12. Under the principle of equitable utilization, which was firmly established in international law, a State was entitled to a reasonable and equitable share of the beneficial uses of the waters of an international watercourse in its territory; but it could not do anything in its

territory that would cause appreciable harm in the territory of another State. Hence there was an apparent conflict between the equitable utilization principle and the duty to refrain from causing appreciable harm. If the right of the second State not to be harmed was given priority, the entitlement of the first State to a reasonable and equitable share of the beneficial uses of the water was overridden.

13. No solution had yet been found to deal with that contradiction. The second Special Rapporteur, Mr. Schwebel, had maintained that, in the event of a conflict, the principle of equitable utilization had priority. In his third report, Mr. Schwebel had stated that the degree of harm would, of course, be an important factor in determining whether the use was reasonable and equitable, but inflicting some harm was not an automatic prohibition on action by a State proposing to undertake a utilization.<sup>6</sup>

14. That argument had not met with the approval of the third Special Rapporteur, Mr. Evensen, who had introduced the concept of “appreciable harm” into article 9 of his draft by requiring a watercourse State to refrain from uses that could cause appreciable harm to the rights or interests of other watercourse States, but with the proviso “unless otherwise provided for in a watercourse agreement or other agreement or arrangement”. That downgrading of the principle of equitable utilization had proved controversial both in the Commission and elsewhere, and Mr. Evensen had been urged to consider incorporating a qualification that would make the obligation to refrain from causing appreciable harm subject to the overriding obligation to share the resource equitably, bearing in mind the need to balance all the relevant factors, including any applicable principles of international law.

15. The present Special Rapporteur had heeded that advice. With a view to reconciling the two principles, he had in his second report (*ibid.*, para. 184) proposed the following formulation for article 9:

In its use of an international watercourse, a watercourse State shall not cause appreciable harm to another watercourse State, except as may be allowable within the context of the first State’s equitable utilization of that international watercourse.

arguing that both States concerned had legal rights and were entitled to have them protected. The right of one State should not be recognized at the expense of ignoring the right of the other. As the Special Rapporteur saw it, what was prohibited was conduct whereby one State exceeded its equitable share or deprived another State of its equitable share, the focus being on the duty not to cause legal injury through non-equitable use, rather than on the duty not to cause factual harm. At the previous session, the Special Rapporteur, referring to the relationship between the principle of equitable utilization and the obligation not to cause appreciable harm, had concluded that the Commission “seemed to be in basic agreement on the manner in which the two principles were interrelated”.<sup>7</sup>

<sup>3</sup> *United States Treaties and Other International Agreements, 1978-1979* (Washington, D.C.), vol. 30, part 2, p. 1383.

<sup>4</sup> *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 239.

<sup>5</sup> ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

<sup>6</sup> See *Yearbook . . . 1982*, vol. II (Part One), pp. 91 *et seq.*, document A/CN.4/348, paras. 111-185 (art. 8).

<sup>7</sup> *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 241.

16. With regard to the concept of "appreciable harm", it was generally agreed that States must tolerate insignificant adverse effects or other minor inconveniences resulting from the uses of a watercourse by neighbouring States. Nevertheless, a number of States had criticized the use of the adjective "appreciable", maintaining that it was vague and called for clarification. For his part, he favoured retention of the word "appreciable" until a better one was found, for it should also be borne in mind that the fundamental principle of equitable utilization was itself vague. The qualification "appreciable" was clearly necessary in articles dealing with substantive law, such as draft article 9, but not so necessary in articles setting forth procedural rules providing for notification, exchange of information, consultation and the duty to negotiate.

17. The draft articles submitted by the Special Rapporteur in his second report had dealt with the duty of a watercourse State to suspend the implementation of a project if objections were raised by another watercourse State. Provision was made for prior notification of a proposed use, for a reply from a notified State within a reasonable time, and for consultations and negotiations in the event of objections. The watercourse State proposing to implement a project was clearly under a duty to suspend implementation until the requisite notice had been given and consultations and negotiations had been attempted. Under draft article 13, failure to notify or to consult or negotiate rendered a State liable for any harm caused to other States by the new use, whether or not such harm was in violation of article 9. A penalty was thus imposed, even though the project was within the legal entitlement of the notifying State. On the other hand, if the notified State failed to reply to the notice within a reasonable time, the notifying State could proceed to implement its project. In doing so, it was subject to article 9, but would be liable only for the harm caused by exceeding its entitlement under the principle of equitable utilization.

18. Those rules did not deal with cases in which notice had been given and negotiations had gone on for a reasonable time, but without success. Mr. Evensen's proposals in that regard had been unsatisfactory; but the present Special Rapporteur's solution was not satisfactory either, for draft article 14 had specified that only in the event of "utmost urgency" could the notifying State's project proceed in the absence of agreement. Consequently, apart from that exceptional circumstance, an objecting State could in effect veto the proposed project by refusing to agree to a settlement or to submit the issue in dispute to binding third-party adjudication.

19. Perhaps the most reasonable course would be to insert a provision to the effect that the project was suspended until the notifying State had made reasonable attempts to reach agreement with the objecting State or States, and in particular until an offer had been made to submit the matters in dispute to adjudication and that offer had been rejected.

20. Draft article 9 raised the problem of selectivity in dealing with the issues raised. A number of authors referred to the matter in detail, including Jan Schneider,

whose book *World Public Order of the Environment: Towards an International Ecological Law and Organization*<sup>9</sup> was based on the preparations for and the follow-up to the United Nations Conference on the Human Environment, held at Stockholm in 1972. The legal principles which had emerged from that Conference had been developed in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,<sup>9</sup> and at the Third United Nations Conference on the Law of the Sea. Twenty-three important principles, unanimously agreed by working groups prior to the Stockholm Conference, had all subsequently been endorsed in the Declaration adopted by the Conference, with one important exception, namely the principle of the duty to notify and consult. On that issue, therefore, there might still be controversy.

21. Principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)<sup>10</sup> were of particular relevance to the Commission's work. They read:

*Principle 21*

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

*Principle 22*

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

22. At the very time when some of the issues involved in those principles had been under discussion in the Sixth Committee of the General Assembly, serious damage had been caused to a major European river, and, as he understood the position, the country in which the damage had occurred, to the detriment of downstream States, had accepted State responsibility. That situation clearly reflected the development of the law since 1972. Yet another development was reflected in the negotiation of the 1979 Convention on Long-range Transboundary Air Pollution,<sup>11</sup> which had chiefly been called for by the very States which, a decade earlier, had not approved of such a method of developing the law, preferring to leave the matter to State practice. It was therefore incumbent on the Commission to take account of the continuing development of international environmental law in its approach to the topic under consideration.

23. Draft principle 20, discussed at the Stockholm Conference, was also relevant to the Commission's work. It read:

20. Relevant information must be supplied by States on activities or developments within their jurisdiction or under their control whenever

<sup>9</sup> Toronto, University of Toronto Press, 1979.

<sup>9</sup> United Nations, *Treaty Series*, vol. 1046, p. 120.

<sup>10</sup> See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.11.A.14 and corrigendum), chap. I.

<sup>11</sup> E/ECE/1010.

they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction.<sup>12</sup>

24. Only one State participating in the Stockholm Conference had objected to draft principle 20, on the ground that it was controversial. The text of the principle had subsequently been referred to the General Assembly, but a watered-down provision had eventually emerged in the form of resolution 2995 (XXVII), from which principle 20 had seemingly been effectively erased. The States which had fought for the principle before and during the Stockholm Conference had, however, introduced resolution 2996 (XXVII), which had declared that no resolution adopted by the General Assembly at its twenty-seventh session could affect Principles 21 and 22. It was therefore gratifying to note that the Special Rapporteur, in his report, had managed to extract the essence not only of Principles 21 and 22, but also of draft principle 20.

25. In considering the present topic, the Commission should also take account of the various recommendations submitted in the Action Plan for the Human Environment adopted by the Stockholm Conference,<sup>13</sup> and particularly recommendation 2 (1) (a), in which countries were invited "to share internationally all relevant information on the problems they encounter and the solutions they devise in developing these areas"; recommendation 4, paragraph 2, to the effect that Governments should consider "co-operative arrangements to undertake the necessary research whenever . . . problem areas have a specific regional impact" and that, in such cases, "provision should be made for the exchange of information and research findings with countries of other geographical regions sharing similar problems"; recommendation 32, that Governments should give attention to the need to "enact international conventions and treaties to protect species inhabiting international waters or those which migrate from one country to another"; recommendation 48, referring in part to estuaries and intertidal marshes; recommendation 51, already referred to by the Special Rapporteur in his report; and recommendation 55 (b), advocating the establishment of a world registry of clean rivers.

26. The principles adopted at the Stockholm Conference, a conference that had itself been a high-water mark, had been acknowledged in the consultations that had followed the Chernobyl disaster in 1986. They had also been reflected in a series of regional agreements on management of the oceans, concluded under the auspices of UNEP, and to a lesser extent in the 1985 Protocol to the Convention on Long-range Transboundary Air Pollution.<sup>14</sup> The importance of the provision of adequate information and of the duty of States to consult had also been recognized in the draft protocol on chlorofluorocarbons<sup>15</sup> to the 1985 Vienna Convention for the Protection of the Ozone Layer. With regard to the duty to notify and consult, he would prefer to

<sup>12</sup> See *Report of the United Nations Conference on the Human Environment . . .*, chap. X, para. 331.

<sup>13</sup> *Ibid.*, chap. II.

<sup>14</sup> ECE/EB.AIR/12.

<sup>15</sup> Adopted on 16 September 1987 as the Montreal Protocol on Substances that Deplete the Ozone Layer.

place more emphasis on the duty to consult, the first step of which would then be the duty to notify.

27. At the Stockholm Conference, some of the strongest views had been voiced by the African representatives, who had considered that certain dams then under construction served to perpetuate a system of human degradation. The problem was none the less a global one and merited the Commission's serious attention. Zambia had also issued a communiqué at the Stockholm Conference concerning two dams being built in southern Africa. Detailed information on the way in which the negotiations had developed at the Stockholm Conference was provided in a book by Wade Rowland entitled *The Plot to Save the World*.<sup>16</sup> Again, some very useful principles relating to the topic had been developed at the Third United Nations Conference on the Law of the Sea, where, for the first time, a positive duty not to pollute had been imposed on States in treaty form. It would be a mistake for the Commission to ignore that principle and the underlying concept in its work on the law of international watercourses.

28. The CHAIRMAN thanked Mr. Beesley for his interesting historical account of the background to the present topic. Since no other members were included in the list of speakers for the present meeting, the remaining time would be assigned to the Drafting Committee.

*The meeting rose at 11.15 a.m.*

<sup>16</sup> Toronto, Clarke, Irwin, 1973.

## 2003rd MEETING

*Monday, 25 May 1987, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

<sup>1</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

CHAPTER III OF THE DRAFT:<sup>3</sup>ARTICLE 10 (General obligation to co-operate)<sup>4</sup>

1. Mr. YANKOV expressed appreciation to the Special Rapporteur for his well-documented third report (A/CN.4/406 and Add.1 and 2) and the sound analysis of State practice and doctrine it contained.

2. The formulation in draft article 10 of a principle whereby States had a duty to co-operate could be justified on two grounds. First, it was a relatively new legal concept that should be set forth explicitly as a general rule of positive international law; secondly, it was a general rule of conduct which, as the Special Rapporteur himself noted throughout his report, was of paramount importance in connection with the uses of international watercourses. Until fairly recently, the principle of co-operation had been regarded not as a duty but as a matter of discretion for States in their relations on affairs of common interest. It was on that basis that the principle had been incorporated, as a rule, in a number of bilateral treaties. In the case of the uses of international rivers, however, the principle of co-operation was more often identified as a rule of good-neighbourly relations.

3. The duty of States to co-operate with each other had first been enunciated as a general principle of international law in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>5</sup> Its significance in international relations had gradually been recognized as an important rule in the determination of matters relating to such global issues as water supply, protection and preservation of the marine environment, new and renewable sources of energy and the more rational use of national resources. The duty to co-operate had also acquired importance in dealing with the adverse effects of the technological revolution, the risks inherent in the uses of nuclear energy, the exploration of outer space and, as was apparent from the 1982 United Nations Convention on the Law of the Sea, the new dimensions of the uses of the world's oceans.

4. Against that background, it would seem that, for the principle of co-operation to be effective, three basic requirements had to be met. First, the scope and objective of the co-operation should always be specified. Secondly, co-operation should be viewed in terms of the way it interacted with other fundamental principles of international law, more particularly those embodied in Article 2 of the Charter of the United Nations. Thirdly, a reference to the modalities of implementation should be included in article 10, for otherwise the principle might sound more like a declaration of intent than a legally binding rule.

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the text, see 2001st meeting, para. 33.

<sup>5</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex; hereinafter referred to as "1970 Declaration on Friendly Relations and Co-operation among States".

5. Accordingly, as far as the uses of international watercourses were concerned, the duty of States to co-operate should be spelt out and it should be made clear that the main objective was to secure reasonable and equitable utilization of the watercourse in question. Furthermore, the duty to co-operate should be considered within the framework of the fundamental principles of international law, especially the principles of sovereign equality and respect for the sovereignty and territorial integrity of States, fulfilment in good faith of international obligations, and the peaceful settlement of disputes.

6. The implementation of the principle of co-operation as a substantive rule of international law should be backed up by appropriate and specific modalities. In that connection, he agreed with the Special Rapporteur's conceptual approach that the operation of the principle as a substantive norm should be complemented by procedural rules or requirements (*ibid.*, paras. 35-36). Yet the Special Rapporteur seemed to confine the principle of co-operation to equitable utilization, for he stated:

. . . The corner-stone of this normative régime is the principle of equitable utilization, according to which States are entitled to a reasonable and equitable share of the uses and benefits of the waters of an international watercourse. (*Ibid.*, para. 31.)

7. Moreover, as stated in his second report (A/CN.4/399 and Add.1 and 2, para. 188) and reiterated in his third report (A/CN.4/406 and Add.1 and 2, paras. 6-7), the Special Rapporteur considered that procedural requirements were an indispensable adjunct to the general principle of equitable utilization. That seemed to be an unnecessary limitation of the scope of application of the principle of co-operation and its procedural requirements. Co-operation between States might involve common activities, for example in the protection and preservation of the environment or joint research activities. Another unwarranted limitation in connection with the uses of international watercourses was to confine the procedural requirements for the operation of the principle to "cases in which a State contemplates a new use of an international watercourse—including an addition to or alteration of an existing use—where the new use may cause appreciable harm to other States using the watercourse" (A/CN.4/406 and Add.1 and 2, para. 6). He agreed that the procedural requirements in those specific cases might be of particular practical importance, but failed to see why co-operation should be limited in scope to those cases alone.

8. Draft article 10 could serve as a basis for a provision embodying the principle of co-operation as it applied to the uses of international watercourses. But the article should make more explicit reference to the object of co-operation and specify that the duty of the States that shared an international watercourse was to achieve optimum utilization, protection and control of that watercourse. The words "respective obligations under the present articles" were too general and, in effect, confined the principle of co-operation to the *pacta sunt servanda* principle. His own understanding of the scope and legal significance of the principle of co-operation was that it might operate even in cases where there was

no prior treaty obligation to adopt certain conduct entailing co-operative action. The *raison d'être* of the principle of co-operation should not be restricted to the fulfilment of existing treaty obligations, something that could be achieved simply by virtue of the duty of States to fulfil in good faith the obligations assumed under the treaty concerned. The Special Rapporteur should perhaps clarify whether the words "with other concerned States" meant only the States that shared the international watercourse, or any other State that might consider that it was affected by the use of the watercourse—on ecological, economic or other grounds, for instance. In its present form, draft article 10 was open to a very broad interpretation of which States were involved.

9. The reference to "good faith" in article 10 was not essential. By definition, co-operation should not be conducted other than in good faith. There was no such qualification in the 1970 Declaration on Friendly Relations and Co-operation among States,<sup>6</sup> in the Helsinki Final Act<sup>7</sup> or in the relevant General Assembly resolutions. Indeed, it seemed that, the more such qualifications were used, the more the substance of the provision in question was weakened.

10. The Special Rapporteur and the Drafting Committee might wish to take into consideration two elements incorporated in paragraph 1 of draft article 10 as submitted in 1983 by the previous Special Rapporteur, Mr. Evensen. The first element concerned the objective of co-operation, which, in Mr. Evensen's text, was the attainment of "optimum utilization, protection and control of the watercourse system". The second element concerned the basic principles of international law. In the light of those two elements, draft article 10 could be worded as follows:

"States sharing an international watercourse shall co-operate in their relations concerning the uses of the watercourse in order to achieve optimum utilization and protection of the watercourse, based on the equality, sovereignty and territorial integrity of the watercourse States concerned."

The Commission would note that that wording made no reference, as did Mr. Evensen's text, to procedural and other modalities. In that connection, he agreed with the present Special Rapporteur that article 10 should be a general introductory article, followed by the articles relating to consultation and notification. Nor did his suggested wording refer to control, since the notion of optimum utilization seemed broad enough to cover that idea.

11. Mr. CALERO RODRIGUES noted that the title of chapter II of the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2) referred to "procedural rules relating to the utilization of international watercourses", whereas the title of chapter III referred to "general principles of co-operation and notification", which raised the question whether the draft should speak of rules or principles. Again, the Special Rapporteur stated (*ibid.*, para. 7) that the centre-piece of his

third report was a set of draft articles on procedural requirements. Draft articles 11 to 15 were indeed rules on procedural requirements, and in that respect the Special Rapporteur had followed his own earlier scheme and the schemes proposed by Mr. Evensen.

12. Draft article 10, on the other hand, laid down a general obligation to co-operate. It had two limbs, one concerning the relations of States with regard to international watercourses, and the other concerning the fulfilment of their respective obligations under the present articles. There had been no similar article in the Special Rapporteur's second report (A/CN.4/399 and Add.1 and 2), but there had been in both of Mr. Evensen's drafts. In draft article 10 as submitted by Mr. Evensen in 1983, entitled "General principles of co-operation and management", only paragraph 1 had actually dealt with co-operation, while paragraphs 2 and 3 had dealt with consultation, exchange of information and the establishment of joint commissions. In 1984, in the revised text of the article, Mr. Evensen had added another element, namely the optional assistance of international agencies in that co-operation.

13. Article 10 was of a very different nature from the other articles now proposed. It raised not only the question of the difference between rules and principles, but also the very concept of co-operation. Rules, of course, created obligations and rights, as did principles, but in the latter case the obligations and rights were less precise, albeit wider. Co-operation was a vague and all-encompassing concept and, in his view, it should be admitted that under international law there was no general obligation on States to co-operate. The achievement of international co-operation was one of the purposes of the United Nations under the Charter. Hence co-operation was a goal, a guideline for conduct, but not a strict legal obligation which, if violated, would entail international responsibility. States could agree to limited obligations to co-operate in precisely defined fields, and they did so by agreement. Indeed, in many cases they had accepted such obligations in regard to the uses of international watercourses; but, even in those cases, there might be a doubt as to whether an obligation existed in the absence of an agreement.

14. In his first report, Mr. Evensen had derived the general principle of co-operation between States from the concept of a shared natural resource, which in turn resulted from the very nature of things.<sup>8</sup> The explanation given by the present Special Rapporteur in his third report was less objectionable, although not entirely convincing. His illustrations of "broad support" for the obligation to co-operate came under four headings: international agreements; decisions of international courts and tribunals; declarations and resolutions adopted by intergovernmental organizations, conferences and meetings; and studies by intergovernmental and non-governmental organizations (A/CN.4/406 and Add.1 and 2, paras. 42-59). But it was doubtful whether all of those illustrations necessarily led to the conclusion that such an obligation existed in the case of international watercourses. For example, the

<sup>6</sup> See footnote 5 above.

<sup>7</sup> Final Act of the Conference on Security and Co-operation in Europe, signed at Helsinki on 1 August 1975.

<sup>8</sup> *Yearbook* . . . 1983, vol. II (Part One), p. 174, document A/CN.4/367, para. 107; and p. 170, para. 81, respectively.

agreements cited under the first heading were all of a very special regional or bilateral nature, from which it would be very difficult to deduce that there was a general rule of co-operation. The same applied to the decisions of courts and tribunals. The *Lake Lanoux* arbitration was admittedly a landmark, but it was difficult to discern in it any recognition of a general obligation to co-operate. The cases involving maritime delimitation applied to very different situations, particularly the *North Sea Continental Shelf* cases, which concerned the delimitation of territories and could hardly be said to apply to watercourses. The same was true of the *Fisheries Jurisdiction* cases.

15. He did not, however, altogether disagree with recognition of the principle of co-operation. The basis for the proposed article was questionable in some respects, but he did not doubt the need for co-operation. In many cases, States had in fact agreed to co-operate and it would be desirable for them to do so in the case of international watercourses. He did, however, have serious doubts whether an article on the principle, or obligation, of co-operation should stand as an introduction to chapter III of the draft, relating to procedural rules. Such an article, if it was necessary, should be placed in chapter II, relating to general principles.

16. Mr. Yankov was right to say that the reference to good faith was probably unnecessary. The text of the article should not be overburdened; in any event, co-operation conducted in bad faith was inconceivable. He also agreed that the provision should contain an objective indication of the terms of the obligation. While he readily understood co-operation as it applied to relations concerning international watercourses (the first limb of draft article 10), he found it more difficult to comprehend what was meant by co-operation in the fulfilment of the obligations under the present articles (the second limb). Article 10 as proposed by Mr. Evensen had referred to co-operation with regard to the uses, projects and programmes relating to the watercourse. That formulation seemed to have been acceptable, and he wondered why it had been changed. If it was thought to be too limitative, the phrase used by the present Special Rapporteur, namely "with regard to the utilization of an international watercourse" (*ibid.*, para. 42), could perhaps be adopted.

17. He also agreed that the purpose of co-operation should be specified, possibly by stipulating that the objective should be the attainment of equitable and optimal utilization of the international watercourse. It would likewise be useful to lay down that co-operation should be compatible with the other general principles of international law.

18. He favoured a provision of a general character which would not constitute a legal strait-jacket and would promote rather than restrict co-operation. The scope of co-operation should be defined, and a general indication should be given of its content. Therefore, on completion of the discussion, draft article 10 could be referred to the Drafting Committee to see how it could be fitted into the general scheme of the draft.

19. Mr. OGISO said that draft article 10 should contain a reference to the basis for the general obligation of

riparian States to co-operate. The obligation actually rested on two principles: good faith, and good-neighbourly relations. The opening words of the article did mention good faith, but he wished to know why the principle of good-neighbourliness had been omitted. Perhaps the intention was for it to be covered by some other part of the draft.

20. The Commission could well consider another question, one that affected not only article 10, but the whole of the draft under consideration. The approach adopted appeared to be based on the assumption that the present articles were intended to deal with situations in which a new use by a riparian State of the waters of an international watercourse would have adverse effects on one or more of the other riparian States. In other words, it was the fact that the use of the waters was new that triggered the obligations provided for in the articles. However, similar problems could arise as a result of a natural change. A historical use of international waters by a riparian State which had not hitherto affected uses of the waters by other States could, as a result of an ecological change, have an adverse effect on uses by those other riparian States. One could imagine, for example, a diminution in the quantity of water available as a result of a change in climatic conditions: a use which had been innocuous under the earlier conditions might then become harmful to the other riparian States. He would like to know whether the Special Rapporteur contemplated including a provision to cover such a situation. The draft articles at present before the Drafting Committee were all based on the assumption that other riparian States would be adversely affected by a new use of a watercourse.

21. Mr. McCAFFREY (Special Rapporteur) said he agreed with Mr. Ogiso that the duty expressed in draft article 10 could be considered as partly based on the two principles of good faith and good-neighbourliness. There was, of course, much support for the principle of good faith; a very scholarly analysis on that point was to be found in the thesis by Elisabeth Zoller.<sup>9</sup> The content of the principle of good-neighbourliness in international law was less certain. While he had no objection to including references to those two principles, care should be taken not to burden the text of the article with material that was not absolutely necessary. Such material would detract from the main purpose of the article, which was to set forth the general duty of the States concerned to co-operate.

22. In his second report, he had dealt with the case in which an adjustment of shares in the waters of the various riparian States might prove necessary because of developments in the natural situation and had suggested that the provisions of draft article 8, paragraph 2, could cover that situation (A/CN.4/399 and Add.1 and 2, para. 194). Those provisions could be taken as the basis of an obligation to adjust water uses as a consequence of changed natural phenomena. Of course, article 8 had been referred to the Drafting Committee, and if it emerged in a form that failed to provide a solution to the problem, a new article on the subject could be prepared.

<sup>9</sup> *La bonne foi en droit international public* (Paris, Pedone, 1977).



23. Mr. ARANGIO-RUIZ said that Mr. Ogiso's second question raised a much broader issue than that of the mere distinction between new uses and natural changes as the origin of the duty to co-operate.

24. Actually, the provisions of draft article 10 were much more general in scope. They did not refer solely to the obligation to co-operate in the event of a new use by a State, or indeed of a natural change. The obligations set forth in the article were tied not so much to good faith and to good-neighbourliness, but rather to the physical fact that the watercourse was international in character.

25. It was doubtful whether the obligation of States enunciated in article 10 could be said to rest on the principle of good faith. In reality, the basis of that obligation lay in the Charter of the United Nations and in the unwritten rules developed since the adoption of the Charter, such as those set forth in the 1970 Declaration on Friendly Relations and Co-operation among States.<sup>10</sup>

26. Mr. KOROMA said that a reference to the principle of good-neighbourliness should indeed be included in article 10. It was a principle that could be said to emanate from the *Trail Smelter* arbitration. He also supported the suggestion that article 10 should be placed in the general part of the draft.

27. Mr. McCAFFREY (Special Rapporteur) said he agreed that article 10 was intended to express a general obligation that was not limited to the problem of new uses. At the same time, he recognized that it was not logical to place it in a set of procedural provisions.

28. He wished to assure Mr. Koroma that he did not intend to rule out any element of the bases of the duty to co-operate. However, it was necessary to avoid expanding the text unduly by including references to a number of bases for the obligation, for such a course might dilute the expression of the essential rule embodied in the article.

29. Mr. ARANGIO-RUIZ said it was wise to suggest that article 10 should be placed among the general principles. Nevertheless, the new place assigned to the article should not have the effect of detracting from its significance.

*The meeting rose at 11.30 a.m.*

<sup>10</sup> See footnote 5 above.

## 2004th MEETING

*Tuesday, 26 May 1987, at 10 a.m.*

**Chairman:** Mr. Leonardo DÍAZ GONZÁLEZ

**Present:** Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas,

Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)

[Agenda item 6]

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

##### CHAPTER III OF THE DRAFT:<sup>3</sup>

##### ARTICLE 10 (General obligation to co-operate)<sup>4</sup> (*continued*)

1. Mr. SHI said that the present topic was very difficult, complex and sensitive. Apart from general principles of international law, the Commission had little guidance from State practice. Every international watercourse had its own peculiarities, features and uses. Hence it was not surprising that, except for the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923), there were practically no general conventions on the non-navigational uses of international watercourses. All the treaties or agreements on the subject had been concluded in connection with particular international watercourses and on a regional or bilateral basis. Even in the case of the 1923 Geneva Convention, the parties were few in number and actually included some that were not riparian States. It would be a difficult and possibly pointless task to try to draw generalized rules from the numerous regional and bilateral treaties. Perhaps the topic was one that involved progressive development more than codification. In formulating the draft articles, the Commission had to be fully aware of the nature of international law at its present stage of development, which, in the words of Georg Schwarzenberger, was a law of society, not a law of community.

2. In that task, two basic factors had to be taken into account. The first was that the waters of an international watercourse were a natural phenomenon which knew no political boundaries and constituted a natural hydrologic unity. That unity obeyed only the iron laws of nature, beyond human will. Therefore any use made of one part of an international watercourse affected other parts of it. The second factor was the sovereignty of a State over the part of an international watercourse situated within its territory: the waters thereof constituted natural resources over which that State had permanent territorial sovereignty, and hence exclusive use. The use and the development of international water-

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the text, see 2001st meeting, para. 33.

courses thus touched upon the vital, and often conflicting, interests of many riparian States.

3. Consequently, if the draft articles were to be meaningful, the Commission must strive to reconcile the sovereign right of riparian States to free use of the waters within their territories with the principle that a State must not exercise sovereignty in such a way as to cause harm to other States. Such reconciliation could be found in the doctrine of reasonable and equitable utilization, which could serve as a general guiding principle of law for determining the rights of watercourse States in regard to non-navigational uses. Equitable utilization was an objective principle and was predicated on an accommodation of interests between States. Since circumstances differed from one international watercourse to another and even along one and the same watercourse, the Commission would be wise to follow the general approach on which it had already embarked, in other words to prepare a framework agreement containing general principles and rules governing the non-navigational uses of international watercourses in the absence of agreement among the States concerned, and providing guidelines for the management of international watercourses and the negotiation of future agreements.

4. In his second report (A/CN.4/399 and Add.1 and 2), the Special Rapporteur had drawn attention to four salient aspects of draft articles 1 to 9, which were at present before the Drafting Committee. The first aspect concerned the definition of the term "international watercourse". It was apparent that both the Commission and the Sixth Committee of the General Assembly were generally in favour of postponing an attempt at defining the term; a laudable approach, for any such attempt at the present stage would inevitably lead to fruitless polemics and would not help to resolve conflicts of interest between riparian States. However, further progress in the present work would certainly help the Commission to arrive at a better understanding of the topic, and later at a universally, or at least generally, acceptable definition of the term.

5. On the other hand, opinion was divided, both in the Commission and in the Sixth Committee, on the "system" concept, which was the foundation for the provisional working hypothesis accepted by the Commission in 1980. In his opinion, it was best for the Commission to proceed to work on that basis, as suggested by the Special Rapporteur in his second report (*ibid.*, para. 63). Although the hypothesis utilized the system concept, it drew a distinction between the hydrologic concept and the legal concept, thereby recognizing the relativity of the international character of a watercourse.

6. The second salient aspect was the question whether the "shared natural resource" concept should be used in the draft itself. That concept was comparatively new and was not fully developed; it was also ambiguous. Moreover, it could be interpreted as a negation of the concept of permanent sovereignty over natural resources. If it was taken as a starting-point for the work on the present topic, it could well lead to the adoption of rules of law with imprecise legal consequences.

He therefore agreed with the Special Rapporteur that the term "shared natural resource" should not be employed in the draft.

7. The third salient aspect concerned the principle of reasonable and equitable utilization, which could hardly be defined. In order for it to have a meaning, a number of factors had to be listed as criteria for assessing such utilization; yet a list of that kind could not be exhaustive, otherwise it could introduce an element of rigidity and thus render the principle inoperative. The Special Rapporteur was right to say that a limited list of general criteria had to be included in the draft. If, however, members were not able to agree to the inclusion of the list in the actual text of an article, they should seriously consider placing one in an annex. There were precedents for such a course in international treaty practice. For example, the General Agreement on Tariffs and Trade contained an article on the subject of subsidies. The term "subsidy" was not defined either in the Agreement itself or in the code of subsidies, but a long list of measures constituting subsidies was included in an annex to the code.

8. The fourth salient aspect concerned the relationship between the concept of equitable utilization and the obligation to refrain from causing appreciable harm. A straightforward reference to the obligation not to cause "appreciable harm" to the rights or interests of other watercourse States would, in his view, make the relationship between the two principles clear enough. An equitable allocation of uses would mean that the full needs of all the watercourse States concerned were not met. Accordingly, some States using the same watercourse could suffer factual harm, but not harm that constituted a legal wrong. However, if the harm to the other watercourse States was appreciable, the allocation of uses could hardly be considered as reasonable and equitable.

9. The draft articles submitted by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2) contained procedural rules relating to the utilization of an international watercourse, under the title "General principles of co-operation, notification and provision of data and information". It was true that the very generality and elasticity of the principle of equitable utilization required that it be supplemented by procedural rules for the purposes of implementation. The Commission's work should none the less aim at the formulation of draft articles on the law of the non-navigational uses of international watercourses by individual States, and not on the law of integrated uses of an international watercourse or the law of an international watercourse community. An attempt to devise a set of rules of the latter kind would be too ambitious and would have little chance of success. Admittedly, States were always free to conclude regional or bilateral agreements on integration of the uses of a watercourse, but it would be unrealistic for a general law of the non-navigational uses of international watercourses to be based on the concept of international watercourse integration. He was therefore somewhat at a loss to follow the basic ideas underlying the procedural rules proposed by the Special Rapporteur (*ibid.*, paras. 6-38).

10. In any case, draft article 10, on the general obligation to co-operate, was puzzling. The need for co-operation between watercourse States in the uses of an international watercourse was undeniable, but the purposes and bases of co-operation should be well defined. Unfortunately, article 10 lacked clarity in that respect. It spoke of the general duty of States to co-operate in good faith in their relations concerning international watercourses. In the first place, the principle of good faith was not all-encompassing and it could not replace other general principles of international law which governed State relations concerning international watercourses. Secondly, in the light of Principle 21 of the Stockholm Declaration,<sup>3</sup> article 10 might prove to be too ambitious. In any event, it was not clear and specific about its purpose. In that connection, he would point out that, according to Principle 21, "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". Clearly, Principle 21 had two aspects: one being the permanent sovereignty of States over their natural resources and the other the exercise by a State of its sovereign rights in such a manner as not to cause harm to other States. As he saw it, the purposes of co-operation between watercourse States should be similar to those set out in Principle 21. Such co-operation should therefore be practised not only in good faith, but also on the basis of the sovereignty, territorial integrity, equality and mutual benefit of all the watercourse States concerned. By co-operation of that kind, States would be able to achieve optimum utilization of the watercourse.

11. Lastly, he supported the suggestion that article 10 should be placed in chapter II of the draft, and not in chapter III.

12. Mr. REUTER said that, more than any of the other topics before the Commission, the one assigned to Mr. McCaffrey posed problems of presentation and drafting, whereas, in all likelihood, the substance did not lend itself to controversy. In his second report (A/CN.4/399 and Add.1 and 2), the Special Rapporteur had amply cited the *Lake Lanoux* arbitration, yet the Commission should guard against the temptation of placing too constructive an interpretation on that case. The arbitral tribunal had been able to base itself on general principles, but it had also been in a position to take account of treaties concluded between France and Spain. Moreover, the case had involved few difficulties and would never have been brought before an arbitral tribunal if Spain had not felt a legitimate concern, exacerbated by the political situation at that time. It had had bitter memories of the sanctions imposed on it in 1946, sanctions which it had regarded as unjustified, and had refused to conclude an agreement that would have enabled France to develop the Lake Lanoux drainage basin and so deprive it of waters which flowed naturally into Spanish territory.

13. He endorsed the underlying philosophy of the draft, for it tended to emphasize procedures, without which the draft would indeed be of little value, and drew a distinction between two kinds of obligations, namely obligations of result and obligations of conduct. The title of chapter III of the draft set forth two quite specific obligations of result: the obligation to provide notification and the obligation to provide data and information. As could be inferred from developments in his previous reports, the Special Rapporteur would doubtless go still further and press for the obligation to consult. The consultation phase could be followed by a procedure that went beyond notification and the provision of data and information and would become an obligation to negotiate in cases in which States did not reach agreement in the course of consultations. In its award in the *Lake Lanoux* case, the arbitral tribunal had decided not to use the term "negotiations", which had been deemed too weighty, and had used the French term *tractations*. In the present instance, the obligation to negotiate was not an obligation of result and merely imposed certain conduct on States without requiring them to reach agreement.

14. Similarly, the obligation to co-operate was an obligation of conduct, and he doubted whether it had a place in the general principles. It should be properly distinguished from the other obligations, which were obligations of result, or have a separate place of its own. He wondered about the exact meaning to be attached to the term "co-operation", which appeared to have become popular after the Second World War and was used particularly in English. It was something of a portmanteau term, comparable to the "collaboration" on which States set such store. Nor was he sure that the obligation to co-operate should be imposed on States. In the case, for instance, of a system which called for work that would obviously be beneficial to all the riparian States, was it possible to consider imposing the obligation to co-operate, in other words the obligation to take part in the work, however useful it was for all the riparian States? From that standpoint, the obligation to co-operate might well prove unacceptable to States.

15. He recalled that some legal texts employed a cautious formulation whereby States were invited to engage in their mutual relations in a "spirit of co-operation", in other words to display openness, to take into consideration not only what was useful in the general interest, but also what was reasonably useful to another State. That was not an unduly heavy obligation inasmuch as States kept control over obligations of conduct, except in extreme cases. The obligation to negotiate, for example, could be violated only if a State refused to engage in negotiations, if it broke them off arbitrarily, or if it systematically refused to bear in mind the interests of another State.

16. Consequently, the obligation to co-operate was a kind of label for an entire range of obligations, and the commentary should make that point clear. If it was taken to mean an obligation performed in a "spirit of co-operation", it would be better to use the appropriate terms. Moreover, by indicating what the objective of the draft articles was, it would be possible to add that

<sup>3</sup> See 2002nd meeting, footnote 10.

displaying a spirit of co-operation meant endeavouring to achieve that objective.

17. It was also worth noting in regard to the obligation to negotiate that, quite often, negotiations were easier under a bilateral agreement than under a multilateral agreement. For that reason, the draft articles could call, in the absence of multilateral negotiations, for respect for equity in conducting a number of bilateral negotiations, so as to avoid any discrimination and maintain some balance between each set of bilateral negotiations.

18. Lastly, while he approved of the ideas reflected in draft article 10, he none the less thought that obligations of result should be separated from obligations of conduct.

19. Mr. McCaffrey (Special Rapporteur), responding to a point raised by Mr. Shi, said that the purpose of the materials presented in chapter II of his third report (A/CN.4/406 and Add.1 and 2) was merely to provide members with information about modern, sophisticated régimes for the management of watercourses. He had not intended to suggest that the draft articles should be directed at integration on the local, regional or any other level. It had been suggested that a model institutional régime for the planning, management and development of international watercourses could be included in an annex to the draft; but in his view it would be virtually pointless to try to incorporate such a régime in the draft articles themselves. A system for the integrated management of watercourses might admittedly facilitate relations among States, but at the present stage in the development of international watercourse law it could not be said to be a requirement of international law.

20. Mr. Reuter had noted that, fundamentally, the obligation to co-operate meant doing something together, and had asked whether that was the true meaning of co-operation under draft article 10. Again, it had not been his intention as Special Rapporteur to suggest that States should form collective institutions in order to act through an integrated mechanism of some kind. Co-operation, within the meaning of draft article 10, denoted a general obligation to act in good faith with regard to other States, and in that particular case to fulfil certain specific obligations in using an international watercourse. There was no abstract obligation to co-operate. A general obligation to co-operate should be incorporated in the draft because, if equitable allocation of uses was to be achieved and maintained, constant dealings between States would be required, dealings that should be conducted in good faith and in a co-operative manner. Mr. Reuter's idea of a spirit of co-operation was something less than an obligation to co-operate as he understood the expression, although he had no initial objection to the idea. Possibly article 10 should open with the words "States shall co-operate", which appeared in several articles of the 1982 United Nations Convention on the Law of the Sea.

21. Draft article 10 obviously needed further refinement, but he believed that, in the light of the constructive comments made, a formulation could be found to make it clear that the obligation of co-operation was a fundamental obligation designed to facilitate the fulfil-

ment of more specific obligations under the draft articles.

22. Mr. KOROMA said that, like Mr. Arangio-Ruiz (2003rd meeting), he found the exchange of views taking place among members extremely useful.

23. It would have been helpful if the Special Rapporteur could have explained at the outset that draft article 10 was predicated on the need to comply with the principle of equitable utilization of a shared natural resource, namely water. The true intent of the article would then have been more readily apparent. That remark was to be construed not as a criticism of the Special Rapporteur, but rather as an encouragement to future special rapporteurs to attempt to explain the intent of the articles they proposed.

24. As far as the text of article 10 was concerned, he considered that, since the main purpose of a definition was to articulate a mode of conduct, the article required refinement and should be placed in another part of the draft.

25. Mr. FRANCIS, stressing the special relevance of sovereignty to draft article 10, said that, in his view, only the source State in a watercourse system, in other words the State in whose territory the watercourse originated, exercised sovereignty over the waters passing through its territory. That sovereignty was, however, qualified to the extent that, like all the downstream States, that State's use of the waters must not cause harm to other riparian States. All other States in the watercourse system exercised no more than sovereign rights over the waters passing through their respective territories; they had sovereignty only over the river-bed beneath such waters.

26. He did not think that co-operation, within the meaning of article 10, should constitute a legal obligation. For the purposes of the draft, a form of wording should be found which imposed a firm obligation, on the clear understanding that a breach of the obligation would not give rise to State responsibility. If co-operation was not forthcoming and harm occurred, there would be liability under the principle *sic utere tuo ut alienum non laedas*. The notions of equity and reasonableness could, however, be achieved only if the riparian States co-operated in the proper manner, and were both willing and able to do so.

*The meeting rose at 11.20 a.m.*

## 2005th MEETING

*Wednesday, 27 May 1987, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr.

Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued)** (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

CHAPTER III OF THE DRAFT:<sup>3</sup>

ARTICLE 10 (General obligation to co-operate)<sup>4</sup> (continued)

1. Mr. TOMUSCHAT said that the wealth of material presented by the Special Rapporteur in his three reports provided an excellent foundation for the Commission's work.

2. The Rhine, a river he crossed twice a day, had once been a symbol of purity but was now seriously polluted. He mentioned that fact because his country, as both an upstream and a downstream State, was in a special situation, and because its experience suggested that no single interest should be emphasized in a one-sided fashion. Clearly, formulations that struck a perfect balance should be found for the draft under consideration.

3. Draft article 10, which laid down a general obligation to co-operate, could be understood only in the overall context of the draft, which, it was generally considered, should ultimately consist of rules that could be applied on a world-wide scale. It was therefore important not to lose sight of the universal character of the proposed normative structure. The rules would not only have to apply as between nations bound together by ties of friendship and a common political ideology, but must also be suitable for application as between nations that did not regard each other with particular sympathy. Hence the choice between a minimum standard approach and an optimum standard approach was not too difficult to make and, as one member had pointed out, the Commission should not be guided by an unduly optimistic or Utopian vision. It could, however, legitimately aim at preventing States from exceeding their equitable share in the utilization of an international watercourse and, to that end, it should establish procedures for co-operation. He would hesitate to accept an objective optimum utilization as called for particularly in article 3 of the Charter of Economic Rights and Duties of States, mentioned by the Special Rap-

porteur in his third report (A/CN.4/406 and Add.1 and 2, para. 51), although he appreciated that optimum utilization was a criterion also used in draft article 7.

4. Accordingly, the precedents assembled by the Special Rapporteur required careful examination. Admittedly, the example of the Convention establishing the Organization for the Development of the Senegal River, cited by the Special Rapporteur (*ibid.*, footnote 35), was particularly encouraging, but in that case States had co-operated in a general spirit of solidarity in the interests of achieving a number of common goals on which they had fundamentally agreed. A world-wide agreement, on the other hand, should be far less ambitious and should define a set of balanced interests acceptable to all States, irrespective of their political relations with their neighbours.

5. The second issue raised by draft article 10 was whether it should set forth a rule of substantive law or a procedural rule. The general context of the article indicated that the Special Rapporteur had had in mind simply a procedural rule, since the title of chapter III of the draft referred to the duty to co-operate as well as to notification and the provision of data and information. Mr. Reuter (2004th meeting) had rightly pointed out that the duty to co-operate was an *obligation de comportement* (obligation of conduct), whereas the other two duties were *obligations de faire* (obligations of result): it was important for the Commission to be fully aware of the choice to be made in that connection. Furthermore, if article 10 were moved to chapter II, where it would take on the character of a general rule of substantive law, he would agree with those members who considered that the duty to co-operate was unduly comprehensive.

6. In its present form, the article could be taken to mean that a State making any use of an international watercourse within its territory could never act alone and always had to act in conjunction with other States adjacent to the watercourse. Such an interpretation would place an undue restriction on territorial sovereignty. The basic approach should be that States could act on their own initiative, even in regard to an international watercourse, but that, owing to their interdependence, the limits on their sovereign powers were reached much earlier than in other fields of activity. A link should therefore be established between the duty to co-operate and the earlier articles, which set forth the substantive legal régime of international watercourses. It should be made perfectly clear that States were not enjoined to take joint action just because they happened to have an international watercourse in common, and that co-operation was one of the tools designed to ensure that States remained within the limits of the equitable share to which they were entitled and did not cause appreciable harm to their neighbours.

7. Thus the duty to co-operate should be qualified in a way that specified the conditions which triggered the relevant mechanisms of co-operation. That could be done, for instance, by giving an indication of instances in which a specific use was likely to have substantive repercussions on other watercourses States. Alternatively, it might be sufficient to include a specific ref-

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the text, see 2001st meeting, para. 33.

erence in article 10 to the preceding provisions of the draft. In any event, a general and all-encompassing duty to co-operate would be too broad, particularly since no such obligation was laid down in Article 55 of the Charter of the United Nations. A close reading of the principle of co-operation as set forth in the 1970 Declaration on Friendly Relations and Co-operation among States<sup>5</sup> also revealed that the drafters of the Declaration had been at pains not to place States in a strait-jacket of co-operation. Co-operation in the management of international watercourses was necessary, even essential, but the conditions and purposes thereof must be spelt out. In his opinion, the duty to co-operate was an ancillary principle designed to secure substantive rules that were still to be agreed on, but it did not have the quality of an autonomous rule modifying the basic principle of State sovereignty.

8. Mr. McCaffrey (Special Rapporteur), referring to the timetable for the Commission's further consideration of the topic, suggested that the debate on draft article 10 should be concluded within two working days. It might also be a good idea, for consideration of the remaining articles, to divide them into two groups, consisting of articles 11 to 13 and articles 14 and 15, respectively.

9. Following an exchange of views in which Mr. Thiam, Mr. Yankov, Mr. Reuter, Mr. Njenga and Mr. Barsegov took part, the Chairman suggested that the debate on article 10 should be closed on Tuesday, 2 June 1987, although it could if necessary be extended until Wednesday, 3 June 1987, on the understanding that members could also speak on articles 11 to 15 of the draft.

*It was so agreed.*

*The meeting rose at 10.50 a.m.*

<sup>5</sup> See 2003rd meeting, footnote 5.

## 2006th MEETING

*Friday, 29 May 1987, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)**

<sup>1</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

[Agenda item 6]

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

#### CHAPTER III OF THE DRAFT:<sup>3</sup>

#### ARTICLE 10 (General obligation to co-operate)<sup>4</sup> (continued)

1. Mr. ROUCOUNAS said that, before considering draft article 10, it was necessary to distinguish between general co-operation and the sources, and therefore the legal effects, of co-operation. Co-operation was an intrinsic part of the process of development of international relations, in a wide variety of activities ranging from juxtaposed fields of competence to full integration. More often than not, it was synonymous with organization on an international level. It was described sometimes as horizontal, when two or more States acted in concert to achieve a particular objective, and more often as structural, when it reached a stage at which it acquired an institutional apparatus of its own. The greater the number of joint actions, the greater became the number of support structures; the more pronounced the legal personality of the international organization, the more fierce the struggle became for the allocation of fields of competence under international law, in the name of co-operation between States. It was doubtful whether, with the requisite logic, the same legal foundation could be identified for each and every form of co-operation.

2. Again, co-operation had different sources and produced different legal effects. The Charter of the United Nations unquestionably issued an appeal for co-operation and provided for a number of mechanisms in that regard; but it was preferable to scrutinize the conduct of States, for the Commission's approach in the case of international watercourse systems did not, at the present stage, provide for any institutional mechanisms. In the 1970 Declaration on Friendly Relations and Co-operation among States,<sup>5</sup> the fourth principle did indeed regard co-operation as a more or less strict legal obligation in a number of areas: the maintenance of international peace and security, the protection of human rights, and the economic field.

3. The Charter of Economic Rights and Duties of States<sup>6</sup> contained a large number of provisions on State co-operation in many fields. Alongside duties to co-operate (arts. 7, 14, 27, etc.), it enunciated rights to co-operation (arts. 5, 12, etc.). A number of legal instruments revealed the different aspects of co-operation. Some obligations to co-operate that were stipulated in the Charter of the United Nations, such as

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the text, see 2001st meeting, para. 33.

<sup>5</sup> See 2003rd meeting, footnote 5.

<sup>6</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

the maintenance of international peace and security, were of a well-established legal character, whereas others were less strict, for the term "should" was often used instead of "shall". The Charter of Economic Rights and Duties of States, on the other hand, viewed the concept of co-operation either as a duty or as a right. Again, co-operation was mentioned in instruments such as the 1982 United Nations Convention on the Law of the Sea and the Helsinki Rules,<sup>7</sup> and in documents such as the report of ECE's Committee on Water Problems on its eighteenth session,<sup>8</sup> which set out principles regarding co-operation in the field of trans-boundary waters and established programmes of activity in that connection.

4. Draft article 10 was particularly welcome, for it was in line with the evolution in concepts of international law. However, the extent of the legal obligation on international watercourse system States to engage in co-operation still had to be determined, although the Special Rapporteur had explained that article 10 did not relate solely to new uses. The Commission could provisionally use the outline prepared by the previous Special Rapporteur to establish which situations and activities would be covered by the obligation to co-operate, and then proceed with chapters III and IV of the draft. Chapter V, concerning the peaceful settlement of disputes, did not enter into account, since it was part of an entirely different problem, as was the reference by the Special Rapporteur in his third report to the *North Sea Continental Shelf* cases (A/CN.4/406 and Add.1 and 2, para. 49).

5. It had been proposed that article 10 should be transferred to chapter II of the draft; but did that mean that it should be elevated to the status of a principle? The term "principle" implied a general norm of conduct, whereas a "rule" was tailored to a more precise and sometimes limited object. International jurisprudence, often called upon to distinguish between principles and rules, was directly interested in the content of the legal obligation. In short, the answer to the question whether the obligation to co-operate should stand as a rule or a principle would depend on the text and on the context. For his part, he hoped that article 10 would be moved to chapter II, but the field of application of the article should be made clear. In that way, the norm regarding co-operation would decisively reinforce the principle of equitable utilization.

6. Mr. BARSEGOV said that the present topic was as complex as the others on the Commission's agenda, since questions pertaining to inter-State relations were never easy. In view of the rules and principles that were involved, no law on the non-navigational uses of international watercourses existed as such. The difficulty of elaborating provisions on inter-State relations in that matter was explained by the fact that the question had a direct bearing on territorial integrity and on the sovereignty of States over their natural resources. In other words, it was bound up with matters that fell exclusively within the jurisdiction of States. The problems

of conservation and rational use of such a fundamental natural resource as water were acute in many countries and were felt very sharply even in countries as vast as the Soviet Union. The task of formulating norms of international law to govern all the modalities of the utilization of watercourses also entailed a need for the Commission to hold itself aloof from individual cases of watercourse use.

7. On what rules of law, on what legal elements, could the Commission base its work? Above all, on long-established practice and concrete precedents. He could not agree with the Special Rapporteur's evaluation of practice or with some of the conclusions drawn from that evaluation. Did the material gathered and discussed by the Special Rapporteur make it possible to arrive at general conclusions and build up a concept whereby draft articles could be elaborated? Personally, he fully understood the temptation to use all the precedents that related in one way or another to the topic under consideration, but it was none the less difficult to find a link between the *Corfu Channel*, the *North Sea Continental Shelf* and the *Trail Smelter* cases, on the one hand, and the law of the non-navigational uses of international watercourses, on the other. Such examples convinced no one. *A fortiori*, those drawn from the internal practice of the United States of America could not afford evidence to assert the existence of rules of international law in the field in question. Moreover, it should be remembered that every case in international law might well involve different factors that had to be interpreted in a specific context.

8. Referring to the *Lake Lanoux* case, discussed by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2, paras. 111-124), he said that the essential point in that precedent was not only the position adopted by the parties, but also the actual settlement of the dispute, namely the arbitral award. The arbitral tribunal had taken as its point of departure the idea of sovereignty and had taken into account the limitations thereon under the treaties in question; it had denied the existence of international rules and even local rules, and had accepted France's rights to its waters, subject to articles 9 and 10 of the Additional Act to the 1866 Treaty of Bayonne. Thus, according to the arbitral tribunal:

... the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.

Mr. Reuter (2004th meeting) had explained the political circumstances in which that case had occurred, circumstances which were of great importance in understanding the background to the case.

9. More generally, the practice of States as revealed in treaties was of decisive importance. The interests of downstream States were recognized to a greater or lesser extent, depending on how close political relations were between the States concerned. Yet, in all the cases he was aware of, relations were based on recognition of a State's sovereignty over its water resources, which implied the State's freedom to do with them as it saw fit. Undeniably, States took positions in international law

<sup>7</sup> See 2002nd meeting, footnote 5.

<sup>8</sup> ECE/WATER/47 (2 March 1987).

that reflected their political, economic and other interests. The Harmon Doctrine was not fortuitous and was not merely an error which had then been rectified.

10. For a proper grasp of the evolution of positions in international law, it was important to look at the way in which a State had settled successive disputes with neighbouring States. For example, the United States of America had first had a dispute with Mexico, in which it had been the upstream State, and later another with Canada, in which its geographical position had been quite the opposite. In the dispute with Canada, international law had been cited instead of the Harmon Doctrine. That example emphasized that international law had values of its own and that it should not follow the various political developments in one State or another. Legal rules, fundamental principles, did exist in inter-State relations, and it was essential to abide by them.

11. In his examination of practice, he had thought it judicious to look at the subject of the settlement in each case. Had it involved a watercourse, a lake or a "system"? Moreover, what had been the basis for the decisions in each individual case? Had it been general rules of international law or a particular international agreement? From his own study of the legal materials he could not endorse the conclusion reached by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2, para. 88). In their international relations concerning the use of international watercourses, States always took as their point of departure the principle of their sovereignty over water resources in their territory. Other States endeavouring to secure recognition of their own interests invoked international treaties or rights and easements "acquired" in the past, or an earlier territorial situation. With regard to the "equitable apportionment" of waters, in every case the decisions had taken account of the political circumstances and had been confirmed by agreements. Accordingly, he inferred from an overall evaluation of current practice that the legal régime for a watercourse was based, as it had been in the past, on an agreement between the riparian States, in the light of the characteristics of each watercourse, and hence that there were no universal rules to govern the legal relations of States in the matter.

12. What conclusions could be drawn from that situation in order to develop rules of international law? Was it possible to ignore or diminish the permanent sovereignty of States over their natural resources? Was it possible to create a supranational law consisting of an international system of regulation and management for all water resources? Such a solution, although it did contain a progressive element, was neither realistic nor legally sound.

13. It had to be admitted, frankly, that there was no convergence of views among members of the Commission on how to proceed with the study of the topic. There were apparently two approaches. One, a "maximalist" approach, diminished the importance of the sovereignty of a State over its water resources and would lead to the elaboration of a universal convention establishing a supranational order with a view to collective utilization of the water resources, which would be considered a "shared natural resource", and to the con-

stitution of a "common property" shared among all system States in the form of apportionment either of the water itself or of the benefits deriving from its use. The other approach took account of objective realities such as the sovereignty of States over their natural resources. In his opinion, analysis confirmed that there were no material grounds for speaking of a right of collective utilization or acquisition of water resources. Consequently, rules could not be formulated to compel States to make joint use of watercourses and thus deny their sovereignty over their natural resources.

14. Did that conclusion rule out the need for and possibility of progressive development of international law and imply that the Commission should engage solely in the task of codification? Certainly not. The development and increasingly intensive utilization of water resources demanded that the rules of law should be refined so as to achieve optimum utilization of those resources. Consideration of objective realities in itself signified progressive development of the law. Codification and progressive development were interdependent processes and, for that reason, the Commission should formulate legal rules in the light of both the fundamental principles of international law and the major tendencies in the development thereof. Under the law at the present time, or in keeping with the positive rules of international law and with State practice, a legal system for the non-navigational uses of international watercourses could take shape only after agreement was reached between the riparian States, having in mind the characteristics of the particular watercourse and the way it was used. The Commission should therefore help States themselves to find the means for reconciling their own interests and those of other riparian States. International co-operation between riparian States was thus essential.

15. Draft article 10 laid down the obligation to co-operate, an extremely important idea from the conceptual standpoint, among others. The practical task in that regard involved the need to prevent any possible harmful consequences of a particular use of an international watercourse. Hence co-operation in the optimum utilization of international watercourses was of major importance: it was a fundamental principle that should govern State relations in that clearly defined field.

16. It was essential not to lose sight of the role of co-operation in current international relations. International co-operation could no longer be regarded merely as an aspect of the unilateral will of States which changed according to their political interests and diplomatic considerations. It was indispensable in modern times: a rule of conduct for all States. Problems that affected the whole of mankind could not be solved by one single State or one single group of States, since they called for world-wide co-operation, for close and constructive interaction among the majority of States, on the basis of the principle of full equality of rights, respect for the sovereignty of others and fulfilment in good faith of obligations entered into under the rules of international law. International co-operation opened up new prospects for mankind, imparting a civilized character to inter-State relations and filling in the gaps



in treaties. The principle of co-operation had been confirmed, for example, by the General Assembly in the 1970 Declaration on Friendly Relations and Co-operation among States.<sup>9</sup> Its substance differed according to the particular field of international relations involved, and its scope depended on the state of the political relations between the States directly concerned. Since the principle of co-operation affected all States and all areas of international relations, the obligation to co-operate was necessary under the current legal system without regard to differences in political, economic and social systems. Clearly, co-operation should satisfy national interests and international interests, whether in bilateral, regional or world-wide relations.

17. Consequently, co-operation should figure in the draft articles as a general principle that created general obligations. A broad conceptual interpretation of the moral, political and legal effects of co-operation determined the place for the principle in the draft. It should be ranked equally with all the other fundamental principles of international law therein. It entailed respect for the rights of States, and hence their permanent sovereignty over their natural resources. Those principles did not appear to be properly reflected in the articles under discussion, for the principle of co-operation concerned the entire draft, not only chapter III. But it should not lose its value when it was moved to another chapter: if the principle was to be effective and practical, it should be enunciated in such a way as to specify both the subject and the objective of co-operation, namely the optimum utilization of international watercourses, including the economical management of reserves and their preservation for future generations.

18. International juridical practice was rich in methods for the practical application of the principle of co-operation. The methods chosen would depend on the physical characteristics of the various international watercourses, the modalities of utilization and the relations between riparian States. All those factors combined could lead to different degrees of co-operation. An instrument that was to be adopted by States and was to be effective should embody the minimum of international rules that were commonly accepted, yet lead to broader co-operation.

19. On the basis of the present legal situation, the Commission should confine itself to elaborating general principles that were in the nature of recommendations. He shared the view of Mr. Calero Rodrigues (2003rd meeting), who advocated provisions that would act as a spur to co-operation but would not turn it into a strait-jacket. One question in that regard was what the nature and form of the draft should be. A very wide variety of views had been expressed, and some difficulties had been left aside to be settled later. Apparently, the idea was that, if agreement could be reached on the substance, the Commission could then agree on the nature and form of the draft. It was important, however, not to forget the very close link between form and substance. A draft consisting of recommendations could include a range of options from which States could choose the solutions best suited to their cir-

cumstances. On the other hand, a very rigid draft that included peremptory provisions irrespective of the particular characteristics of individual watercourses would, in all likelihood, fail to command acceptance by States and would be "stillborn". Unfortunately, the history of the Commission was not without regrettable examples of that kind. To avoid such a turn of events, it was desirable to define the nature of the draft and settle certain fundamental issues that affected its subject and its scope.

20. As a new member of the Commission, and thus speaking since the working hypothesis had been adopted, he wished to explain his views on a number of issues. If the Commission considered the treaty practice of States, it would find that the concept of an "international watercourse system" was unfounded and ultimately encompassed all the world's waters, even the oceans and the water in the atmosphere. The advocates of that concept took the view that the "system" included not only international watercourses and their tributaries, but also lakes, canals and glaciers—all the waters linked by nature. Obviously, the subject of the draft should be defined by a valid scientific term; but the concept of an international watercourse system was so wide-ranging that it brought into question the very possibility of progressive development of international law in that field. The system concept could be applied to almost all the waters of a large number of small and medium-sized States, which would mean that those water resources should be endowed with international legal status. Indeed, according to that concept, all States that had any kind of link, however tenuous, with a watercourse system could take part in regulating it.

21. State practice could not justify that approach. There was no strict scientific definition of a watercourse system, or even of a watercourse. In considering the draft articles submitted, the Commission had to bear in mind the scope of international legal arrangements encompassing utilization, management and regulation. Under the working hypothesis, a State would lose the power and the right to dispose of its own water resources. The idea of a "shared natural resource", as applied to watercourse uses, was out of place; the point was not to share the waters, but to enable States to use international watercourses within their own territory. Obviously, the concept underlying the working hypothesis was incompatible with the principle of the permanent sovereignty of States over their natural resources, as a number of members had already pointed out.

22. That kind of contradiction also affected the attempt to replace the concept of a shared natural resource by that of shared use. Although use itself could obviously not be shared, it was possible to participate in the utilization of the waters on the basis of agreements that took account of State sovereignty. He could not agree that the shared natural resource concept was the sole basis for preventing harm to other riparian States. The crucial point was the principle of co-operation between sovereign States, and only if it accepted that principle unreservedly could the Commission eliminate the contradictions contained in the draft.

<sup>9</sup> See 2003rd meeting, footnote 5.

23. The arbitral award in the *Lake Lanoux* case had stated that the question as to who was to determine the reasonable and equitable utilization of a watercourse and the modalities thereof was a matter of national sovereignty. Moreover, he was entirely against the presumption of culpability of States set forth in draft article 8. There again, the same arbitral award had confirmed the presumption of good faith by stating: "it is a well-established general principle of law that bad faith is not presumed". Stating the issue in a clearly unjustified manner would not encourage co-operation between States. Indeed, if the criteria for reasonable and equitable utilization were interpreted in the broad sense, if the subject of the draft was an international watercourse system, and if the Commission did not place a limit on the modalities of implementation, States might well turn against one another. Lastly, the notion of "appreciable harm" was imprecise and could be a source of disputes and conflicts, for it was not known who would determine whether harm was appreciable and what methods would be used to make such a determination.

24. Mr. PAWLAK said that the particular value of the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2) lay in the commendable effort to find correct formulations for the articles concerning the general principles of co-operation and notification. As pointed out by the Special Rapporteur himself:

... the rule of equitable utilization would mean little in the absence of procedures at least permitting States to determine in advance whether their actions would violate it. (*Ibid.*, para. 40.)

25. The present topic was very complex and sensitive and touched the vital interests of many States, large and small alike. For all of them, fresh water supply, fisheries, pollution control and water as a source of energy were extremely important issues. There could be no doubt that the international community as a whole needed, and awaited, some guidance in the matter from the United Nations and its International Law Commission. The time had therefore come to attempt to codify rules of international law on the subject, on the basis of many international conventions, court decisions and studies by learned bodies, as well as important resolutions of various organizations. It had to be remembered that some two thirds of the 200 international watercourses in the world were not governed by agreements between the riparian States.

26. The difficulty of codifying the topic was due to the great variety of non-navigational uses of watercourses and even more to the sensitivity of States with regard to their sovereignty. Many States viewed the Commission's current exercise with some suspicion. That was why the crucial definition constituting the basis for the draft articles had been changed four times and the Commission had not yet resolved many important theoretical issues. Accordingly, the success of the Commission's endeavours depended not only on the skill of its members and their dedication to fulfilling the current task, but also on a clear view of the direction of the work and of the limitations that would be encountered.

27. The work should be directed along three main lines. The first was to continue the approach of preparing a "framework" legal instrument or agreement consisting of general principles and rules to govern the non-

navigational uses of international watercourses in the absence of bilateral or multilateral regional agreements. For that purpose, the Commission should first determine the existing substantive rules of conduct for States and then elaborate future substantive rules of conduct to be used by States when they came to conclude agreements.

28. Secondly, the draft articles should constitute not a draft multilateral convention, but rather a set of general principles and rules providing general guidelines that the States concerned could use and adapt in specific agreements relating to particular watercourses.

29. Thirdly, the draft could not realistically be expected to solve all the problems relating to the topic. It could only provide general guidelines and offer riparian States an important international instrument that would facilitate both co-operation and the negotiation of future agreements. The problems existing in different regions as a result of local geographical, economic, hydrologic and historical conditions could be solved solely through bilateral or regional agreements.

30. In the light of those directions, the draft should necessarily include a general rule on the subject of co-operation in relations between States concerning watercourses. The Special Rapporteur, on the basis of a wealth of international agreements and other legal sources, had arrived at the conclusion that there was "broad recognition of the obligation of States to co-operate in their relations in respect of common natural resources in general, and international watercourses in particular" (*ibid.*, para. 59). The Special Rapporteur also pointed out that the obligation to co-operate arose from the need to achieve optimum development and allocation of international fresh water resources.

31. Generally speaking, he agreed with the Special Rapporteur in that regard; but draft article 10, relating as it did to the obligation to co-operate, was out of place in chapter III of the draft, which contained procedural provisions. The article should be viewed more broadly as a rule of conduct for States. It was therefore wise to propose its transfer to chapter II.

32. The content and formulation of article 10 should be made to reflect more accurately the general character of its subject-matter and, at the same time, the reference to "good faith" introduced by the Special Rapporteur should be retained. Account should also be taken of Mr. Barsegov's point regarding the legal background to international co-operation among sovereign States and the recognition of the sovereign rights of States over their watercourses.

33. The Special Rapporteur had rightly affirmed that "good faith" and "good-neighbourliness" were the formulation of the duty to co-operate. Consequently, he agreed with the arguments advanced by Mr. Ogiso and Mr. Koroma (2003rd meeting) in support of a reference in article 10 to the principle of good-neighbourliness. The Drafting Committee could endeavour to incorporate it properly in the text.

34. He tended to concur with Mr. Roucouas that article 10 should specify the exact fields of co-operation involved. In that connection, he cited the 1964 Agree-

ment between Poland and the USSR concerning the use of water resources in frontier waters (A/CN.4/406 and Add.1 and 2, para. 44), article 3 of which referred to the various areas of co-operation, such as the economic and scientific fields. Another international instrument which specified areas of co-operation was the 1962 Convention between France and Switzerland concerning protection of the waters of Lake Geneva against pollution (*ibid.*, para. 45).

35. In conclusion, he suggested that article 10 should be referred to the Drafting Committee with the recommendation that it be transferred to chapter II. An attempt could then be made to formulate cautiously the general duty of States to co-operate in the utilization of international watercourses, as an essential basis for the smooth functioning of international co-operation to achieve and maintain equitable uses and benefits.

36. Mr. THIAM warmly congratulated the Special Rapporteur on his outstanding third report (A/CN.4/406 and Add.1 and 2), which called for but few comments, mainly in regard to form.

37. In the matter of form, the title of chapter III of the draft referred to general principles of co-operation and also to rules of procedure, which the Special Rapporteur considered as being linked with the topic. Perhaps it would be better to separate the two aspects, especially as the principles set forth in the draft were fundamental principles. Moreover, the title of chapter III spoke of "principles" in the plural, but enunciated only one, namely the principle of co-operation.

38. In the matter of substance, draft article 10 said that "States shall co-operate in good faith . . ."; but he wondered about the meaning of the verb "co-operate", which often had a political content. In the resolutions of the General Assembly, the word was used chiefly in general declarations and in the preambular parts. Admittedly the language of politics lent itself to a lack of precision, something that was even necessary from time to time, but the Commission was dealing with law, a delicate field in which it was essential to have a proper grasp of what "co-operation" meant. To co-operate meant acting together in order to achieve a particular aim, yet co-operation was also shaped by its form. In terms of form, State co-operation could range from a mere exchange of data or technical information to the establishment of joint co-ordination, even decision-making, institutions.

39. The Special Rapporteur described the institutions of the Organization for the Development of the Senegal River as supranational (*ibid.*, para. 27). They were not in fact entirely supranational, for decisions were taken unanimously, but it was none the less a highly integrated intergovernmental organization in which the States concerned acted in concert by partly renouncing their sovereignty. Once they were adopted, the decisions were binding on all member States. Unlike that unique system of truly integrated co-operation, the treaty régime covering the River Niger simply provided for a co-ordinating body with no decision-making power, such power being reserved for the seven States through which the river flowed.

40. The Special Rapporteur, for his part, was proposing a still more flexible form of co-operation, which would be confined to a bilateral exchange of data, information, etc., with strict respect for State sovereignty. The content of all co-operation differed, but the Special Rapporteur spoke of co-operation without indicating either its degree or its form. A scrutiny of the meaning of the expression "general obligation to co-operate" raised the problem of State sovereignty, one that was encountered in all subjects of international law. In other words, the topic under consideration was caught between State sovereignty, on the one hand, and a growing need for international co-operation, particularly in the utilization of watercourses, on the other. Hence the question: did a general obligation to co-operate exist in the present case?

41. He had examined many international treaties, more particularly in regard to watercourses, and nowhere had he found a general legal obligation to co-operate. True, co-operation was encouraged as a definite vital need, but so far no international legal instrument specified that it constituted a legal obligation. Even the declaration on rights and duties of States was founded more on respect for sovereignty and good-neighbourliness than on an obligation to co-operate. It had to be recognized that co-operation was not an obligation, but that it was bound up with policy considerations, with the environment. Co-operation was possible once States established relations of mutual confidence, respect and good-neighbourliness. Moreover, to a greater extent, it was important for policies to concur. In most international organizations, co-operation stemmed from the harmonization of general concepts and policies. Accordingly, he had come to the conclusion that no legal obligation to co-operate existed as yet. Some people would maintain that that was *lex lata* and that the Commission should proceed *de lege ferenda*. In any event, an extremely flexible solution was essential.

42. To reconcile the various positions, the Special Rapporteur could well assign a chapter of the draft to the various forms of co-operation. States would then be free to choose the one that suited them and a single rigid framework would be avoided. In the case of the Organization for the Development of the Senegal River, he would point out that three States, namely Senegal, Mali and Mauritania, had encountered a special need to co-operate, unlike Guinea, the upstream State in which the source of the river was located. It had not proved possible to compel Guinea to co-operate and three States had therefore established an organization, allowing the fourth State the fullest opportunity to join when it so wished. Consequently, he was in favour of a flexible solution, as advocated from the outset by many members of the Commission when they had spoken of a framework agreement, under which each State would be able to act in keeping with its needs. To employ a gastronomic image, an *à la carte* menu was preferable to a set menu.

43. Some members had argued that an integrated form of co-operation would not come under international law, yet he wished to emphasize that not only States, but unions of States did fall under international law. The question therefore was to determine whether the Com-

mission should contemplate forms of integration or whether, after finding that they ran counter to State sovereignty, it would envisage much more flexible procedures, confined to the exchange of data, and so on. The draft articles should take all those aspects into account, for which reason it would be useful to have a chapter setting out the various forms of co-operation and the various choices possible.

44. Mr. GRAEFRATH commended the Special Rapporteur for his learned third report (A/CN.4/406 and Add.1 and 2) and his clear introduction. The topic had been in the Commission's programme of work for more than 15 years and the Commission now had before it a wealth of material, including the substantive comments made in the Sixth Committee of the General Assembly. He therefore appreciated the Special Rapporteur's efforts to take all those factors into consideration in his report.

45. The codification of the rules of the non-navigational uses of international watercourses had proved rather difficult because relatively few rules had commanded general recognition, the international practice of States being reflected for the most part in bilateral agreements relating mainly to specific uses. Hence it was not surprising that some of the basic questions raised in the draft had not been answered so far. It was difficult to draw up rules on the more detailed issues when the fundamental concepts and purposes of the work had not been formulated. It was therefore important to bear in mind that the whole project was designed to facilitate co-operation between sovereign States in an area of common interest which also involved the delicate matter of territorial sovereignty.

46. In his second report (A/CN.4/399 and Add.1 and 2, para. 13), the Special Rapporteur had stated that the framework agreement approach seemed to be broadly acceptable to the Commission, and that Mr. Evensen, like Mr. Schwebel, had believed that, in the absence of an agreement among the States concerned, the Commission's aim should be to lay down the general principles and rules governing international watercourses. It was apparent from the debate in the Sixth Committee, however, that the concept of a framework agreement was open to widely differing interpretations. For instance, a framework agreement had been variously understood as an instrument that laid down general principles regarding the rights and duties of States; an instrument that served as the basis for the conclusion of bilateral or regional agreements; an instrument that set forth general guidelines to facilitate co-operation and the negotiation of specific agreements; an instrument limited to projects, principles and general guidelines; and an instrument providing recommendations and guidelines not for a convention, but leaving the conclusion of agreements to the parties concerned. Only a few representatives in the Sixth Committee had regarded a framework agreement as a means of determining residual rules that were binding on States.

47. Yet the draft was based on the assumption that, where no specific agreement existed, the rules it set forth constituted binding law, something which was clear from articles 2, 4 and 8 and also from the Special Rapporteur's second report. Given the views expressed in

the Sixth Committee, the idea underlying the draft seemed somewhat narrow and could hinder the Commission's efforts to pay more attention to guidelines for co-operation between the States concerned. He would point out in that connection that ECE had adopted principles regarding co-operation in the field of transboundary waters<sup>10</sup> that concentrated on facilitating the conclusion of co-operation agreements between riparian States and took account of the special geographical situation and needs of the States concerned. In his view, it would be a mistake to seek to distil rules from certain exceptional and all-encompassing watercourse system agreements in the belief that other States, in very different situations, would or could accept those rules.

48. Moreover, he was not convinced that valid results would be achieved if efforts were based on the assumption that general uniform rules could or should be derived from the hydrologic and geographical system. The transformation of a natural system into a system of legal rules was by no means a logical or automatic process. Rather, it depended on a political decision by the States concerned, one which necessarily involved many other important aspects and could not, therefore, be taken for granted. In reality, it was much easier for States to agree to specific uses, procedures and rules on a step-by-step basis. That was even confirmed by the title of the present topic, which did not refer to one of the main uses of international watercourses, namely navigational uses, on which certain rules already existed. Most of the agreements on other uses which had been cited concerned specific uses and particular watercourses or parts of watercourses. All the general drafts formulated by scientific organizations were projects, not legal rules or a reflection of State practice—an important point that should not be ignored. Hence the emphasis on an all-encompassing instrument covering an entire watercourse system would make it difficult to conclude a meaningful framework agreement.

49. The close interrelationship between the form, general scope and purpose of the draft explained the continuing preoccupation with such expressions as watercourse, watercourse system, equitable utilization, equitable share and shared resources. Yet the question was not so much one of terminology as of different approaches and concepts. Hydrologists necessarily had to treat a watercourse as a drainage system, whereas States were not obliged to do so. A framework concept which was designed to be universally applicable had to be founded on broad principles and recommendations that would facilitate the conclusion of specific watercourse agreements, since that was the means by which sovereign States co-operated. It should be left to the States concerned to determine which waters should be covered by the framework instrument. Such an approach would preclude the need to work on the hypothesis that the rules of the framework agreement would apply if nothing more specific was agreed.

50. It was interesting that the ECE principles, which were based on the assumption that transboundary

<sup>10</sup> Decision I (42) of 10 April 1987 (*Official Records of the Economic and Social Council, 1987, Supplement No. 13 (E/1987/33-E/ECE/1148), chap. IV*).

waters required co-operation between riparian countries, did not seek to impose rules on watercourse system States, but instead encouraged States to define the waters to which their treaties should apply. In that way, the rules governing a particular watercourse were bound to be the result of an agreement between the States concerned. It made no sense to juxtapose absolute sovereignty, as expressed in the Harmon Doctrine, and the principle of shared resources, which did not take sufficient account of the sovereign rights of States. A realistic approach could be based only on the fact that every State had a sovereign right to use its own water resources in keeping with its national policy, and must, in a spirit of co-operation, take account of the rights of other watercourse States.

51. International co-operation under modern international law, as defined in the 1970 Declaration on Friendly Relations and Co-operation among States,<sup>11</sup> was not only a legal principle in itself, but also a necessary element of the principle of the sovereign equality of States. Equitable utilization of international watercourses and participation in such utilization by several States were not based on any abstract principle but on sovereign equality and agreed policies which allowed for optimum utilization and concerted action to improve the quality of the water, to protect and develop watercourses and to safeguard against accidents. The principles of sovereign equality and peaceful co-operation were the bedrock on which the doctrine and practice of equitable utilization rested. In that connection, he basically agreed with the view expressed by the Special Rapporteur in his second report (*ibid.*, para. 190) that the need for adjustments implicit in the principle of equitable utilization could best be provided for in specific agreements tailored to take account of the unique characteristics of the individual States and watercourses concerned.

52. Co-operation was very much at the heart of the topic and he therefore welcomed the Special Rapporteur's proposal for a separate article defining the duty to co-operate. Further elaboration was none the less required, since co-operation was not simply a lofty principle, but a legal duty. The fact that States were free to determine the modalities of their co-operation did not divest the principle of its legal content. As he understood it, the principle could comprise obligations of conduct and obligations of result that would depend entirely on the content given to the principle by the State concerned. In his second report (*ibid.*, para. 191), the Special Rapporteur had in a sense created the obligation to co-operate as a rule for implementing the principle of equitable utilization, inasmuch as the equitable utilization of a watercourse and the participation of watercourse States in the uses and benefits of a watercourse would result from fruitful co-operation between watercourse States.

53. However, in his third report (A/CN.4/406 and Add.1 and 2), the Special Rapporteur treated the duty to co-operate more or less as the basis for procedural rules and thereby unnecessarily narrowed that duty. Article 10 as proposed by Mr. Evensen had not been con-

finied to notification and consultation on new uses; it had referred to uses, projects, programmes, planning and developments. Moreover, it was clear from a number of agreements, including the 1983 co-operation agreement between the United States of America and Mexico (*ibid.*, para. 46) and the 1964 Agreement between Poland and the USSR, mentioned by Mr. Pawlak, that the field of co-operation was much broader than that envisaged in draft articles 10 to 15. It could, for example, cover the important field of research, and also exchange of data, development plans and programmes, protection against accidents, joint commissions and warning systems. In particular, a framework agreement could offer guidelines for the broadest possible co-operation and should not be limited to procedural rules. The thrust of the draft should therefore be directed at the use and protection of international watercourses, and not at the establishment of procedures to govern new uses. Accordingly, the provision relating to co-operation should have a central place in the draft.

54. Draft article 10 should certainly refer to some of the legal principles that were essential for fruitful co-operation. There were a number of possibilities. The ECE principles, for example, referred to co-operation on the basis of reciprocity, good faith and good-neighbourliness. Article 10 as proposed by Mr. Evensen had referred to the principles of equality, sovereignty and territorial integrity. The 1983 Agreement between Mexico and the United States mentioned the principles of equality, reciprocity and mutual benefit. The decision in the *Lake Lanoux* case had been firmly rooted in the sovereignty of the State concerned. All those principles had been invoked as a basis for the duty to co-operate, a duty that should be clearly determined within the framework of the fundamental principles of modern international law and of the sovereign equality of States.

55. Mr. McCaffrey (Special Rapporteur) said that, for the reasons already stated by other members, he agreed that the proper place for article 10 was in chapter II of the draft, which dealt with general principles, rather than in chapter III. Mr. Evensen, however, had placed article 10 in chapter III, and he himself had left it there.

56. The use of the word "principles", in the plural, in the title of chapter III did not signify that he intended to propose additional principles. It had been employed merely to cover notification and the provision of data and information, but did not preclude the possibility of a chapter on the modalities of co-operation. The matter would require further thought and a decision could perhaps be deferred until there was a clearer idea of what the draft as a whole would involve.

57. A number of members had asked whether there was a legal duty to co-operate. His own view was that there could be such a duty, but "obligation to co-operate" was really an umbrella term which covered a number of other more specific obligations. Another question raised was how that legal obligation, if it existed, could be violated. From abundant jurisprudence in that respect it was apparent that, if a State failed to take account of the representations of another State

<sup>11</sup> See 2003rd meeting, footnote 5.

during the process of diplomatic negotiations, there might well be repercussions. He had in mind, in particular, the decision in the *Lake Lanoux* case and also the decisions of the ICJ on maritime delimitations and access to fisheries.

58. With regard to sovereign equality and territorial sovereignty, he had never sought to cast doubt on those principles, which lay at the very basis of international relations. Nevertheless, it was important to remember that international watercourses involved the sovereignty not just of one State, but of at least two. Just as one State had the right to use the waters within its territorial jurisdiction, so did another: the one might be affected by the other's use and had the right not to be harmed by that use. That idea was well expressed by the concept of sovereign equality.

59. The Commission's major task was the progressive development and codification of the rules of international law. Previous special rapporteurs had suggested that it might be useful to set forth guidelines and models for use by States in drawing up specific watercourse agreements; but it would be desirable to keep the two undertakings separate. The Commission should first try to agree upon the rules that had been developed and recognized by States and it could then set forth, in annexes or in a separate part of the draft, models for the regulation and management of international watercourses. It could profit greatly from the work already carried out by ECE, for example, but it should also bear in mind State practice, as reflected not only in the treaties concluded, but also in judicial decisions, the writings of noted publicists and the other sources listed in Article 38 of the Statute of the ICJ.

60. Mr. KOROMA said that he was grateful for the Special Rapporteur's willingness to transfer article 10, on the obligation to co-operate, to chapter II of the draft, relating to general principles. However, the Special Rapporteur had doubtless had good reasons for placing the article in chapter III, one of them possibly being that he wished to vest the obligation with an enforceable element.

61. Mr. THIAM said that, in affirming that the obligation to co-operate had no legal foundation, it had not been his intention to say that no attempt should be made to establish such an obligation *de lege ferenda*. He, too, favoured the progressive development of international law and understood that the Special Rapporteur was endeavouring to propose a text for co-operation between States. The Commission should none the less be cautious in its approach. At a later stage in its work, it would be able to see how the obligation should be formulated.

*The meeting rose at 1 p.m.*

## 2007th MEETING

*Tuesday, 2 June 1987, at 10 a.m.*

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ*

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat.

### The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)

[Agenda item 6]

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

##### CHAPTER III OF THE DRAFT:<sup>3</sup>

##### ARTICLE 10 (General obligation to co-operate)<sup>4</sup> (*continued*)

1. The CHAIRMAN extended a warm welcome to the participants in the International Law Seminar, who had come to attend the Commission's meeting, and expressed the hope that they would have a fruitful stay in Geneva.

2. Speaking as a member of the Commission, he congratulated the Special Rapporteur on the calibre of this third report (A/CN.4/406 and Add.1 and 2). Unfortunately, some of the terms used in the Spanish translation were not in keeping with legal terminology, at least in the Latin-American countries. For example, the word *ordenación*, for the English term "management", was not appropriate and should be replaced by *administración*, for instance.

3. He had not so far heard any legal argument to convince him that a general obligation to co-operate should be included in the draft. Indeed, the Special Rapporteur's explanations further persuaded him that, unlike draft article 10, the texts cited by the Special Rapporteur did not view co-operation as a legal obligation on the States parties. Co-operation was regarded not as a means of securing application of the provisions of the instruments in question, but as a desirable end. In Article 1 of the Charter of the United Nations, co-operation was listed as one of the purposes of the Organization, yet Article 2 enunciated the principle of the sovereign equality of all States Members, for which reason it was difficult to see how a State could be compelled to co-operate with another. Article 2 of the Charter also set forth the principle of good faith, but that was a principle that lay at the very foundation of in-

<sup>1</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the text, see 2001st meeting, para. 33.

ternational relations between sovereign States and should be presumed.

4. Again, the various international agreements cited as examples in the third report (*ibid.*, paras. 43-47) did not impose a general obligation to co-operate. Contrary to what the Special Rapporteur said, they simply provided for co-operation in specific fields such as hydroeconomics or the prevention of pollution. In all cases, the aim was to do something to achieve inter-State co-operation. It should be noted that the obligation to undertake negotiations came not under a general obligation to co-operate but under Article 33 of the Charter, relating to the peaceful settlement of disputes. As to the provisions of the Stockholm Declaration<sup>5</sup> which had been mentioned so many times, they too simply expressed a wish for State co-operation, more especially for the purpose of preserving the environment from pollution.

5. Thus, like other members, he considered that the obligation to co-operate was not and could not be a genuine legal rule, in other words one that created rights and duties. The only obligation that could be imposed was the obligation to respect the right of every State to equitable utilization of shared natural resources, with a view to achieving solidarity and co-operation between States.

6. Various formulations had been proposed to describe co-operation, such as "in good faith" or "in accordance with the principles of good-neighbourliness". As he had already pointed out, good faith was normally presumed; but good-neighbourly relations, as shown by the bitter experience of the Latin-American countries, were very difficult when the neighbour was a powerful State which had the means to impose its will.

7. The answer to the question as to which was the right chapter of the draft for article 10 would depend on the Commission's decision concerning the legal nature of the provision it contained. If the Commission saw co-operation as a desirable aim to ensure the harmonious management of international watercourses by riparian States, the provision should without doubt figure among the general principles. The way in which it was to be qualified, for example by using the phrase "in good faith", would not be of major importance, for co-operation would not constitute a legal rule and hence would not create rights and obligations. If, however, the Commission wished to elaborate an obligatory rule for all States parties, something which could very well prevent a large number of States from acceding to the instrument in its final form, account should be taken of Mr. Reuter's comments (2004th meeting), particularly the distinction between obligations of result and obligations of conduct, and between obligations to act and obligations not to act.

8. It would be premature to refer article 10 to the Drafting Committee until such time as the Commission had decided whether the obligation to co-operate should figure among the general principles or whether, on the contrary, it should constitute an obligatory legal rule, in

which case the legal content of the notion of co-operation would first have to be defined.

9. Mr. SEPÚLVEDA GUTIÉRREZ said that the Special Rapporteur's detailed and well-documented third report (A/CN.4/406 and Add.1 and 2) showed all too clearly the complexity of the topic, which was due both to the technical, political, economic, legal, ecological and other interests involved and to the natural diversity of international watercourses. An examination of the ways in which international problems connected with watercourse systems had been solved in practice, and the realization of how difficult it was to find generally applicable solutions, revealed the full measure of the task facing the Commission. As Mr. Shi (2004th meeting) had rightly said, it was a task that related more to progressive development of the law than to codification. The Special Rapporteur should not feel discouraged by adverse comments and differences of approach, for his efforts were fully recognized by the Commission, which should move ahead slowly but surely in its difficult task.

10. He would confine himself to a few observations, for Mr. Yankov and Mr. Calero Rodrigues (2003rd meeting) had already made a perceptive and detailed analysis of draft article 10. The general obligation to co-operate was a new concept emerging in the elaboration of legal rules applicable to international watercourses and it should therefore be received with some caution, since it involved new types of action and also the requirement to refrain from taking action. In view of its major importance, article 10 called for an in-depth examination that would be difficult to complete in the time available; perhaps it would not prove possible to put the article into final form until the next session, by which time the Commission would have the advantage of the views of States on the matter. In addition, it would be advisable to transfer the article to the chapter on basic principles, for co-operation was a general principle and logically belonged among the provisions setting forth specific obligations.

11. As to the legal nature of international co-operation, neither doctrine nor practice had succeeded in properly defining the dividing line between a legal rule and a legal principle. The question had arisen, for example, in connection with non-intervention, which was, in his opinion, a guiding principle, and hence a source of related principles, but at the same time a rule of conduct. To ensure that the rule was respected, it had been included in various basic instruments, such as the Charter of OAS, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>6</sup> and the 1970 Declaration on Friendly Relations and Co-operation among States.<sup>7</sup> Hence co-operation could be translated into tangible duties, and the general obligation to co-operate was an emerging rule that materialized, for instance, in situations in which a dispute had to be settled in good faith. The rules of co-operation were inherent in relations between the riparian States of an international watercourse, but they had not always been

<sup>5</sup> See 2002nd meeting, footnote 10.

<sup>6</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>7</sup> See 2003rd meeting, footnote 5.

manifested, sometimes because relations in that field were infrequent.

12. Co-operation in matters pertaining to shared rivers had its own dynamics: once co-operation was initiated, it developed, moved ahead and grew richer in substance. For example, co-operation between Mexico and the United States of America had steadily increased since the end of the last century. Initially a timid attempt to rectify certain parts of the Rio Bravo (Rio Grande), co-operation between the two countries had grown closer, with the establishment, for example, of the International Boundary and Water Commission and then the settlement of the Chamizal question. A number of treaties had been concluded, including the important 1944 Treaty on the utilization of the waters of the Rio Bravo and the Colorado River,<sup>8</sup> thanks to the endeavours of President Hoover and despite the opposition of seven federated states of the United States, and the 1983 Agreement on Co-operation for the Protection and Improvement of the Environment in the Border Area, mentioned by the Special Rapporteur (A/CN.4/406 and Add.1 and 2, para. 46). Some problems remained to be solved and both countries would still have to display the same will to co-operate. However, with such an example of progressive co-operation, he could not fail to endorse the point made by Mr. Calero Rodrigues (2003rd meeting) that the role of article 10 was to urge States to co-operate or to stimulate co-operation when it already existed.

13. The principle of co-operation should be given the same rank as the other principles enunciated in chapter II of the draft and should not, as was now the case, be placed above them—something which had perhaps led to some suspicion. The title of article 10 was too ambitious. It should be reduced to the necessary limits, although the provision should not, in the process, lose its character as a principle. Moreover, the content was too vague, for it failed to indicate the meaning to be attached to the words “other concerned States”. The expression “in the fulfilment of their respective obligations” was also unsuitable, because nothing was known about the nature and scope of the obligations in question. Provisions could be added on the possible forms of co-operation between States, provisions necessarily tied in with optimum utilization, equitable participation and maximum benefits, so as to avoid any misinterpretation of the principle of co-operation. Perhaps an attempt should also be made to take into account the particular features of various watercourses in order to determine as far as possible the potential forms of co-operation. The difficulties varied, depending on the practical aims and the States involved.

14. It would be preferable not to prolong unduly the debate on the concept of co-operation, which still needed further examination, but to move ahead with the wording of articles 1 to 9 of the draft, which would then facilitate the drafting of article 10. He was grateful to the Special Rapporteur for including the concept of co-operation in the draft. The Commission would naturally have to move in new directions and, in so doing, sometimes have to take risks in order to engage in con-

structive work. Article 10, in its final form, should exercise a powerful influence on real co-operation.

15. Mr. KOROMA said that the need for rational management of the water resources of the planet could not be over-emphasized. An estimated one half of the population of the world did not have an adequate supply of clean water, and very many people did not have easy access to drinking-water. Moreover, according to WHO, 80 per cent of the world's diseases were directly linked to water.

16. A watercourse was a component part of the territory of the State through which it flowed, and the State exercised full sovereignty and jurisdiction over the watercourse. Some watercourses, however, flowed through more than one State and could affect the interests of other States as well, which explained the need for a régime to regulate their use. The best way of resolving the competing interests of the modern world lay in co-operation agreements, and accordingly the Special Rapporteur had proposed devoting an article to the principle of co-operation. Support for that principle was to be found not only in the Charter of the United Nations, but also in the 1970 Declaration on Friendly Relations and Co-operation among States,<sup>9</sup> in the Charter of Economic Rights and Duties of States<sup>10</sup> and in several articles of the 1982 United Nations Convention on the Law of the Sea concerning the preservation of the marine environment and the prevention of pollution. The principle of international co-operation was further recognized in a number of international treaties concerning watercourses, such as the two treaties which made up the River Niger régime, namely the Act regarding navigation and economic co-operation between the States of the Niger Basin, concluded at Niamey in 1963,<sup>11</sup> and the Agreement concerning the Niger River Commission and the navigation and transport on the River Niger, signed at Niamey in 1964,<sup>12</sup> under articles 4 and 12 of which, respectively, riparian States were required to establish close co-operation in the study and execution of any project likely to have an appreciable effect on the river. Similar provisions were to be found in the statutes governing the development of the Chad Basin.

17. The principle was also set forth in a number of other river agreements between African States, as well as in the 1968 African Convention on the Conservation of Nature and Natural Resources.<sup>13</sup> Non-governmental organizations had studied the matter in depth; the International Law Association and the Asian-African Legal Consultative Committee, for example, had decided to support the principle of international co-operation in the development and utilization of international watercourses.

18. Some river agreements, on the other hand, made no reference to the principle of co-operation, but it was none the less possible to discern that the principle was an accepted norm, at least as far as the use of inter-

<sup>8</sup> See 2003rd meeting, footnote 5.

<sup>9</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

<sup>10</sup> United Nations, *Treaty Series*, vol. 587, p. 9.

<sup>11</sup> *Ibid.*, p. 19.

<sup>12</sup> *Ibid.*, vol. 1001, p. 3.

<sup>13</sup> United Nations, *Treaty Series*, vol. 3, p. 313.



national watercourses was concerned. An *opinio juris* also emerged from the examples he had cited, in particular from multilateral and bilateral treaties, international declarations and State practice. If, therefore, the Commission wished to show that the principle of co-operation existed as an autonomous principle, it should look to customary international law for support. Furthermore, under its mandate as laid down by General Assembly resolution 2669 (XXV), the Commission was required to examine the law of the non-navigational uses of international watercourses with a view to its progressive development and codification. Accordingly, draft article 10 could be regarded either as a synthesis of the progressive development and codification of international law, or as an attempt to develop the law as reflected in existing State practice and international legislation and doctrine.

19. The Special Rapporteur had attempted to couch the duty to co-operate in draft article 10 in legal language, so as to make it binding in character. The validity of the definition had rightly been queried, although all definitions, in his view, were by nature an exercise in semantics. The sole test of any definition was how useful the definition was in explaining a given mode of conduct. On that basis, article 10 could be said to have captured contemporary practice, at least in part.

20. The duty to co-operate, as set out in article 10, should be construed in accordance with the basic principles of international law, namely sovereignty and the sovereign equality of States and respect for the territorial sovereignty and integrity of the States concerned. It would also be appropriate for the article to refer to good faith as a principle, since the duty to co-operate stemmed from the obligation of a party to a treaty to refrain in good faith from acting in a way that would seriously hamper achievement of the purposes of the treaty. It was true that the principle of good faith was generally implicit in modern agreements and did not have to be spelt out. Given the nature of the topic under consideration, however, and the fact that the aim was to achieve a framework agreement, it would be preferable to make an express reference to the principle.

21. He agreed that article 10 should be transferred to chapter II of the draft, relating to general principles, although it had perhaps originally been included in chapter III in order to provide a framework for the principle and to make the duty of co-operation enforceable. He would none the less suggest the inclusion in chapter III of a provision similar to article 12 of the 1964 Niamey Agreement, under which riparian States were required to inform the Niger River Commission at the earliest stage of all studies and works upon which they proposed to embark, in order to achieve maximum co-operation in the study and execution of projects.

22. He endorsed the suggestion that reference should be made in article 10 to the purpose of co-operation, namely equitable utilization of the watercourse. The duty to co-operate as it applied to international watercourses was predicated on the principle of equitable utilization, which had a firmer basis than did the principle of good-neighbourliness. Equitable utilization recognized not only the principle of the sovereign

equality of States, but also the need for close co-operation between States, which was often the only way of ensuring acquisition of benefits through joint exploitation, while taking account of the specific geographical, hydrological, economic and social conditions of a particular watercourse.

23. Mr. NJENGA expressed gratitude to the Special Rapporteur for his scholarly third report (A/CN.4/406 and Add.1 and 2) and carefully considered draft articles, which would provide the basis for concrete proposals from the Commission.

24. The first question that arose was whether draft article 10 constituted the codification of a generally accepted norm of international law or the progressive development of a desirable principle of law concerning a resource which could be equitably used only if the States involved worked together for their mutual benefit. The Special Rapporteur seemed to opt for the first alternative and to consider that there was already a normative principle of co-operation which riparian States were bound to observe in their relations with one another. That was borne out by the reference in his third report to the "obligation of States to co-operate in their relations in respect of common natural resources in general, and international watercourses in particular" (*ibid.*, para. 59).

25. As was apparent from the debate, however, the existence of such an obligation was far from established. What did emerge clearly from the examples given by the Special Rapporteur was that the point of departure for such co-operation was the sovereignty of each State over its natural resources, including the waters within its territory, and the resulting duty not to use those resources in a manner that would harm the interests of other States. It was plain from the provisions of the Delaware River Basin Compact (*ibid.*, paras. 13 *et seq.*), for instance, that the aim was not to impose stringent obligations but to provide for co-operation to the mutual benefit of all the basin States. The 1972 Convention relating to the status of the Senegal River, between Mali, Mauritania and Senegal (*ibid.*, paras. 21 *et seq.*), provided another example of voluntary co-operation for mutual benefit at the international level: it had created the Organization for the Development of the Senegal River, which had very broad responsibility for the elaboration of general policy concerning the management and development of the Senegal River. The key to the success of that agreement was not, in his view, the obligation to co-operate, but recognition of the need to co-operate and also recognition of the sovereignty of the neighbouring States over the resources within their territories. All the decisions of the Council, which was the Organization's decision-making body, were taken by unanimous vote.

26. Similar agreements had been concluded by the States of the Niger Basin, the Gambia Basin, the Lake Chad Basin and the Mano River Basin. The Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin,<sup>14</sup> signed in 1977 by the riparian States, Burundi,

<sup>14</sup> *Ibid.*, vol. 1089, p. 165.

Rwanda and the United Republic of Tanzania, and subsequently acceded to by Uganda, was not only regulatory but development-oriented and it empowered the governing body to assume obligations with international institutions and with other Governments for technical assistance and financing. It had thus been largely possible in Africa, with its common objectives and common development problems, to advance the principle of co-operation further than in any other region, on the basis of voluntary co-operation and in full respect for the territorial sovereignty of all riparian States.

27. His point was further illustrated by the failure to establish a similar commission to regulate the longest river in the world, the Nile. Of the eight riparian States, Zaire, Rwanda, Burundi, Uganda, Kenya, Ethiopia, Sudan and Egypt, six contributed to the waters of the Nile in differing shares but two, Sudan and Egypt, merely consumed the water resources. Paradoxically, in the period from 1891 to 1959, when the Agreement between the United Arab Republic and Sudan for the full utilization of the Nile waters<sup>15</sup> had been concluded, only the interests of those two States seemed to have counted, to the exclusion of those of all other riparian States, by virtue of the principle of acquired rights. A series of treaties had been concluded between the United Kingdom and certain other countries with the aim of preventing any modification of the flow of water into the Nile. Under the Nile waters agreement concluded between the United Kingdom and Egypt in 1929,<sup>16</sup> Sudan and the then British dependencies upstream had had to secure the prior agreement of Egypt before undertaking any irrigation works for the purposes of power generation. That agreement had in fact been cited by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2, para. 92) to justify the theory of limited sovereignty or equitable utilization. Under the agreement, Egypt was recognized as having "natural and historical rights" to waters to which it did not contribute and to the exclusion of most of the upper riparian States then under British domination. It was little wonder that all the States affected by the 1929 Nile waters agreement had denounced it when they had attained independence. In his opinion, any reliance on that agreement or on the earlier agreements concerning the Nile as a basis for a normative obligation to co-operate rested on very uncertain ground.

28. Like Mr. Reuter (2004th meeting), who had given a very persuasive analysis of the limitations of the *Lake Lanoux* arbitration, he was convinced that the only obligation with regard to co-operation to be inferred from State practice and case-law was a general obligation of conduct and not an obligation of result. Such co-operation was based on the principles of good-neighbourly relations, in particular as spelt out in the 1970 Declaration on Friendly Relations and Co-operation among States,<sup>17</sup> which took account of the sovereign equality of States. Also, as recognized in

recommendation 90 of the Mar del Plata Action Plan,<sup>18</sup> Principle 21 of the Stockholm Declaration<sup>19</sup> was highly relevant, for under the terms of that principle States had the sovereign right to exploit their own resources and, at the same time, the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States. There were also a number of articles in the 1982 United Nations Convention on the Law of the Sea that were pertinent in that regard.

29. Draft article 10 would impose a mandatory obligation to co-operate and to achieve certain results, which was totally unrealistic. The most that could be hoped for was an obligation of conduct that would not give rise to State responsibility. In that connection, he also agreed that a general obligation was involved and that it should be placed in chapter II of the draft. Since the scope of co-operation was of fundamental importance, the principles of good-neighbourliness and optimum utilization of the watercourse should also be reflected in the article. While he was fully prepared to consider the alternative formulation proposed by Mr. Yankov (2003rd meeting, para. 10), he also thought that the Drafting Committee should take a closer look at paragraph 1 of article 10 as proposed by Mr. Evensen in his second report, which offered a realistic basis for meaningful co-operation among riparian States.

30. Lastly, he wished to assure the Commission that he was speaking entirely from conviction and not as a member from an upper riparian State.

31. Mr. FRANCIS said that, as a citizen of an island State, he was mainly concerned with the way in which the matter under discussion affected relations between States. With the topic of international watercourses the Commission was breaking new ground, since the only existing precedents were bilateral arrangements and multilateral instruments of a limited nature. The Commission would have to rely on those precedents, as well as on the general principles of international law, to codify and develop the law on the subject.

32. As he had already pointed out (2004th meeting), only the State in whose territory a watercourse originated had actual sovereignty over the waters of the watercourse. All other riparian States had only sovereign rights in respect of the uses of the waters. It was as well to remember that all downstream States were also in a sense upstream States, and that was true even of the State of the estuary, in other words the point at which the river entered the sea or a lake. The estuary State had a duty not to pollute the waters of the sea or lake into which the river flowed and from that point of view was thus in the position of an upstream State.

33. As to draft article 10, it was essential to start from the notion of a shared resource. The situation was one in which all riparian States had a community of interest in the uses of the waters, which called for co-operation among them, not only in management but also in other fields.

<sup>15</sup> *Ibid.*, vol. 453, p. 51.

<sup>16</sup> League of Nations, *Treaty Series*, vol. XCIII, p. 43.

<sup>17</sup> See 2003rd meeting, footnote 5.

<sup>18</sup> See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), p. 53, chap. I.

<sup>19</sup> See 2002nd meeting, footnote 10.

34. As the discussion had shown, article 10 gave rise to the delicate problem of whether there should be a substantive rule imposing an obligation to co-operate. Co-operation was, of course, a very general concept and appeared as such in many international instruments. In the present instance, however, the question of co-operation was a very sensitive one, since water was a matter of life and death for millions. Accordingly, he could accept the suggestion to transfer article 10 to chapter II of the draft, relating to general principles. The form of language used in the article, however, should be forceful, so as to make it clear that it imposed an obligation on the States concerned and that any breach of the obligation would give rise to international responsibility.

35. With regard to the question of imposing on States an obligation to co-operate, two interesting precedents could be drawn from a different area of international law. The first was the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which had been based on a draft prepared by the Commission. Article 4 of the Convention imposed on the States parties a duty to “co-operate in the prevention of the crimes set forth in article 2”, and in particular to take “all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories” and to exchange information and co-ordinate the taking of administrative and other measures to prevent those crimes. Article 5 required a State party, in the event of the flight of the alleged offender from its territory, to “communicate to all other States concerned . . . all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender”.

36. The second example was the 1979 International Convention against the Taking of Hostages, article 4 of which contained identical provisions to those in article 4 of the 1973 Convention which he had just cited. Those two examples illustrated the need to draw information from all sources in the preparation of the draft articles on the present topic.

37. Mr. ARANGIO-RUIZ said that the many interesting statements made during the discussion had provided much food for thought. It was also gratifying that the Special Rapporteur gave tentative replies in advance of his final summing-up, a new method of work that was a very positive feature. Members of the Commission, unlike representatives in the Sixth Committee of the General Assembly, should be able to change their minds under each other’s influence, even in the course of a session.

38. The first point he wished to touch on was the impact of the question of sovereignty on the present topic. It had been said that the primary consideration must necessarily be the sovereignty of each riparian State over its part of the watercourse. It was therefore claimed that the Commission should not elaborate a régime for the non-navigational uses of watercourses on the basis of analogies drawn from régimes of waterways in national legal systems. A warning had also been issued against

attempting to transform natural rules into legal rules. The concept of a watercourse or its waters as a “shared resource” had been described as a dangerous one in relations between sovereign States. The discussions in the Sixth Committee had been said to support those various postulates and the Commission had consequently been urged to be content with drafting a framework agreement. Such an agreement had to be understood not simply as a set of residual rules but perhaps as a set of broad principles, guidelines and recommendations—what was commonly known as “soft law”. According to that minimalist approach, the only rules to be included in the draft would be those of equitable and reasonable utilization of the waters by watercourse States, and co-operation, the latter being understood as a principle and hence as a kind of “soft law”.

39. With regard to the question of sovereignty, no one would deny that, in the case of international watercourses, the Commission was dealing with relations between sovereign States. The Wyoming State legislation and the Delaware River Basin Compact, cited by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2, paras. 11 *et seq.*), did not of course come under that heading, and he agreed with those who criticized the use of the federal analogy in international law. As he saw it, the Special Rapporteur had mentioned those two examples from the United States of America simply to show how state and federal legal systems were dealing with the exigencies of watercourse utilization and management under a multiplicity of “jurisdictions”, a multiplicity that should not lead one to ignore the natural, technical, social and economic unity which characterized a watercourse or a watercourse system.

40. Naturally, the situation was radically different when the multiple jurisdictions were not co-ordinated and integrated within the fabric of a unitary or federal State, as happened in relations between sovereign States. In their case, separate, distinct and original sovereignties coexisted. At the same time, it had to be recognized that the physical characteristics of watercourses did result in a difference between the waters, on the one hand, and the other elements of the territory of neighbouring States, on the other. The problem lay in the fact that there was more than one sovereignty, for there were as many sovereignties as there were riparian States. The particular nature of water as a living thing, in perpetual movement and constant change, also had to be borne in mind, particularly in speaking without qualification of an international watercourse as a portion of the territory of a riparian State.

41. The truth of the matter was that, with respect to the waters, none of the riparian States could really claim the same total, unlimited and exclusive right as it could claim over dry land, airspace or even territorial waters in the sea. The fact called for something more than the ordinary concepts, rules and principles which applied to elements of a State’s physical domain other than water. The aim should be not only to reject the erroneous Harmon Doctrine, but to try to come as close as possible to the notion of a “shared” or “common” resource, something mentioned even by such a conservative as

Secretary of State Stettinius in connection with United States-Mexican litigation over a watercourse problem.

42. His second point related to the assertion that natural law could not be transformed or transferred into legal rules. Legal rules and principles must none the less take account of physical as well as human realities. To ignore the essential features of a river's waters would be to ignore those realities, to the detriment of watercourse States and mankind as a whole.

43. Another point to be considered was the relationship between the Commission and States. As the servant of the General Assembly, the Commission was under a duty to pay regard to the wishes and attitudes of States, and it could not therefore embark on a pointless enterprise of progressive development of the law in any field. At the same time, in the interests of the United Nations and of States themselves, the Commission should not be too reluctant to make reasonably progressive suggestions whenever they seemed necessary. It should not be discouraged by the possibility that some of them would not find favour with States, which were in any event free to reject any element of progressive development of the law that did not appeal to them.

44. He fully agreed that the duty to co-operate should not be expressed in unduly general and vague terms. It was a duty that should be stated in terms of the specific aims of watercourse utilization, conservation and development, and strengthened by an indication of appropriate procedures and methods. Moreover, the obligation to co-operate should be formulated by reference to such fundamental principles as sovereignty, territorial integrity, good faith, equality and good-neighbourliness. At the same time, the Drafting Committee should bear in mind that, while equality, good faith and good-neighbourliness were likely to exert a positive influence on compliance with the duty to co-operate, too much emphasis on sovereignty would weaken the duty to co-operate.

45. At the previous session, the Commission had arrived at a consensus on the organization or arrangement of the draft articles and had requested the Special Rapporteur to prepare a set of rules and principles corresponding to the existing rules and principles of international law on the subject, as well as a set of guidelines and recommendations, including machinery. The guidelines and recommendations, being "soft law", were to be placed in a section separate from the one containing the "hard law", namely the principles and rules. The distinction thus drawn between hard law and soft law had not been strictly adhered to at the present session. More particularly, the notion of a "principle" had sometimes been treated as soft law. He could not accept that approach, for the international legal system had its own general principles, which were part of hard law. They played an essential role in the application and development of legal rules and also served to fill the gaps in the rules.

46. The essential distinction between binding rules and principles, on the one hand, and non-binding guidelines and recommendations, on the other, had been blurred

in the course of the discussion. He therefore urged the Commission to maintain that distinction.

*The meeting rose at 1 p.m.*

## 2008th MEETING

*Wednesday, 3 June 1987, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouñas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

CHAPTER III OF THE DRAFT:<sup>3</sup>

ARTICLE 10 (General obligation to co-operate)\* (*concluded*)

1. Mr. BENNOUNA said that the Commission and the Sixth Committee of the General Assembly appeared to have reached a consensus on the approach to be taken to the formulation of draft articles which would give States a general framework for the harmonization of their relations in respect of the non-navigational uses of international watercourses. Such a general framework would be extremely useful, for although there had been many examples of positive and mutually beneficial arrangements and agreements, there had unfortunately also been many failures, as well as many disputes concerning the use of water. That was not at all surprising in view of the problems of that kind that could arise between communities in the same country. In his own country, for example, a complex set of customary rules had been developed to govern water uses and settle disputes arising therefrom.

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the text, see 2001st meeting, para. 33.

2. Moreover, the spiritual and religious symbolism that had always associated water with life and creativity encouraged harmony rather than confrontation. As the source of life, water heightened the sense of justice which was reflected in the draft by means of the rule concerning reasonable and equitable utilization, a highly relative concept that depended on the States and the situations involved. The main purpose of the draft was to help States initiate permanent negotiations to solve their problems in an equitable manner. Care therefore had to be taken in referring to objective factors and the Special Rapporteur had done so by not proposing any kind of binding system that would not reflect the realities of inter-State relations.

3. The Commission had to avoid the temptation of drawing analogies with the concept of equity as used in the law of the sea. Such analogies could be quite dangerous, because they did not take account of the subject-matter of the sovereign rights at stake. Watercourses bore the stamp of absolute sovereignty, whereas the sea was the subject only of derived rights that stemmed precisely from absolute sovereignty. Moreover, man's impact on the environment was obviously much greater in the case of watercourses. In the law of the non-navigational uses of international watercourses, therefore, the concept of shared resources did not have the same meaning as it did in the law of the sea. Although States were bound to co-operate at sea, they were not bound to do so on land or in the area with which the Commission was dealing—or at least not in the same way. At sea, the exercise of rights required mutual acceptance, but that was not always true in the case of watercourses. The objective was thus to avoid any abuses of right, particularly abuse of the right to territorial sovereignty.

4. Reference had often been made to the law of the sea to justify the obligation to co-operate as a corollary of the principle of reasonable and equitable utilization. In fact, the obligation to co-operate had come to have different meanings in theory and in practice. It was a general obligation when the rights of States were not well established, but it became a genuine obligation to negotiate when sovereign rights were at stake. In the present case, it was full territorial sovereignty that was being exercised. The Commission's role would therefore be to enable the sovereignties involved to coexist positively, as well as to prevent any abuses of right: it had to promote the establishment of good-neighbourly relations.

5. That did not mean that a general provision such as the one contained in draft article 10 was unnecessary. That provision would serve a useful purpose because the harmonization procedures which would be elaborated at a later stage could not be exhaustive and the States concerned had to be allowed to show some creative imagination. It could also be asked whether the concept of co-operation should be maintained in article 10. That concept was not neutral, for it had ideological and political connotations. It concerned friendly relations between States. In legal terms, co-operation meant that States had to find peaceful solutions to their problems. That was why he preferred the term "harmonization". States would endeavour to harmonize their obligations

and their rights under the draft articles, in the light of the object and purpose of the draft, which did not, moreover, have to be explicitly stated in the text.

6. Mr. AL-BAHARNA congratulated the Special Rapporteur on his reports, which contained a wealth of material on treaty provisions, court decisions, legal writings, the practice of States and the general rules of international law relevant to the topic under consideration.

7. The topic was a complex and sensitive one. For one thing, some States appeared hesitant to accept binding rules and took the view that the topic should be covered primarily by bilateral agreements. It was, however, quite clear that the Commission's mandate, as specified in General Assembly resolutions, included both the progressive development and the codification of rules of general international law relating to the non-navigational uses of international watercourses. Since the vital interests of so many States were at stake and more than two thirds of the 200 international river basins in the world were still not governed by agreements among the riparian States, there was every justification for the view that the Commission should prepare a draft convention which would develop and codify the relevant rules of international law.

8. As shown by the divergent views expressed in the Sixth Committee of the General Assembly in 1986, the Commission faced the difficult task of reconciling the doctrine of State sovereignty *stricto sensu* with the obligation of riparian States to co-operate in the reasonable and equitable utilization of international watercourses. Rules that would be legally binding on sovereign States could be drafted if, as some members of the Commission had suggested, the duty to co-operate provided for in draft article 10 was regarded as a general obligation to co-operate in good faith with other States. The basis for such co-operation would therefore be good faith, mutual respect and good-neighbourliness. Article 10 would then be a well-balanced text that took account of all the divergent views that had been expressed.

9. On the whole, articles 1 to 9 and article 10 should be drafted in a flexible manner so as to strike a balance between the sovereign rights of riparian States and their obligation to co-operate in good faith. It must be recognized that the classical doctrine of territorial sovereignty, which allowed a State to do what it pleased in its own territory regardless of the consequences outside that territory, now had to be reconciled with the principle that a State could not do anything within its territory that might produce harmful effects in the territory of another State. In that connection, most publicists had adopted a compromise position which required States to act in such a way as to avoid causing appreciable harm in the territory of neighbouring States.

10. The Sixth Committee's debate on the present topic during its consideration of the Commission's report on its thirty-eighth session had focused on four main points (see A/CN.4/L.410, paras. 708 *et seq.*). The first point was whether the Commission could, for the time being, defer the attempt to define the term "international watercourse". The Special Rapporteur had suggested

that the attempt could be postponed and, in the Sixth Committee, some representatives had supported that suggestion, while others had considered that the term had to be defined because the nature and scope of the obligations of riparian States depended on such a definition. The latter argument was theoretically sound, but prudence required that definitional questions should be deferred. He therefore supported the Special Rapporteur's position on that point.

11. The second point related to the use of the term "shared natural resources". The Special Rapporteur had proposed that effect should be given to the principles underlying that concept without using the term itself in the text of the draft articles. That approach had been supported by some representatives, but others had expressed the view that the term "shared natural resources" should be specifically mentioned, since it formed the basis for all the applicable principles in the area of law under consideration. Another opinion had been that the "shared natural resource" concept tended to cast doubts on the sovereign rights of States over their natural resources. In view of the variety of opinions expressed in the Sixth Committee, the Special Rapporteur had adopted a sound and pragmatic position. The "shared natural resource" concept could thus be rendered by stating the legal principles underlying it, without necessarily using the term itself in the text of the draft articles.

12. The third point was whether an article concerning the determination of reasonable and equitable use should contain a list of factors to be taken into account, or whether such factors should be referred to in the commentary. The Special Rapporteur had proposed that the article on equitable use should contain an indicative list of factors. In the Sixth Committee, most representatives had been in favour of the inclusion of a list of factors in draft article 8. Others had urged that the list should not differ essentially from that contained in article V of the Helsinki Rules,<sup>5</sup> which they regarded as part of the well-established practice of States. In his view, the list of factors was too important to be left to the commentary: only if it were included in the text of article 8 would it have its full significance and offer normative guidance. The list should, of course, be an indicative one, as proposed by the Special Rapporteur.

13. The fourth point was whether the relationship between the obligation to refrain from causing appreciable harm and the principle of equitable utilization should be made clear in the text of an article. The Special Rapporteur had indicated that the Drafting Committee would be able to find a generally acceptable means of expressing that relationship. In his second report (A/CN.4/399 and Add.1 and 2, paras. 180-181), the Special Rapporteur had stated that the problem was that an equitable allocation of the uses and benefits of an international watercourse might entail some "factual harm", in the sense of unmet needs, without entailing "legal injury" or being otherwise wrongful. In that connection, some representatives in the Sixth Committee had considered that unmet needs should not be the sole criterion, and had suggested that reference should be

made only to "appreciable harm". Others had expressed the view that the term "harm" must be interpreted to mean "legal injury". Personally, he agreed with the Special Rapporteur that the task of balancing the two principles should be left to the Drafting Committee. The matter was of such great importance, however, that the Commission itself would also have to consider it at some stage.

14. He supported the suggestion that article 10, on the duty to co-operate, should be transferred to chapter II of the draft.

15. The Commission should give further consideration to the question whether the draft articles should take the form of a framework agreement or of a multilateral convention. Those in favour of the framework agreement approach had argued that it would be the best means of taking account of the wide variety of problems involved in the use of international watercourses. It had also been argued that, because of the diversity of international watercourses in terms of their physical characteristics and the human needs they served, that approach would be the best suited to the formulation of draft articles setting forth general principles and rules and providing general guidelines to facilitate co-operation among riparian States and the negotiation of future agreements relating to specific watercourses. He had, however, not yet decided whether he would prefer a multilateral convention or a framework agreement.

16. Mr. GRAEFRATH said that the interesting debate on draft article 10 had focused attention on the relationship between the principles of the sovereign equality of States and the duty to co-operate, to which quite different approaches could obviously be taken. In his view, however, those principles were very much at the heart of the present topic. He therefore supported the proposals made by Mr. Yankov (2003rd meeting). Unlike some members of the Commission, he was convinced that the draft articles should refer to the basic principle of sovereignty, as the draft submitted by the previous Special Rapporteur, Mr. Evensen, had done. In that connection, he did not find it helpful to describe one position taken by members of the Commission as conservative and another as more or less progressive: that sort of classification was purely a matter of opinion. The Commission had to take account not only of the competing interests of States, but also of different legal approaches to the topic under discussion. It had always refrained from characterizing any particular view as "conservative" or "progressive" and it would do well to abide by that tradition.

17. He supported the view that, in placing article 10 in the general part of the draft, the Commission should be careful not to water down the principle of the duty to co-operate to the point of rendering it devoid of legal meaning. It could therefore either define the content and purpose of co-operation on the basis of State sovereignty, or introduce a new article on the specific types of co-operation envisaged. He would welcome the Special Rapporteur's response to that suggestion.

18. Mr. FRANCIS pointed out that many parts of the world were subject to changing weather patterns and

<sup>5</sup> See 2002nd meeting, footnote 5.

asked whether that fact had been taken into account in article 10 and other articles of the draft.

19. Mr. McCAFFREY (Special Rapporteur) said that there was, of course, a close relationship between weather patterns and the hydrological cycle. Problems such as drought therefore provided an impetus for the Commission's work on the present topic. It would, however, be inappropriate for the draft articles to deal with the question of changes in weather patterns.

20. There had been a very rich discussion on draft article 10 and he thanked the members of the Commission for the constructive suggestions they had made. The discussion had focused on the existence and nature of a general obligation to co-operate in accordance with international law, on the position of article 10 in the draft and on the wording of the article.

21. Some speakers had expressed the view that a general duty to co-operate existed by virtue of the provisions of the Charter of the United Nations and the 1970 Declaration on Friendly Relations and Co-operation among States<sup>6</sup> and had drawn attention to the fact that it was recognized in a number of international instruments, including the 1982 United Nations Convention on the Law of the Sea. Other speakers had expressed doubts about the existence of such a duty and had stressed its vague nature. It had also been asked whether the duty to co-operate was an obligation of conduct or an obligation of result. Perhaps it might be more to the point to ask what specific obligations it entailed.

22. The relevant international instruments, as well as State practice and decisions in disputes relating to watercourses, clearly showed that States recognized co-operation as a basis for such important obligations as those relating to equitable distribution and the avoidance of causing appreciable harm. In fact, most agreements on watercourse uses referred to co-operation for a specific purpose and many of them indicated the legal basis for co-operation.

23. No one had objected to the idea of including an article on co-operation in the draft, provided that it was appropriately worded. In that connection, he welcomed Mr. Yankov's proposal (2003rd meeting, para. 10), which would improve the wording of article 10.

24. In his view, the duty to co-operate was quite clearly an obligation of conduct. What it involved was not a duty to take part with other States in collective action, but rather a duty to work towards a common goal. A watercourse State would thus not be under a duty to participate in waterworks planned by another watercourse State, but it would have the duty not to prevent a new project from being discussed.

25. Several members had stressed that the obligation set forth in article 10 was an umbrella obligation that covered other, more concrete, obligations, and had suggested that those obligations be specified in the draft. Some of them had, of course, already been specified in other articles, such as the obligation to avoid causing appreciable harm.

26. As to the question of the fulfilment of legal obligations, he stressed that the law of the non-navigational uses of international watercourses was very different from diplomatic law or the law of treaties, where it was comparatively easy to ascertain whether an obligation had been complied with or not. Such problems as determining whether a riparian State's equitable share was being exceeded or not called for co-operation between the States concerned to achieve and maintain an equitable apportionment. Some degree of contact and co-operation was essential. The content of the obligation stated in article 10 would therefore have to be spelt out as clearly as possible.

27. With regard to the position of article 10 in the draft, he agreed that it should be included in chapter II, dealing with general principles, rather than in chapter III, dealing with procedural rules, since the co-operation in question went beyond co-operation in matters of procedure. It was true that the other obligations set forth in chapter II, such as those relating to equitable utilization and the avoidance of causing appreciable harm, were obligations of result, whereas the obligation contained in article 10 was an obligation of conduct. But that fact should not deter the Commission from placing the provisions of article 10 in chapter II.

28. The time had come to refer article 10 to the Drafting Committee, which was currently considering articles 1 to 9. Mr. Yankov had rightly proposed that article 10 should refer to the specific purposes and objectives of co-operation, as well as to the principles of international law on which co-operation was based. Accordingly, he suggested that the Drafting Committee might consider the following revised text:

“Watercourse States shall co-operate in good faith in the utilization and development of an international watercourse [system] and its waters in an equitable and reasonable manner, and in order to achieve optimum utilization and protection thereof, on the basis of the equality, sovereignty and territorial integrity of the States concerned.”

29. A provision along those lines should not preclude the adoption of Mr. Graefrath's suggestion (para. 17 above) for the introduction of a new article on specific types of co-operation. The Drafting Committee might wish to consider whether such a new article should be included in the draft.

30. Mr. Sreenivasa RAO said that the discussion had served to highlight the fact that the world was interdependent and made up of independent sovereign States. It had therefore rightly been said that the doctrine of co-operation should be viewed in its broader context, notwithstanding the importance of the procedural aspects. The duty to co-operate was a matter of general policy and, as such, could not be elevated to the status of a principle or a prescription in a vacuum. It would, however, be erroneous to make a watertight distinction between policy and prescription, which interacted closely even if they were distinct. Furthermore, the duty to co-operate was a reciprocal duty and central to the peaceful coexistence and co-operative interaction of all members of the international community.

<sup>6</sup> See 2003rd meeting, footnote 5.

31. The framework agreement approach was the only way in which to deal with such a unique subject as watercourses. As he understood it, such an agreement represented an effort to capture general norms at the level of policies and at the level of more specific rules, both of which formed part of the process of the progressive development and codification of the law. Accordingly, the duty to co-operate should be seen not as a principle whereby certain conduct was required of a State, but as a general policy willingly adopted whenever interdependence and common interests so required.

32. Proceeding on the basis of such general policies, it could perhaps be stated with some assurance that, in the context of international watercourses, a State was entitled to reasonable and equitable use and enjoyment of the watercourse in accordance with the primary principle of sovereignty and territorial integrity. That primary principle of the sovereignty of a State over the portion of an international watercourse which flowed through its territory was, however, subject to a secondary principle, namely that, in using the watercourse, the State had a duty not to cause any adverse effects on uses by other riparian States. The Commission should therefore not only identify general and specific principles, but also seek to articulate priorities among those principles. In so doing, it should endeavour to avoid placing undue emphasis on the principle of territorial sovereignty or on the concept of collective ownership. It should likewise be wary of such general concepts as good faith, good-neighbourliness, shared natural resources, equitable use, etc., which had been used as a basis for propounding the collective or common-ownership concept.

33. Following a brief procedural discussion, the CHAIRMAN said he would take it that the Commission agreed to refer draft article 10 as submitted by the Special Rapporteur in his third report to the Drafting Committee for consideration in the light of the discussion and the summing-up by the Special Rapporteur.

*It was so agreed.*

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)<sup>7</sup>

34. The CHAIRMAN invited the Commission to consider draft articles 11 to 15.

35. Mr. REUTER, noting that some members of the Commission were still not sure of the exact nature of the work done thus far, said that only when the entire text had been considered could it be decided whether the draft would take the form of recommendations or of a convention. In any event, the final decision would be made not by the Commission, but by the General Assembly. The Commission must nevertheless continue, as it had always done, to elaborate texts in the form of

draft articles and to regard the provisions it formulated as binding legal rules entailing obligations which, even though they might be worded in a flexible manner, were obligations of conduct, not obligations of result. That was the Commission's role. The text it was preparing was, of course, intended to become universal and it had therefore been drafted in very general terms. That meant that States would be able to derogate from it and that specific agreements, whether regional or otherwise, would also have to be concluded. In that sense, the text might be described as a framework agreement, but it was binding all the same. That was the spirit in which the rules which the Commission had considered thus far must be regarded, for all of them, including draft article 10, about which some doubts had been expressed, were substantive rules.

36. In chapter III of the draft, the Commission was discussing procedural matters. He was, however, not sure whether the articles that remained to be considered really contained only procedural rules. They related to such questions as the obligation to provide notice of a proposed new use, the obligation to refrain for a certain period of time from initiating a proposed new use, and consultations and negotiations. The Special Rapporteur had rightly not gone beyond negotiation in the draft articles. But the Commission had to try to determine what would happen when negotiations came to a standstill. In his view, the only possible solutions in such a case were that the parties would either resort to arbitration or some other compulsory form of settlement, or recover their freedom of action. The second solution was probably preferable. There was, of course, nothing to prevent the Commission from proposing a compulsory arbitration procedure, but it must do so only by way of a recommendation and not in the draft articles, for two reasons: first, because its usual practice had been to leave it to Governments to decide whether the text should establish such a procedure; and secondly, because of the problems involved in arbitration, where, save in entirely exceptional cases, the arbitrators were not called upon to replace the parties to make a settlement or revise a contract, and where decisions were not taken on the basis of purely legal considerations and usually represented only an imperfect compromise solution.

37. He thus thought that the parties should recover their freedom of action if negotiations came to a standstill. Each State would then be free to decide what position to adopt and would be able to make its own assessment of the substantive rules contained in chapters I and II of the draft. If the text did not establish a compulsory arbitration procedure, the Commission would have to draft procedural articles in as precise a manner as possible in order to give the substantive rules approved thus far their full meaning.

38. In that connection, the provisions proposed by the Special Rapporteur in articles 11 and 12 were very important, because, for a State which was planning a new use of a watercourse, they constituted a recognition of the fact that rules applied to it, or in other words that its territorial sovereignty was no longer intact, even though it was still sovereign to assess the legal situations of concern to it. He personally would be inclined to strengthen

<sup>7</sup> For the texts, see 2001st meeting, para. 33.



the provisions of draft article 11 so that States would be under an obligation to explain why they thought a planned new use was reasonable and equitable. It was also obvious that notice had to be provided as soon as possible. The ideal solution would be for informal consultations to be held immediately, but unfortunately relations between States did not always make that possible. In any event, notice had to be provided before the Government had started the necessary internal procedures to give its project legal force—before the parliament was consulted, for example—because otherwise consultations and exchanges of views with the States concerned would serve no purpose.

39. The main question that arose in connection with draft article 12 was that of the length of the period of time to be allowed for replying to the notification. Initially, he had been in favour of general wording along the following lines: “within a reasonable period of time, taking account of the scope of the new use”. Now, however, he thought that, if no provision was to be made for compulsory arbitration, article 12 should stipulate only a short period of time, so that there would be fewer disadvantages for the notifying State, which was already making a sacrifice by taking account of the interests of the other States concerned. A period of six months would be reasonable and, at the end of that period, the notifying State would recover its freedom of action.

40. He could not agree to the exception in the case of utmost urgency provided for in draft article 15, since a proposed use could be of utmost urgency only in the case where a disaster had occurred.

41. Finally, the future work on the topic would depend on the approach the Commission adopted now. If it decided to establish a compulsory arbitration procedure, it would probably have no difficulty in agreeing to a text proposed by the Drafting Committee, since any problems that might arise would be settled by the arbitrators. If it decided not to establish such a procedure, however, the substantive rules would assume even greater importance and would have to be carefully reconsidered.

*The meeting rose at 1 p.m.*

## 2009th MEETING

*Thursday, 4 June 1987, at 10.05 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

CHAPTER III OF THE DRAFT:<sup>3</sup>

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)<sup>4</sup> (*continued*)

1. Mr. TOMUSCHAT said that he welcomed the Special Rapporteur's general approach to draft articles 11 to 15, which set forth a number of clear-cut principles. Chapter III of the draft was obviously intended to make the suggested rules effective by implying that the outcome of the Commission's endeavour should be a binding international treaty. In that respect, he fully agreed with the remarks made by Mr. Reuter at the previous meeting.

2. There was an inherent logic in the structure of the draft. A treaty on international watercourses that was universal in scope must of necessity be less specific than a treaty governing a single watercourse, although generality could easily become synonymous with weakness or even irrelevance. Too much abstraction meant that, in the absence of a provision establishing a mechanism for implementation, the substance of the relevant formulas tended to become volatile. Yet international lawyers had found that, in recent decades, even rather broadly framed principles could be remarkably effective, a case in point being the principle of self-determination, which, largely as a result of the efforts of the Committee of 24, had become a living reality. Good procedural rules were thus capable of compensating to a large extent for certain shortcomings in substantive provisions. He therefore agreed that the draft rules should contain a section on implementation mechanisms, which was the only way in which real progress could be achieved.

3. As demonstrated in the reports of both the present and the previous Special Rapporteurs, the basic substantive rules to be included in the draft were firmly rooted in contemporary practice and had already crystallized as customary rules. The Commission's main contribution, therefore, would lie in making proposals

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the texts, see 2001st meeting, para. 33.

for appropriate procedural solutions. It would be helpful to all parties concerned if, on the one hand, potentially or actually affected States could lodge objections against measures that did not take adequate account of their interests and, on the other, the State planning such measures could duly inform its neighbours and thus be certain that it had done all that was required of it. A notified State which remained silent was precluded from making any complaints about the situation later on. Thus the proposed rules should not be seen as a unilateral sacrifice on the part of States wishing to develop the resources of an international watercourse within their territory. Most States were, in fact, likely to find themselves in both positions and few would have to consider the situation purely from the standpoint of an upstream State.

4. He wondered whether the Commission would classify the process contemplated in articles 11 to 15 as international co-operation or as a special form of international dispute settlement. Notification and information, which were provided for in article 11, could perhaps best be labelled mechanisms of international co-operation. As soon as consultations began under paragraph 2 of article 13, however, or at the latest at the negotiation stage under paragraph 3 of article 13, States would enter the realm of dispute settlement, in which there would be two conflicting claims: the notifying State claiming that the intended use was perfectly lawful, and the notified State claiming that the intended use would exceed the relevant equitable share of the use of the waters of the international watercourse in question and thus deprive it of its rightful benefits. He saw no obstacle to moving in that way from co-operation to dispute settlement. Normally, however, such negotiations would mark the final stage of the procedures to be provided for in the draft. It would be deceptive to think that a world-wide agreement could be usefully supplemented by provisions on arbitration. The progress achieved by placing States under an obligation to consult and negotiate should not, however, be underestimated.

5. The first issue to be faced in regard to draft article 11 was the most difficult, namely when and in what circumstances a duty of notification would arise. The Special Rapporteur had opted for the concept of "appreciable harm" and had explained that a new use which might cause appreciable harm to other States would not *per se* be unlawful. In that connection, the Special Rapporteur had drawn a distinction between instances in which uses entailing appreciable harm would still be within the equitable share accruing to the acting State, and instances in which appreciable harm would be coterminous with legal injury. A change in the wording none the less seemed desirable, for most lawyers would equate the term "appreciable harm" with legal injury, which would in turn imply an unlawful use of the waters in question.

6. Moreover, under article 11 as it was now worded, and in spite of the Special Rapporteur's intentions, a duty of notification could be seen to arise if, and only if, a use prohibited by international law was intended, with the unfortunate consequence that, by providing notification, a State would implicitly admit that it was

potentially in breach of its international obligations. That being so, there would be virtually no voluntary compliance with the duty of notification and States would be at pains to refrain from notifying others of their plans, so as to make sure that they were not questioned.

7. Some more neutral form of wording should therefore be found to avoid prejudging the issue of whether an intended use was lawful or unlawful. It might be possible to borrow from the terminology used in the wealth of material presented by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2) and to provide that a duty to take procedural steps usually arose if and when another State would be "seriously", "significantly" or "materially" affected by an intended use.

8. Article 11 now covered major works such as the construction of canals or hydroelectric power stations. Day-to-day routine uses which could not be traced back to a single, major new polluting factor could, however, also result in a significant deterioration of the waters of an international watercourse. For instance, a series of factories sited along a river might each dispose of waste water in the river, and a point would come at which the regenerating capacity of the river would be exceeded. That situation occurred in many industrialized countries. For example, nobody would dream of using the waters of the Seine, the Rhine, the Elbe, the Oder or the Vistula for irrigation purposes. The main problem was pollution to which everyone contributed, not only factories, but also farmers who used pesticides and insecticides in ever-increasing amounts, and individuals who readily availed themselves of all the benefits of modern hygiene. Articles 11 to 15 failed to have any bearing on that phenomenon of creeping pollution. An entirely new provision was required specifically establishing that a State which considered that it was being deprived of its equitable share in the utilization of an international watercourse—not by a new use but in any other fashion—might notify the State affecting its interests, whereupon that second State would be obliged to consult and eventually negotiate with the notifying State.

9. A further point concerned the opening words of article 11, "If a State contemplates a new use . . .". Obviously, it was not only States that made use of international watercourses. In a modern industrialized country, there was a multitude of private uses of watercourses. To refer simply to the State would create the false impression that only acts of State organs were being considered. The Commission could well revert to the wording proposed in earlier drafts and refer to a State which "undertakes, authorizes or permits a project". That would also be in line with draft article 9, under which States had a general responsibility to control any activity relating to an international watercourse within their territories.

10. It was a little dangerous and misleading to use the word "determine" in the second sentence of article 11, since it suggested that the notified State might make a unilateral determination of a binding character. The notified State should have the opportunity of evaluating and assessing the potential harm, according to its sub-

jective judgment, but it should not be able to impose its views on the notifying State. It would therefore be preferable to speak of “assessment” or “evaluation”. It would also be better to refer to any other potentially affected “State”, in the singular rather than the plural, for in many instances only one State would be involved.

11. The substantive provisions of articles 11 to 15 should be separated from the genuinely procedural rules, particularly in the case of the standstill provision in paragraph 2 of article 12, which could easily be overlooked if the text were not read with the necessary attention. Paragraph 3 of article 14, which provided that a State would incur liability for any harm caused to other States by a new use which it had not notified them of, should also form the subject of a separate article. The standstill clause and the liability provisions were crucial and therefore deserved the closest attention. The standstill clause, in particular, posed a dilemma because, on the one hand, States planning certain major works should be encouraged to provide full information on the wide range of activities that might entail serious consequences, and, on the other hand, if a notifying State was bound to refrain from pursuing its activities on an intended project it might decide that it was in its best interest to make notification only in extreme circumstances. Those two positions could perhaps be reconciled in the manner indicated by Mr. Reuter, but the issues involved were so important that they should be dealt with in a special article. He would like to know whether any authority existed in international sources for a “freeze” on activities, or whether the Commission would be breaking new ground, which it was fully entitled to do under its mandate to engage in the progressive development of international law.

12. The draft articles were not entirely clear as to the duration of the standstill. Article 12, paragraph 2, referred only to the initial period during which the notified State was expected to reply to the notification. It seemed from article 14, paragraph 2, that the freeze would normally extend beyond the initial six-month period. Since negotiations might take years, even decades, a clear-cut closing date was obviously needed. Possibly the point could be covered by extending the initial period for a flexible or fixed amount of time. The burden placed on the notifying State should not be unduly heavy, however, for otherwise the draft articles would not be acceptable to the States concerned.

13. He wondered whether it was wise to relate the standstill clause solely to notification under article 11, since no similar obligation would arise for a State if it simply refrained from providing any information. If a potentially affected State which had not been informed about an intended new use invoked the obligations of the author State under article 11, the author State was not bound to refrain from executing its project. Once again, it was apparent that any State which took its obligations seriously and provided notification under article 11 would be placed at a disadvantage, for notification would be tantamount to an admission of guilt. On the other hand, to confer upon a foreign State the right to obtain unilaterally, and merely by invoking article 11, the suspension of work undertaken by the author State would seriously encroach upon the latter's

sovereign rights. The standstill clause would be operative only if the notifying State voluntarily undertook to abide by it, and that might make Governments very reluctant to provide notification. To his mind, they should not, however, have any inhibitions about establishing a channel of communication with neighbouring States. It was a problem that would require very careful consideration.

14. Mr. McCaffrey (Special Rapporteur) said that creeping pollution, mentioned by Mr. Tomuschat, raised the question whether the obligations under articles 11 *et seq.* would be invoked if the harm or adverse effects for the other State did not result from a new use or project. There were two possible answers. One, which related more specifically to the kind of situation envisaged by Mr. Tomuschat, was to be found in the statement in paragraph (3) of the comments on draft article 11 that “the expression ‘new use’ comprehends an addition to or alteration of an existing use, as well as new projects, programmes, etc.”. The difficulty there was that the State which was the source of the adverse effects might not be aware of its obligation to provide notice under article 11, and the burden would therefore fall on the affected State to request the source State to comply with its obligations under articles 11 *et seq.* The other answer, to which he had already referred in his second report (A/CN.4/399 and Add.1 and 2), was that the situation might be covered by paragraph 2 of draft article 8. He would, however, have no objection to Mr. Tomuschat's suggestion regarding a separate article on the matter.

15. As to the mechanism that would trigger the duty to notify, it might be advisable from the point of view of consistency to use in the articles on notification the same criterion as contained in draft article 9, which spoke of the duty to avoid causing appreciable harm. A triggering mechanism which would not necessarily entail the commission of an international wrong could none the less be considered. Rather than focus on harm, therefore, it would be useful to consider some standard based on appreciable, significant or material effect.

16. He did not attach the same connotations to the word “determination” as did other members, but if it caused problems another term could be found. It had not been his intention to imply that the notified State could make a unilateral and binding determination, but rather to provide that that State should decide for itself whether a contemplated use of a watercourse would pose a risk of harm to it. “Assessment” was a good alternative, and “evaluation” was also a possibility.

17. With regard to the standstill provision, authority for a freeze could be found more particularly in a large body of European practice, in which the duty to consult had reached the level of a duty to obtain prior consent. Such practice, which was summarized in his third report (A/CN.4/406 and Add.1 and 2, paras. 63-87), provided support for a reasonable standstill period, and he was entirely in agreement with that, since an unreasonably long period would merely deter States from providing notification.

18. One further question was whether a standstill obligation arose if a State believed that it would be af-

fectured by an activity or project contemplated or initiated by another State and if it so informed that other State under article 14. Possibly some drafting changes might be required to make the position quite clear.

19. Mr. KOROMA, referring to the standstill clause in article 12, said that some situations did not appear to be covered at the present time and that the Commission might well have to prepare a new rule that would also contain an element of progressive development of the law. He had in mind instances in which a State invoked the obligation to notify on the grounds that a new project would cause appreciable harm to it but the author State decided that the case did not call for notification and went ahead with the project. The first State thereupon took countermeasures and embarked on a project of its own. The question was whether the obligation to freeze the project would apply in that situation.

20. Mr. McCAFFREY (Special Rapporteur) said that the whole purpose of draft articles 11 to 15 was to prevent a situation of that kind, namely one in which it was too late to turn back. The articles were intended to achieve and maintain an equitable allocation of the uses of the watercourse and to nip in the bud the type of problem that arose when the scales were tipped in favour of one riparian State.

21. A State contemplating a new use could consider that its project did not call for notification and then proceed with it, but another State which believed that the contemplated use would cause it appreciable harm could, by virtue of article 14, paragraph 1, invoke the obligation of the author State to notify under article 11. Discussions would then take place and an adjustment might be arrived at. If, however, the author State continued with the project and the project caused appreciable harm to the other State, such action would constitute an internationally wrongful act. The case was clearly one of international responsibility and, in that respect, he would draw attention to the provisions of article 14, paragraph 3. Bringing international responsibility into play was of course the last resort, when the balance of uses by the various riparian States could not be restored by means of consultation and negotiation.

22. When the author State failed to provide notice of the contemplated new use, the proper response by the other State was to invoke the obligation to notify, as indicated in article 14, paragraph 1. If it was too late and the appreciable harm had already occurred, the injured State could invoke the international responsibility of the author State in respect of what constituted an internationally wrongful act.

23. The problem of countermeasures, though not frequent, was very real. The State which considered itself harmed by the author State's new use sometimes took retaliatory action, possibly by erecting waterworks. In a case of that kind, if appreciable harm ensued, draft articles 11 to 15 would also apply.

24. Mr. BENNOUNA said that the situation mentioned by Mr. Koroma and the Special Rapporteur involved another field, namely the law of treaties, and the relevant rules would then be the rules applicable to failure to observe treaty obligations.

25. It was perhaps regrettable that the Commission had decided to consider article 10 separately from articles 11 to 15, for the procedural rules contained in articles 11 to 15 took on a slightly different meaning when they were tied in with the provisions of article 10, which related to co-operation. From the examples used by the Special Rapporteur in drafting articles 11 to 15, it was plain that co-operation between the States concerned had existed, even in an institutionalized form, such as joint commissions and other administrative mechanisms, as mentioned in the third report (A/CN.4/406 and Add.1 and 2, para. 75). Where there was a will to co-operate, to act together in developing a watercourse, as in the examples cited, it was of course possible to lay down binding procedures such as those set out in articles 11 to 15. Such readiness to co-operate did not always exist, however. Consequently, he was somewhat disturbed by the contrast between chapter II of the draft, which set out general principles but none the less allowed States some room for manoeuvre, and articles 11 to 15, which established an extremely rigid and binding procedure. In particular, the standstill clause in article 12 went too far and placed too many limitations on the State's jurisdiction over its territory. He wondered whether it might not have been preferable to retain in the rules on procedure the same flexibility as was to be found in the substantive rules.

26. Mr. McCAFFREY (Special Rapporteur) said that it was difficult for a State to determine whether it was complying with general provisions such as the rules on equitable utilization and the prevention of appreciable harm. The procedural rules enabled a State contemplating a new project to notify the other States concerned and, in the absence of a response, to go ahead with its project.

27. It would have to be seen whether States would accept general obligations of that kind. Actually, a large number of States had accepted them in agreements on international watercourses. The list in annex II to his third report (A/CN.4/406 and Add.1 and 2) cited a great many international agreements containing provisions concerning notification and consultation. The agreements, which related to Africa, America, Asia and Europe, were only a sample of the far more numerous international instruments embodying provisions of that type. Additional agreements appeared in the 1963 report by the Secretary-General, which had been brought up to date in 1974.<sup>5</sup> The problem was whether the existence of a rule of general international law could be inferred from that impressive body of treaty practice. Some would argue that the inclusion of a rule on notification and consultation in nearly all watercourse treaties showed that a customary rule of international law on the subject did exist. Others, however, would hold that the very need to include such a provision in treaties proved that customary international law did not impose a duty to notify and consult.

<sup>5</sup> "Legal problems relating to the utilization and use of international rivers", report by the Secretary-General (A/5409), and "Legal problems relating to the non-navigational uses of international watercourses", supplementary report by the Secretary-General (A/CN.4/274), reproduced in *Yearbook . . . 1974*, vol. II (Part Two).

28. He preferred to take a less theoretical approach. The plain fact was that States had accepted provisions on notification and consultation in numerous watercourse treaties. The problem facing the Commission was to decide whether that duty could be generalized. As he saw it, recognition of the duty to notify and consult was necessary in order to give effect to the rules on equitable utilization and prevention of appreciable harm. Rules on notification and consultation would make it possible for a State to ascertain whether it was exceeding its equitable share of a watercourse. Otherwise, it would have to wait until the other State or States concerned made representations, by which time it might be too late: a dam or a new factory might already have been built.

29. Mr. FRANCIS said that, further to Mr. Bennouna's comments, it was pertinent to determine the nature of the draft convention the Commission was preparing. Was it a set of residuary rules? Secondly, it was necessary to take account of the greatly accelerated pace of progress in all fields, including technology, for the Commission's draft would have to stand the test of time. Allowance would have to be made for the fact that the principles embodied in it would be applied largely through bilateral treaties or restricted multilateral treaties, depending on the number of riparian States involved.

30. Lastly, it should be emphasized that the Commission was engaged in the task of both developing and codifying international law. Where it developed the law, it would have to ensure that the new rules were made effective.

31. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.15 a.m.*

## 2010th MEETING

*Friday, 5 June 1987, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi.

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

## THIRD REPORT OF THE SPECIAL RAPPOREUR (continued)

### CHAPTER III OF THE DRAFT:<sup>3</sup>

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) and

ARTICLE 15 (Proposed uses of utmost urgency)<sup>4</sup> (continued)

1. Mr. CALERO RODRIGUES said that the importance of draft articles 11 to 15 went far beyond procedural considerations. As the Special Rapporteur pointed out in his third report, the "set of draft articles on procedural requirements" constituted the "centre-piece" of the report (A/CN.4/406 and Add.1 and 2, para. 7). In his second report, too, the Special Rapporteur had referred to "procedural requirements that are an indispensable adjunct to the general principle of equitable utilization" (A/CN.4/399 and Add.1 and 2, para. 188).

2. The procedural rules were intended to apply to the situation in which a State "contemplates a new use of an international watercourse which may cause appreciable harm to other States". Like the corresponding provisions submitted by the previous Special Rapporteur, Mr. Evensen, the draft articles under consideration provided for a scheme comprising notification, reply, time for reply, consultations, negotiations and, finally, settlement of disputes. Draft articles 11 to 15, however, also dealt with the consequences of objections raised in reply, with the consequences of failure to comply with the rules, and with the rights of States in cases of "utmost urgency". At the present stage, he proposed to deal with only three questions: first, the scope or nature of the situation to which the rules applied; secondly, the consequences of non-compliance with the rules; and, thirdly, the suspensive effects of the application of the procedural provisions, in other words the "standstill clause".

3. On the first question, the draft articles required "timely notice" to be given when a State contemplated a new use of an international watercourse that could cause "appreciable harm" to other States. The term "new use" had to be construed *lato sensu*, so as to cover modification of an existing use and uses by private persons in the State concerned.

4. Under draft article 9, which was before the Drafting Committee, uses or activities that might cause appreciable harm to the rights or interests of other watercourse States were prohibited, unless otherwise provided for in an agreement between the States concerned. Certain undesirable restrictions on uses then appeared

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the texts, see 2001st meeting, para. 33.

in draft article 11, as a logical consequence of article 9 as currently drafted. Draft article 11 set out the procedure for dealing with a forbidden action; it specified the conditions to be fulfilled for action to be permitted—the conditions for allowable harm and for allowable risk of harm. The two concepts of allowable harm and allowable risk were given equal treatment in draft article 9, which prohibited both harm and risk of harm unless allowed by agreement. The first proposition was quite normal, but to prohibit risk of harm was much more questionable. There could be a small risk of great harm, a small risk of small harm, a great risk of small harm or a great risk of great harm, and obviously those four situations could not be treated equally, as they were in article 9. Article 9 should refer only to harm; then article 11 could treat harm and risk differently. The present strict provisions of draft article 11 would apply only to harm: when only risk was involved, States would be allowed more freedom. The rules relating to co-operation and communication would apply in either case.

5. The consequences of non-compliance with the procedural rules were set out in draft article 14, paragraph 3, which provided that the defaulting State “shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article [9]”. That provision did not, in principle, have much meaning, since liability for harm would exist in any case; it would not flow from non-compliance with the procedural rules. Liability was the normal result of any activity which caused harm; it could not be regarded as a sanction for non-compliance.

6. As to the proviso “whether or not such harm is in violation of article [9]”, the Special Rapporteur explained in his third report (A/CN.4/406 and Add.1 and 2), in paragraph (4) of his comments on draft article 14, that liability would exist “even if such harm would otherwise be allowable under article [9] as being a consequence of the notifying State’s equitable utilization of the watercourse”. But article 9, as drafted, did not appear to give any indication that harm would be allowable as a consequence of “equitable utilization”. He was at a loss to understand how a use which actually caused harm could be considered an equitable use. The concept of allowable harm, in article 9, meant harm that was accepted by the affected State. If the procedure of co-operation provided for in the procedural articles was not followed, clearly there could be no agreement allowing the harm. It would therefore seem that, under article 14, paragraph 3, no particular consequences would follow from non-compliance with the procedures. He was not pronouncing on the question whether it was necessary or useful to provide some sanction for non-compliance, but paragraph 3 of article 14, as it stood, served no useful purpose.

7. The suspensive effects of the application of the procedural rules depended largely on the situations to which those rules applied. It was generally agreed that the suspensive effects should not last longer than necessary, but a clear rule on the point should be included in the draft.

8. The first reference to a suspensive effect was in draft article 12, paragraph 2, *in fine*, which provided that a notifying State “shall not initiate, or permit the initiation of, the proposed new use without the consent of the notified States”, while the notified States were studying the notification. But nothing was said about the period of consultations and negotiations under paragraphs 2 and 3 of draft article 13; the question arose whether the suspensive effect would continue to apply during that period, and during the entire period in which a procedure for the settlement of disputes was engaged. That point should be clarified.

9. There were only two references in the draft articles to the possibility of initiating the contemplated use during the application of the procedural rules. The first was in draft article 14, paragraph 2, which provided that, if a notified State failed to reply to a notification “within a reasonable period”, the notifying State could proceed with the initiation of the use. The second was in draft article 15, paragraph 1, where the contemplated use was “of the utmost urgency” as determined in good faith by the notifying State. The latter case, as explained by the Special Rapporteur in paragraph (1) of his comments on draft article 15, concerned “certain extraordinary situations involving public emergencies”. Those two provisions, which applied in clearly defined situations, did not provide any answer to the basic question as to when the suspension ended.

10. The general thrust of the procedures set out in draft articles 11 to 15 was acceptable, although the drafting needed improvement to remove certain doubts and imprecisions. The essential issue was the determination of the situations to which the rules would apply. Some of those rules, such as the standstill clause and the clause on the settlement of disputes, would be unduly restrictive if applied to situations involving risk of harm without qualification, but they would not be so considered if they applied only to situations in which harm was certain or almost certain. The present understanding of the procedural provisions was that they applied to situations prohibited by article 9. Thus they dealt with forbidden situations, in which it was logical to require the agreement of the States concerned for the contemplated use to be initiated.

11. Although consistent with their own internal logic, the provisions under consideration would, in practice, create an impossible situation, in which a riparian State’s utilization of a watercourse would be dependent on the will of another State having an interest in the question which was not comparable with its own. To avoid creating such an unbalanced situation, he suggested that article 9 should be redrafted to prohibit only the causing of harm, and that the procedural rules should be reconsidered. Those rules should be strict for application to forbidden situations, in which the contemplated use could be initiated only with the consent of the affected State. They should be far less strict for application to situations in which the contemplated use was not prohibited. In those situations, co-operation would be recommended.

12. Mr. OGISO said that he was in broad agreement with the remarks made by Mr. Bennouna at the previous

meeting, suggesting that the procedural rules should take the form of recommendations rather than obligatory norms. He found that suggestion very pertinent, at least as far as draft articles 11 to 14 were concerned. Draft article 15 was of rather a different character.

13. In his second report (A/CN.4/399 and Add.1 and 2, para. 59, *in fine*), the Special Rapporteur had referred as follows to the possibility of making recommendations concerning non-binding provisions:

. . . the Special Rapporteur would venture to suggest that, at least initially, the Commission should concentrate on the elaboration of the basic legal principles operative in this area. Once that task has been accomplished, the Commission may wish to consider whether it would be advisable to go on to make recommendations concerning various forms of non-binding provisions, for example the establishment of institutional mechanisms for implementing the obligations provided for in the articles.

That passage, which showed the Special Rapporteur's understanding of the nature of a "framework agreement", suggested that it would not be altogether contrary to his approach if the Commission were to recommend that the procedural provisions of the draft should take the form of guidelines or recommendations, rather than principles or binding rules—even residual rules.

14. The "basic legal principles" referred to by the Special Rapporteur in that passage were the subject of articles 6 to 9, currently before the Drafting Committee. Those principles covered the following four obligations of watercourse States: (a) the obligation to consult and negotiate in good faith; (b) the obligation to utilize the international watercourse and to participate in its development and protection in a reasonable and equitable manner; (c) the obligation to take all relevant factors into account in determining whether a use was exercised in a reasonable and equitable manner; (d) the obligation to refrain from activities which might cause appreciable harm. Those four principles could be regarded either as general principles of customary international law, or as principles that could be derived from generally recognized international law. It was therefore appropriate that the Drafting Committee should consider them for inclusion in chapter II of the draft.

15. It was doubtful whether the provisions on notification procedures in draft articles 11 to 14 could be regarded as part of customary international law. Nor was it possible to deduce from treaty practice that there was a legal obligation for a watercourse State to notify other watercourse States of a contemplated new use in the absence of a specific agreement on the subject. Many interesting examples of the inclusion of such a requirement in watercourse treaties had been cited by the Special Rapporteur, but the presence of such provisions in a number of treaties did not prove that an obligation to notify already existed in customary international law. There was only a contractual obligation as set out in a particular agreement and binding only on the parties thereto.

16. In his third report, Mr. Schwebel had taken the position that a watercourse State was required "to give notice and to provide the necessary and relevant infor-

mation and data";<sup>5</sup> but his own clear impression was that Mr. Schwebel had derived the notion of such an obligation from his proposed concept of an "international watercourse system". The obligation he postulated for the "system State" stood or fell by the concept of the "watercourse system". Yet it should be borne in mind that the "watercourse system" concept was now unlikely to be retained in the draft.

17. There was, of course, nothing wrong in making provision for a procedural requirement of notification as a contractual obligation. It was his feeling, however, that it was not possible to derive certain compulsory procedures from the general principles stated in articles 6 to 9. It would therefore be preferable to frame the articles on procedure in the form of recommendations; they would then become binding on watercourse States only when introduced into individual watercourse agreements.

18. Mr. Tomuschat (2009th meeting) had suggested that the opening words of draft article 11, "If a State contemplates a new use", had to be interpreted as meaning "If a State authorizes a new use". It could be argued, however, that once a State had authorized a certain project at a high level, it might be difficult to alter it because of a claim by another watercourse State that there was a possibility of harm.

19. Another question raised during the discussion was whether the concept of harm was to be limited to legal injury. In his third report (A/CN.4/406 and Add.1 and 2), in paragraph (5) of his comments on draft article 11, the Special Rapporteur offered the following explanation:

While, technically speaking, a State suffers no legal injury unless it is deprived of its equitable share, the article is couched in terms of "appreciable harm" in order to facilitate a joint determination of whether any harm entailed by the new use would be wrongful (because the new use would exceed the notifying State's equitable share) or would have to be tolerated by potentially affected States (because the new use would not exceed the notifying State's equitable share).

He was not altogether convinced by that rather simplified explanation. There could be cases in which the new use was not wrongful, but still caused some adverse effect on other watercourse States, thereby calling for some compensatory or protective measures.

20. Draft article 12 referred to the period within which the notified State must respond to the notifying State. Alternative A of paragraph 1 proposed a "reasonable" period and alternative B a period of not less than six months. Actually, it would be difficult to justify a period of six months only on legal grounds; argument in favour of a shorter or a longer period might well be made. The choice could therefore be made only in the light of the circumstances of a particular international watercourse.

21. He shared the view that the obligations set out in chapter II of the draft would mean little if they were not accompanied by procedural provisions giving them concrete form. But those provisions would themselves be effective only if accepted by the watercourse States concerned and incorporated in watercourse agreements.

<sup>5</sup> *Yearbook* . . . 1982, vol. II (Part One), p. 104, document A/CN.4/348, para. 158.

22. In his view, therefore, draft articles 11 to 14 should be formulated as recommendations, which would become binding on watercourse States only when embodied in watercourse agreements. The provisions of those articles would thus take the form of guidelines or of a recommendation such as that on transfrontier pollution adopted by the Council of OECD in 1974 and cited by the Special Rapporteur in his third report (*ibid.*, para. 79).

23. Mr. McCAFFREY (Special Rapporteur) noted that Mr. Calero Rodrigues regarded paragraph 3 of draft article 14 as pointless because, in the case envisaged, liability would be incurred in any event. That was true, but in the law of international watercourses the legal wrong arose if one State was deprived of its equitable share in a particular watercourse, or if another State exceeded its share. Thus, if there was not sufficient water in the watercourse to satisfy all the States concerned and consequently a conflict arose, it became important to make an equitable allocation of the waters. Presumably, if an equitable balance was struck, neither State would achieve everything it wanted in terms of its own plans and needs. To that extent, therefore, some harm would have been done. To focus exclusively on harm, however, was to overlook the fact that the real legal injury arose when a State was deprived of its equitable share in cases where there was not enough water. The problem, therefore, was how to express the notion that, if a State failed to comply with the procedural rules, it should in some way be held responsible for actions for which it might not otherwise have been responsible. The only way to do that was to provide that a State might be liable for harm even if it was not deemed to have caused a legally recognized injury by exceeding its share. In order to understand the idea of equitable utilization it was essential to grasp that fundamental concept. Indeed, draft articles submitted by previous special rapporteurs had been criticized for failing to recognize the distinction. His intention in paragraph 3 of article 14 had been to add an extra tooth to the draft, as it were, but he remained at the Commission's disposal.

24. He agreed that the question of the standstill provision, or suspensive effect, required close attention. Mr. Reuter (2008th meeting) had dealt cogently with the question as to when such a provision might start to operate and had provided a possible basis for a solution to the problem. It was probably not a good idea, however, to wait until projects, programmes or uses were authorized, for by then it would be too late. It was necessary to find an expression that would be generally applicable to all legal systems and all States. He realized that the word "contemplates" was very vague; he had used it only for want of a better term and with an eye to flexibility. Any another term that could pin-point the stage in the planning process of a new project, programme or use that would be neither too early nor too late would have his support.

25. It was not so difficult to pin-point the end of a suspensive effect. His own view was that, unless otherwise agreed by the parties during the consultations and negotiations, such an effect should last for a reasonable period. It should not be so short as to allow a State

simply to go through the motions of consultation, in order to let time run out so that it could then proceed with its project, although of course considerations of good faith were also involved. Nor should it necessarily last for the entire process of consultation, negotiation and settlement of a dispute, since that could take a long time.

26. With regard to Mr. Ogiso's point concerning procedural rules and whether they could form part of a set of recommendations and guidelines, he considered that it would be a very regressive step in the development of international watercourse law if the Commission were to recommend to the General Assembly that any procedural rules accompanying the fundamental principles of equitable utilization and the duty to avoid causing appreciable harm should be regarded as guidelines or recommendations. Procedural rules or requirements, as opposed to recommendations, were an indispensable adjunct to such principles. It might be asked why the rules could not be set out in a separate part of the draft for acceptance by States through agreement. The answer was that, where international watercourses and other subjects involving transmission of injurious substances through the medium of natural resources or the use of shared natural resources were concerned, procedures were of particular importance and had to be treated separately from procedures in other areas. In the case of such a general rule as that of equitable utilization, there had to be some procedural mechanism by which States could determine their compliance with the rule.

27. Mr. Ogiso had also raised the question whether, in the absence of agreement, procedural rules could be said to exist as part of customary international law. That was a very difficult question and all he could do as Special Rapporteur was to provide illustrations from the wealth of evidence that supported procedures as being rules of customary international law. The point was brought out in stark terms by article 3 of the Charter of Economic Rights and Duties of States, which he cited in his third report (A/CN.4/406 and Add.1 and 2, para. 51). The whole thrust of that provision was that the exploitation of shared natural resources, because of the very nature of such resources, required discussions in advance, not only to achieve optimum use, but also to avoid causing harm.

28. Mr. Ogiso had apparently inferred from the title of chapter II of the draft that only general principles were included in that chapter and that none were included in chapter III or perhaps even in succeeding chapters. Chapter III, however, also referred to general principles in its title and contained rules which, in his view, were essential for the proper implementation of the general principles of chapter II.

29. He would very much regret any action by the Commission tending to recognize a duty not to cause harm without providing States with guidance on how to discharge that duty. The many disputes throughout the world concerning the non-navigational uses of international watercourses could hardly be resolved without a set of procedural mechanisms for the implementation of the general rules set out in the draft.



30. Mr. REUTER said he fully agreed with the Special Rapporteur that procedural mechanisms which were not obligatory would be quite meaningless. The Commission's role was not to dispense fair words and advice to States, but to formulate rules of law. It mattered little if the Commission agreed on only a few rules, provided that they were obligatory. And it would be an illusion to think that it could confine itself to general principles, even though they were undoubtedly legal principles; it must adopt a minimum of obligatory mechanisms, which were not too heavy and were as precise as possible.

31. In his previous statement (2008th meeting), he had said that the Commission, when examining rules of procedure, would need to revert to the substantive rules, and Mr. Calero Rodrigues had just given a striking demonstration of that fact in connection with draft article 9, and of the distinction to be made between a risk of disturbance and certainty of disturbance. But that was far from being the only problem raised by article 9. For the Special Rapporteur distinguished—and that distinction was crucial—between harm resulting from a wrongful act and harm caused by disturbance of an existing situation or even of a legitimate expectation. But while the English terminology was sufficiently precise in that respect, French legal language, for example, was much less so. Hence it was extremely important to be quite clear on the meaning of the terms, in order to avoid any misunderstanding.

32. In articles 11 to 15, the Commission would have to settle other difficult questions relating to responsibility—for example, responsibility incurred by failure to notify—but it must first solve the fundamental problems, and to do so it must revert to the substantive rules, which were still very imprecise.

33. Mr. ARANGIO-RUIZ said he did not think that the Commission should get too involved in the meaning of the term "customary law". He would prefer the term "unwritten law", since he had doubts about the concept of custom as applied to international law. As he understood it, the role of the Commission was to draft conventions which consisted partly of customary or unwritten law, and partly of new law—in other words the progressive development of the law. It was for States to decide whether or not the conventions drafted by the Commission were acceptable to them.

34. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.35 a.m.*

## 2011th MEETING

*Tuesday, 9 June 1987, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Benouna, Mr. Calero Rodrigues, Mr. Francis, Mr.

Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

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

#### CHAPTER III OF THE DRAFT:<sup>3</sup>

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)<sup>4</sup> (*continued*)

1. Mr. GRAEFRATH said his initial impression that the Special Rapporteur's approach to co-operation was much too narrow was confirmed by draft articles 11 to 15. The Special Rapporteur regarded the rules laid down in those articles as procedural. On analysis, however, they proved to be a mixture of substantive rules on co-operation and implementation measures and rules that established or would lead to dispute-settlement procedures. Moreover, articles 11 to 15 focused on only one aspect of co-operation among watercourse States and sought to impose on the author State a strict procedure for which there was no basis in customary international law. State practice revealed a very different picture inasmuch as most bilateral and multilateral treaties covered a wide range of activities and procedures concerned with the promotion of co-operation in a variety of forms, including exchange of information, co-ordination of protective measures, common research projects, mutual assistance in times of danger, close co-operation among administrative bodies, establishment of joint commissions and even joint financing of programmes.

2. It was on the basis of such agreed co-operation that procedures operated effectively. Admittedly, procedures were a necessary element of co-operation, but the substance of co-operation could not be reduced to a set of procedural rules. Indeed, in many instances, it

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the texts, see 2001st meeting, para. 33.

might be far more important to have, for example, a permanent system for the exchange of information and data than any *ad hoc* procedure concerning new uses. Given the wide variety of State interests and the great number of co-operation issues involved in a particular watercourse, therefore, it seemed somewhat arbitrary, and also unjustified by State practice, to concentrate, as the Special Rapporteur had done, on new uses that involved risk.

3. The procedure provided for in articles 11 to 15 was also very one-sided, for it was geared mainly to the settlement of disputes and not to organized co-operation. Whether or not States accepted and applied the proposed rules as a matter of law would depend on whether those rules were in keeping with their own interests. In that connection, it was extremely important to determine whether the rules reflected customary international law. Nobody would question that the Commission's task was the progressive development and codification of international law and that codification always contained elements of progressive development, but it was highly questionable whether what certain lawyers regarded as proposals for the progressive development of international law ultimately became part of the codified rules of international law. International practice in the matter of watercourses, as reflected mainly in bilateral agreements, showed that States felt the need to establish rules relating chiefly to specific uses, objects or tasks which corresponded to their particular interests. He knew of no practice, however, to justify the assumption that the strict procedure laid down in articles 11 to 15 could be regarded as customary law. A rule whereby States could embark on a new use of an international watercourse only after prior agreement between the States concerned or a binding third-party decision could not be regarded as a rule of customary law, and still less as a general principle of law. Consequently, he could only conclude that the articles under consideration contained rules for the progressive development of the law and did not seek to codify existing rules.

4. He agreed that draft article 11, which referred solely to State and not private activities, was too narrow and therefore required modification. It was also necessary to determine whether the term "new use" covered any change in an existing use. The Special Rapporteur had himself recognized that the word "contemplates" was vague; it should be changed so as to indicate the point at which a duty to notify other States arose. It should be remembered that a long period of time normally elapsed between the policy decision to undertake a project and the actual decision to start work. A more precise determination of the starting-point for the duty to inform other States was also important because it was used in draft article 14 to define the point at which other States could invoke the obligations of the author State.

5. Articles 11 to 15 dealt solely with new uses that might cause appreciable harm. As Mr. Tomuschat (2009th meeting) had noted, article 11 in its present form could be taken to mean that the author State had to admit from the outset that the planned new use might cause appreciable harm, otherwise there would be no

obligation to notify, consult and negotiate. The entire procedure therefore focused not on co-operation, but on avoiding or reducing harm, or ensuring compensation. If equitable utilization was to be the agreed standard, the question was not whether the new use could cause appreciable harm, but whether it would exceed a State's equitable share.

6. Articles 11 to 15 introduced a new threshold based on risk, not harm or injury. Duties were created that could not be deduced from equitable utilization, but were based on the idea of shared resources or an integrated watercourse system. While it would be reasonable to provide for co-operation whenever projects or activities affected another State, such an approach should not be pressed into a strait-jacket of settlement procedures and standstill clauses whereby any new activity would be made subject to the consent of other States. The draft articles thus operated to the disadvantage of a State that was about to do something new and gave the other watercourse States a definite right to interfere and hinder the work, even if they had no real interest in it.

7. Draft article 14, paragraph 3, envisaged punishment in the event of non-compliance with the requirements of notification, consultation and negotiation, since an author State would be liable for any harm caused to other States by a new use. Yet no such punishment was contemplated for causing harm to the author State by imposing unnecessary standstill periods under the procedure envisaged. In any event, he very much doubted whether punishment could serve as an effective incentive to co-operation.

8. Articles 11 to 15 lacked balanced. Under the terms of article 11, an author State was required to admit, through notification, that it was planning to do something risky, and under the terms of article 12, paragraph 2, it could not initiate or permit the initiation of the proposed new use without the consent of the notified States. Hence the notified States had a veto, at least so long as no agreement was reached that satisfied them under article 12, paragraph 3, or so long as the veto was not overruled by a binding decision in a third-party dispute-settlement procedure under article 13, paragraph 5. The effect of a unilateral determination by a notified State that a contemplated new use would cause it appreciable harm was to impose a duty on the notifying State to consult the notified State so as to confirm or adjust its determination. If such confirmation or adjustment could not be achieved by consultation, the next step was negotiation, which was in effect the first step in a dispute-settlement procedure. Thus it would seem that it was always the notified State which decided on the next step in the procedure and that, even if no notification was made, any watercourse State could at any time set that procedure in motion and force the State contemplating a new use to submit to a binding settlement procedure.

9. The Special Rapporteur referred in his third report (A/CN.4/406 and Add.1 and 2, para. 89) to a third-party dispute-resolution procedure to be discussed in a subsequent report. It therefore seemed that there were two different kinds of dispute-settlement procedure: a bilateral one, which would take the form of negotiation,

and a third-party procedure, which would be adopted if the dispute could not be settled by negotiation. Clearly, negotiation and the duty to negotiate were not perceived as means of organizing co-operation, but as a dispute-settlement procedure. That was another reason why the Special Rapporteur's position was not supported by the judgment of the ICJ in the *North Sea Continental Shelf* cases,<sup>3</sup> which the Court had referred back to the parties on the ground that it was for them to shape their international relations through negotiation.

10. The procedure proposed in draft articles 11 to 15 had nothing to do with existing practice and could not be based on the *Lake Lanoux* arbitration. It introduced an entirely new rule whereby a new use of a watercourse that other watercourse States might find risky could be initiated only after the consent of the other States concerned had been secured. Furthermore, his understanding of the terms of article 14, paragraph 3, was that, if a State planning a new use ultimately failed to comply with the proposed new procedure, it always had to submit to a third-party decision if another watercourse State so decided. If it then failed to comply with that decision, it faced the spectre of absolute liability. He could not believe that States which made active use of international watercourses within their territories would be prepared to accept such rules, nor did he see why they should do so. Moreover, the articles did not give any bite to the general principles. They were too narrow in scope, were not well balanced and focused mainly on third-party decisions rather than on co-operation between watercourse States. They would therefore require extensive recasting and he doubted whether that could be left to the Drafting Committee.

11. Mr. BARBOZA congratulated the Special Rapporteur on his excellent third report (A/CN.4/406 and Add.1 and 2), which contained a wealth of examples from State practice. The procedural rules in chapter III of the draft were necessary in order to ensure application of the principles set out in articles 7 and 9, in chapter II, for the concepts of reasonable and equitable use and of appreciable harm were protean and changed depending on the particular watercourse and the case in question. It was therefore impossible for those concepts to be determined *in abstracto*; hence the need for article 8, which indicated some of the factors to be taken into account. Consequently, it was indispensable to establish procedures to shape those concepts.

12. The Special Rapporteur cited cases in which the ICJ had been called upon to establish limits, as in the *North Sea Continental Shelf* cases, and others, such as the *Fisheries Jurisdiction* cases, in which it had been asked to determine the scope of certain preferential rights (*ibid.*, paras. 49-50). The connection with watercourse management was obvious, the aim in all instances being to mark out rights and interests with the distant help of general principles. As in other topics in international law, the fact was that the one under consideration was imprecise and complex; but the Commission should strive to regulate the matter in law. Its mandate from the General Assembly responded to the urgent need to find a solution as soon as possible to a

chaotic and litigious state of affairs. The only possible solution was to use procedures such as negotiation and third-party dispute settlement to achieve not only an equitable, but also a rapid settlement of differences.

13. Like Mr. Bennouna (2008th meeting), he had wondered about the link between draft article 10, which set out the "general obligation to co-operate", and the strictly procedural articles, and had come to the conclusion that the foundation for the latter lay not in international co-operation and solidarity but simply in the legal duty not to cause harm to a third party: *sic utere tuo ut alienum non laedas*, which was a well-established principle of international law.

14. The draft combined three principles, namely reasonable and equitable use, optimum utilization and the avoidance of causing appreciable harm. The first two were interconnected in article 7, because the aim of reasonable and equitable use should be to secure optimum utilization of the shared resource. Nevertheless, they could sometimes be incompatible, for example when one riparian State was more developed than the other and had advanced technology enabling it to make much greater use of the waters than did the other riparian State, in which case the concept of reasonable and equitable use would temper the requirements of optimum utilization. Similarly, there was a link between the principle of reasonable and equitable use and the principle of not causing appreciable harm, inasmuch as the latter could sometimes be measured only in terms of the former, in other words of the imbalance it occasioned between States' reasonable and equitable shares in the watercourse. Otherwise, any new use affecting some previous use by the other State would be prohibited, unless it did not affect reasonable and equitable use of the waters.

15. Accordingly, the principle of co-operation would, by definition, seem to apply to joint initiatives to achieve optimum utilization, whereas the principle of not causing appreciable harm related to the obligations to notify and to consult. Those obligations did in all probability entail a process of co-operation, but their origin undeniably lay in the duty not to cause harm. Consequently, the title of chapter III could be replaced by something like "Obligations and procedures relating to international watercourse management", and article 10 could be moved to chapter II, which was concerned with general principles.

16. He was convinced by the Special Rapporteur's arguments and examples that the obligations to notify and to consult were well established, and the question whether they formed part of customary international law did not seem to be particularly important, since the Commission's mandate included both progressive development and codification of international law. The important thing was for the Commission to prepare legal rules to govern the matter of international watercourses, and in so doing it should establish the obligations to notify and to consult, which were to be found, as the Special Rapporteur indicated, in many multilateral and bilateral treaties and also in the decisions of international courts and tribunals, the resolutions of intergovernmental organizations and the

<sup>3</sup> *I.C.J. Reports 1969*, p. 3.

recommendations of learned bodies. The objectiveness of those sources could not be impugned.

17. He agreed basically with the provisions of draft article 11, which took account of cases of harm and cases of risk. If that were not so, the draft would be incomplete and it would be difficult to draw a strict line of demarcation between one case and the other, which would merely create additional uncertainty. Moreover, the obligation stemming from an activity which presented a risk should not be consigned to the uncertain limbo of co-operation. The duty to notify and to consult arose in every instance and only subsequent consideration that was necessarily bilateral, or possibly multilateral, could determine the true nature of the use in question and the appropriate régime to be applied.

18. Draft article 12 could be dealt with by the Drafting Committee. The reasonable period of time referred to in paragraphs 1 and 3 should be as short as possible. In the event of any differences in determining the period, they should be summarily resolved to avoid prejudice to the notifying State and to remove the possibility of a *de facto* veto by another State or States. The notion of co-operation in paragraph 2 should be deleted by saying something along the lines of "the notifying State shall provide the notified States, on request, with any additional data and information . . .", so as to retain the original obligation to notify. It seemed logical to prevent a new use from being initiated without the consent of the notified States, since the obligation covered solely projects which presented a risk of causing "appreciable" harm.

19. Draft article 13 was also acceptable in principle. Since, in paragraph 3, which related to negotiations, the second sentence was merely indicative, the words "*inter alia*" could be inserted after "include". Alternatively, the whole of the sentence could be deleted and its content included in the commentary, which should also take account of the possibility that, ultimately, the use might not be permitted.

20. Draft article 14 posed no problems. As for draft article 15, it was understandable that an urgent project could be undertaken in good faith for what it might be better to term "serious" public health, safety or similar considerations. However, the use might ultimately be prohibited, in which case the notifying State would not be able to proceed with the project and would have to bear the costs or the compensation payable under its internal law. In other words, the State in question would not be able to proceed simply by paying compensation to the other States, a point which tied in with his comments on paragraph 3 of article 13.

21. The General Assembly and a wide range of bodies and persons interested in the present topic were following the Commission's work closely. Essentially, a conflict between two equal territorial sovereignties had to be resolved and neither should prevail over the other: the sovereignty of the upstream State, which claimed that it was free to act in its territory as it saw fit, and the sovereignty of the downstream State, which required that the waters of the watercourse flowing into its territory should have suffered no adverse effects as regards volume or quality. It was a classic situation calling for

regulation by law, which should respect the nature of the shared resource that international watercourses were. The Commission's work had suffered delays because of changes of special rapporteur and the unusual fact that it had also gone back on earlier agreements: for example, the deletion of an article which had regarded watercourses as a shared natural resource, a concept which, in his view, rightly indicated their legal nature.

22. He was firmly opposed to the idea of turning the procedural articles into mere recommendations, or basing definite obligations to notify and to consult on the concept of co-operation. The Commission should spare no effort to arrive promptly at the legal formulations required of it by the General Assembly.

23. Mr. SHI noted that the Special Rapporteur regarded the procedural rules in draft articles 11 to 15 as an indispensable adjunct to the general principle of equitable utilization. There was undoubtedly an objective need for procedural rules of some kind, since without them the principle of equitable utilization could become devoid of meaning. Nevertheless, the actual rules embodied in articles 11 to 15 could hardly be considered as part of the existing law of international watercourses; rather, they were generalizations drawn from bilateral and regional treaties on specific international watercourses and from intergovernmental or non-governmental resolutions or declarations and studies on the subject. In short, the proposed articles were an attempt at progressive development of the law.

24. The question therefore arose as to what kind of procedural rules the Commission should develop. Clearly, if progressive development was to be successful, the rules would have to be widely accepted by sovereign States; and the articles in question would have a better chance of being generally accepted if they struck a proper balance in the protection of the rights and interests of all the riparian States concerned. In the procedural rules proposed by the Special Rapporteur, however, the scales were tipped against States contemplating new uses of an international watercourse.

25. In the first place, notification of contemplated new uses was made an absolute duty and a penalty was imposed for failure to notify. Notice of a new use was required under draft article 11 whenever the use might cause appreciable harm to other States. So long as there was a possibility of appreciable harm to other watercourse States, it was undoubtedly appropriate to require prior notification. No such duty to notify would exist, however, if the author State considered, on the basis of all available data and information, that the contemplated use would not cause appreciable harm to other watercourse States. Yet, even in that case, draft article 14 would allow other watercourse States to invoke against the author State the obligation to notify under article 11. The only condition set for invoking that obligation was a mere belief in the possibility of appreciable harm, for article 14, paragraph 1, provided that "any of those other States believing that the contemplated use may cause it appreciable harm may invoke . . .". States could easily take advantage of that loophole in order to raise objections, and the State contemplating a new use could be unjustly obliged to enter

into negotiations. Article 11, when read in conjunction with article 14, paragraph 1, implied that a State contemplating a new use was under a duty to notify other watercourse States whether or not the use in question might cause appreciable harm. Furthermore, under article 14, paragraph 3, failure to notify would give rise to liability for “any harm” whatsoever. It was a provision that imposed a penalty for failure to provide notification—a particularly harsh penalty, since the initiation of the new use might ultimately prove to be justified.

26. According to draft article 12, paragraph 1, the notifying State had to allow the notified State a “reasonable” period of time for study and evaluation; in the event of disagreement as to what constituted a “reasonable” period of time, paragraph 3 of the article required the States concerned to negotiate in good faith with a view to agreeing upon such a period. Those provisions were formulated in such a way that the burden of the duty to negotiate fell essentially on the notifying State. Admittedly it was laid down that such negotiations must not “unduly delay” the initiation of the contemplated use, but “undue delay” was a vague and uncertain concept and no attempt had been made to define it. The terms of article 12 would thus afford a notified State the pretext to use delaying tactics without exposing itself to the charge of violating the principles of co-operation and good faith.

27. As to the duty to reply to a notification, the draft articles did not require a notified State to explain in detail its grounds for objecting to a contemplated use and to furnish the notifying State with sufficient data and information. The articles were, on the other hand, strict in requiring a notifying State to supply sufficient technical data and information. Moreover, unlike failure to notify, failure to reply was not penalized. The duty of the notifying State to consult and to negotiate was thus erected into an absolute and unconditional duty, without reasonable regard for that State’s rights and interests. Furthermore, the articles under consideration lacked satisfactory provisions to deal with a situation in which prior notification had been given and consultations and negotiations had been conducted for some time without success. In the absence of an appropriate provision to cover that situation, an objecting State could in effect veto a contemplated use by indefinitely delaying the negotiations.

28. In conclusion, the proposed procedural rules prejudiced somewhat the rights and interests of States contemplating new uses of an international watercourse. It was not easy to strike a balance between the interests of all the riparian States concerned, despite the efforts made by the Special Rapporteur.

29. Mr. BARSEGOV said that he would first like to say a few words about the legal basis of the proposed mechanism for implementation, which comprised the procedures of notification, consultation and dispute settlement. As evidence of the existence of general international legal rules in that field, some members of the Commission had referred to customary law, something which compelled him to linger for a moment on custom. Any conventional course on international law taught that custom was formed as a result of inter-State practices that were enduring, uniform, continuous and

peaceful, in other words that had not led to any opposition. To those conditions for the formation of custom, namely duration, uniformity, continuity and absence of opposition, a generally held view would add the requirement of *opinio juris*, that was to say the clearly expressed will of States that the practice in question was to be considered as customary law. Only if all those elements were combined was there a rule of international law. Yet some now maintained that, in view of the contacts existing nowadays between States, their positions were known immediately—some even went so far as to speak of “instant history”—and duration was no longer required as a condition for concluding that a customary rule did exist. A few examples would illustrate what such an interpretation would lead to.

30. In the 1950s, a few Latin-American States had unilaterally decided to increase the limit of their territorial sea to 200 miles and had declared that the limit constituted a rule of customary international law. It was well known that the 1982 United Nations Convention on the Law of the Sea had not confirmed that view, since it had retained the 12-mile limit for the territorial sea. However, references were starting to be made nowadays to the instant creation of custom, even among those who had been opposed to the 200-mile limit at the time. For instance, one State which had refused to accede to the Convention on the Law of the Sea in order not to assume certain obligations that were not in its interests, none the less sought to utilize some provisions on the exclusive economic zone and the continental shelf that were favourable to it by asserting that they were customary rules.

31. Having examined the legislation of various States on the exclusive economic zone and the continental shelf, he had found great differences between those bodies of legislation and the provisions of the Convention. For example, some “territorialists” had not, further to the Convention, rescinded their laws establishing a 200-mile limit on the territorial sea. The same was true in the case of the continental shelf, which Mr. Calero Rodrigues, for example, considered as being comparable with the territory of a State, a view that was also upheld by some States but had not been confirmed by either the 1958 Convention on the Continental Shelf or the 1982 Convention on the Law of the Sea. Accordingly, so long as there were fundamental divergences in the practice of States, it was absolutely impossible to speak of the existence of international custom in that field. It was necessary to guard against hasty conclusions, particularly when they could well have major consequences in practice.

32. Similarly, it was an inescapable conclusion that those who viewed certain rules relating to watercourses as being rules of customary law were simply taking their wishes for reality. There was no uniform general practice concerning mechanisms of implementation. In fact, while it was true that mechanisms of that kind were provided for in certain agreements concluded between a small number of States concerned, it was apparent from the examples cited by the Special Rapporteur that each of those agreements was on a particular water resource and that a particular object was fixed for the procedures of notification, consultation and negotiation—the con-

struction works for hydraulic installations in the Drava Basin, or the protection of Lake Constance, for instance. In each case, the State concluding an agreement knew what consequences it wished to avoid and what works could lead to such consequences; thus States were sometimes compelled to make reservations in regard to certain procedures.

33. The existence of such agreements between only a small number of parties and relating to specific watercourse uses was not enough to infer that a general rule of international law had been formed. Perhaps there was a tendency for agreements of that kind to increase in number, but it was quite premature to speak of general rules of procedure in that field. It was no coincidence that, in his third report, the Special Rapporteur cited only one general convention on the matter, namely the Convention relating to the Development of Hydraulic Power affecting more than one State, which dated back to 1923 (A/CN.4/406 and Add.1 and 2, para. 64). There was no more recent example in the report. The legal and technical problems which that Convention had sought to govern were very different from the question now under consideration by the Commission, since the aim had been to use hydraulic power in the common interest. When States reached an agreement to use water in the common interest, they were required to act in accordance with the obligations stemming from the agreement. However, even in that Convention, which appeared to presuppose the possibility of a broader use of dispute-settlement procedures, those procedures were set out very cautiously: the Convention merely stipulated that the States concerned would negotiate with a view to concluding specific agreements. Hence the Convention did not provide for procedures involving third parties or binding decisions.

34. Proof of the existence of general legal rules could also be sought in the practice of international arbitral tribunals. As the Special Rapporteur himself had pointed out, however, there had been no recent decisions by international tribunals on international watercourse problems in general, or on the duty to notify and consult in particular.

35. With regard to draft article 11, there was no need to be a great specialist in international relations or in international law or to be particularly well versed in the techniques of the utilization of watercourses to realize that, aside from the requirement, already noted in the Commission, of a favourable political climate in relations between watercourse States, the States concerned could fulfil an obligation to notify only if they maintained good relations and had the technical know-how enabling them to evaluate the potentially adverse effects of a particular new use on their own territory and on that of other States. Yet the fact was that not all States had the necessary specialists and the means to obtain the costly equipment they would need in order to conduct the requisite studies. In practice, the requirement of notification based on appropriate evaluations was therefore unrealistic for the majority of States. Furthermore, it should be recognized that the present state of science and technology did not make for reliable forecasts. Again, with regard to the economic, scientific and technical side of relations between States, inter-

State contacts had to be relatively close if States were to be in a position to assess the potential effect of the execution of a particular plan for the use of a watercourse in other States. In addition, the concept of appreciable harm was quite relative, from the standpoint of both its intensity and its extent.

36. As for the notion of a "new use", he wondered about the reasons why a use should be regarded as new and whether it should be so for the whole of mankind, for all the riparian States or for only one of them, and in that case, which one. With reference to paragraph (4) of the Special Rapporteur's comments on article 11, he would point out that the terms "new use" and "contemplated new use" constituted fundamental elements of the draft articles on the implementation of the draft as a whole, and it was essential to define them. To his mind, in terms of methodology it was not justified to draft articles without, at the same time, explaining the conceptual basis thereof. Such a method was unfortunately becoming more common in the practice of the Commission and he would revert to that problem in the discussion on methods of work. For the moment, he would simply emphasize the need for a precise definition of what "new use" was taken to mean, so that the corresponding provisions could be elaborated. Unfortunately, the Special Rapporteur did not propose any interpretation, although in his comments he in fact cast doubt on the necessity and usefulness of such a definition. According to paragraph (3) of his comments, new projects or programmes and any change in an existing use should be considered as new uses.

37. A reading of the comments on draft articles 12 and 13 showed that, in the opinion of the Special Rapporteur, the question of the necessary periods of time for the study and evaluation of potentially adverse consequences should command the Commission's careful attention. The Special Rapporteur considered that the period depended on the particular situation. He doubted the possibility of formulating general recommendations in that regard, which proved that the question could be settled satisfactorily only on a case-by-case basis, when the specific aspects of a use were known and the particular features of a given watercourse could be taken into account. A special rapporteur could not be expected to define the concept of a "reasonable" period of time for notification. Nothing made it possible in practice to establish one period rather than another for States that were supposed to reply to a notification.

38. The obligation to negotiate in connection with the contemplated use of a watercourse was a requirement that could not give rise to any controversy. Nevertheless, that aspect undoubtedly warranted close scrutiny by the Commission. In the explanations given to justify that obligation, the Special Rapporteur referred to the practice of the ICJ. In paragraph (5) of his comments on article 12, he expressed the view that the Court's judgment in the *North Sea Continental Shelf* cases "holds interesting lessons for the field of watercourse law, requiring as it did that the parties apply equitable principles in their negotiations". However, the obligation imposed by the Court on the States concerned to conduct negotiations in order to arrive at an

equitable solution was by no means typical of judgments relating to natural resources, since it was also found in judgments rendered in cases of quite another type. Obviously, negotiations on the use of a watercourse could be based on the general obligation to cooperate, and in that respect the Charter of the United Nations provided a much broader basis for the obligation to negotiate. The fact remained, however, that the obligation to negotiate had a specific legal content and that it was possible to envisage ways of increasing the effectiveness of negotiations.

39. His only objection in that respect concerned the reference made by the Special Rapporteur to the judgments rendered by the ICJ in the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases in order to justify the proposed concepts, whereas the negotiations contemplated by the Court in its judgments were based on observance of the sovereignty and sovereign equality of States. Those cases involved the delimitation of the continental shelf, in one instance, and the settlement of fisheries' disputes in the other. Those judgments could not be considered as precedents, since the question asked by the Special Rapporteur himself was of a quite different kind, concerning as it did the right of a foreign State to participate in the settlement of matters falling within the exclusive jurisdiction of another State on whose territory there was a watercourse. The solution proposed was unrealistic in that it ignored the sovereignty of the State over that part of the watercourse passing through its territory.

40. He recognized that the content of sovereignty was not immutable. In many cases where the solution to a problem fell traditionally within the exclusive jurisdiction of States, those States negotiated and concluded agreements, and that was how the process of interdependence was reflected in the law. In the course of that process, the content of sovereignty became less strict, and the different types and degrees of cooperation among States became more clearly defined. A current development was the emergence of new ways of organizing contacts between States which ensured close interrelationships in many fields, including the economic and political fields. Did that mean that the notion of sovereignty and, consequently, the principles of international law relating to sovereignty, sovereign equality and territorial integrity were in the process of disappearing? Did the reference to sovereignty indicate a return to the nineteenth century? Of course not. The concept of sovereignty was to be found at the root of all the changes taking place. Indeed, it was the guarantees of sovereignty which enabled States to act more boldly, to embark on various forms of co-operation and gradually to extend the areas in which they co-operated with other States. Those considerations applied to all the draft articles, including articles 13 and 14 on the settlement of disputes.

41. In general, the Special Rapporteur seemed to have exaggerated the role of binding procedures for the settlement of disputes. As to his conception of the modalities whereby States would invoke those procedures and the cases in which they would be implemented, it was to be noted that the settlement procedure would apply to differences of view concerning

the consequences of a proposed project. A reading of draft article 14 led to the conclusion that such differences could stem not only from existing projects, but also from information indirectly received on the nature of the proposed project. In that regard, he wished to point out that an arbitral tribunal dealt not with differences of view, but with legal questions, as provided in the Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes. For example, Yugoslavia and Austria, which were parties to the 1954 Convention concerning Water Economy Questions relating to the Drava,<sup>6</sup> had entered into a number of obligations relating to the diversion of water in the Drava Basin and had set out procedures for the settlement of disputes which might arise with regard to water-use rights. Questions concerning the use of the waters of the Drava were dealt with by a commission of experts. If such binding procedures were recognized in international law, they would certainly be embodied in an instrument as fundamental as the Charter of the United Nations. But the Charter was based on a quite different premise, inasmuch as it laid down a free choice of means to settle disputes.

42. States accepted binding procedures in the case of certain international agreements. However, there was a trend towards fewer agreements of that kind, and States displayed a particularly cautious approach towards such procedures when questions affecting territorial sovereignty were involved. For example, such procedures did not apply to disputes relating to the resources of maritime areas falling within national jurisdictions. Yet was the conservation of marine resources not a question that affected the interests of mankind as a whole? How had the Third United Nations Conference on the Law of the Sea dealt with that question? Far from referring to universal norms for collective settlement, it had opted for the creation of exclusive economic zones. Members of the Commission who favoured collective management of water resources should study the positions adopted in that regard by the countries whose legal systems they represented, and should compare those positions with the approach they now adopted towards the question of water resources under the permanent sovereignty of States.

43. Suitable examples were to be found in the mineral resources of the ocean, the rational and optimum exploitation of which concerned mankind as a whole, and the decision by the United Nations Conference on the Law of the Sea to establish exclusive rights over the resources of the continental shelf was of particular importance in that regard. Even if a State did not assert its rights over the continental shelf and did not exploit its resources, no other State could lay claim to those resources. He would remind the Special Rapporteur that no procedure, whether mandatory or optional, was provided for in that regard, even in the case of litigation with an international organization deemed to represent mankind as a whole, concerning the outer limit of the continental shelf. The same could be said with respect to the procedure for the settlement of disputes relating to the rights of other States over the surplus of the allowable catch of the living resources of the exclusive

<sup>6</sup> United Nations, *Treaty Series*, vol. 227, p. 111.

economic zone. If the Special Rapporteur wished to find precedents in the law of the sea, he could draw on those examples. In his own view, the Commission should recognize objective realities and concentrate on tasks which were both promising and practicable, without confining itself to the codification of international law.

44. As the area for codification of the law shrank and mankind found itself confronted by new problems, the important thing was the progressive development of international law, which meant filling in gaps which already existed or were likely to occur with the creation of new areas of international relations. The new problems included the rational use of non-renewable water resources, an area in which progressive development, as well as codification, was needed. The Soviet school of international law not only recognized that fact, but was actively formulating an appropriate doctrine. In the Soviet memorandum on the development of international law presented at the forty-first session of the General Assembly,<sup>7</sup> it was emphasized that present-day realities urgently required not only that all States should adhere strictly to the existing principles and norms of international law, but also that there should be a qualitative development of international law, in the light of the emergence of a new category of problems of a universal nature or affecting mankind as a whole.

45. In what direction should international law develop in order to become the basis of an international legal order and of an international juridical legitimacy? The members of the Commission could not raise objections to the basic tenets of international law, such as sovereignty, and in particular the permanent sovereignty of States over their natural resources. Dealing with matters concerning relations between States, and consequently finding solutions that were acceptable to all parties and took account of their interests, called for deft use of the mechanisms of international law, on the basis of the principle of the sovereign equality of States. In the present instance, the search for implementation machinery should draw on the wealth of experience afforded by practice. Yet, when circumstances required, practice tended towards the creation of commissions of experts able to consider the questions raised by specific uses of watercourses. Needless to say, the draft articles prepared by the Commission should not undermine existing international agreements through which States organized their relations. They must also take account of article 16 of the 1969 Vienna Convention on the Law of Treaties. Nor should it be forgotten that a newly independent State was not bound by agreements concluded at the time it had been under colonial rule.

46. The fact that the entire effort of the Commission on the topic of the law of the non-navigational uses of international watercourses was based on a quite vague working hypothesis could have adverse consequences for the Commission's work. The inherent flaw in the Commission's practice of preparing draft articles without first clearly defining the actual subject of such regulations could place the Commission in an inextricable situation in so far as concepts were concerned.

Thus far, the Commission had always spoken of the undefined nature of the watercourse system concept; yet it was now proceeding to prepare draft articles purportedly based on a sound conceptual foundation. Thus it was faced with the question of the legitimacy of using terms such as "international" in connection with watercourses. Hitherto, "international rivers" had been taken to mean rivers which flowed into the sea after passing through the territories of a number of States and which, by virtue of international agreements, were open to the commercial shipping of all States. Consequently, not all rivers passing through the territories of a number of States were international rivers, nor were they all subject to an international régime. The international river concept was not a geographical concept, but a legal one, based on the assumption that the régime was determined by a special agreement concluded by riparian States, although the river could also be used by third States. In the present instance, the future scope of the draft articles being prepared would not coincide with what was currently meant in international law by "international rivers" subject to an international shipping régime, and the result was a certain legal inconsistency.

47. In Soviet legal doctrine, a distinction was drawn between the concept of an international river and that of a multinational river, which were not given the same legal content. Multinational rivers could not be used by third States. In the light of the discussion of the question, it was necessary to clarify the terminological link between the existing concepts of a multinational river and an international river. The proposed definition of a "watercourse" led to the inevitable conclusion that the Commission did not intend to give that concept the same legal content as the concept of an international river. Serious thought must therefore be given to the terms used, in order to obviate any possibility of misinterpretation.

48. In conclusion, he expressed the hope that the Special Rapporteur would give careful consideration to the concerns expressed in the course of the debate and take account of them in further preparation of the draft articles. He wholeheartedly shared Mr. Graefrath's view that the draft articles required in-depth consideration before being referred to the Drafting Committee.

49. Mr. BENNOUNA said that the problem or the misunderstanding created by draft articles 11 to 15 apparently arose out of the fact that they could not be read separately from the substantive provisions in chapter II of the draft. Hence the looseness and lack of precision, which were due less to the procedure than to the principles themselves, inasmuch as the procedure referred back to the principles. The Commission thus found itself in a position in which it should clarify earlier articles, namely those on the principles on which the procedural articles were based. However, the situation should not be overdramatized, since the Special Rapporteur, like his predecessors, had made it clear that those draft articles were simply of a residual character, in that they would apply only in the absence of any agreement between the parties. The provisions were thus intended to prevent conflicts. Moreover, the notion of co-operation should not be interpreted as meaning the

<sup>7</sup> Memorandum transmitted to the Secretary-General by a letter from the Soviet delegation dated 24 November 1986, and circulated as document A/C.6/41/5.



taking of joint action, but should be recognized as being preventive in character. The third report of Mr. Schwebel contained, in chapter III, a section E specifically entitled "Avoidance and settlement of disputes".<sup>8</sup>

50. If articles 11 to 15 were intended to impose restrictions on the jurisdiction of States and thereby impose specific obligations on them, they should be as clear and concise as possible. However, the lack of precision was not so much a matter of the legal terminology used as of the essential logical link between the procedure and the substantive principles. The first question to which it was important to provide a clear answer was the exact relationship between articles 11 to 15, on procedure, the articles on equitable sharing and reasonable and equitable utilization, and the article on the prohibition of activities which might cause appreciable harm to other watercourse States. He wondered whether articles 11 to 15 related to equitable utilization, to appreciable harm, or to both at the same time, and whether they were intended to prevent any breach of the future treaty. If they related both to equitable utilization and to the prohibition on causing appreciable harm, the Commission should seriously consider the link between those two concepts. In his third report (A/CN.4/406 and Add.1 and 2, para. 40), the Special Rapporteur justified the procedural provisions by saying that "the rule of equitable utilization would mean little in the absence of procedures at least permitting States to determine in advance whether their actions would violate it". In the Special Rapporteur's view, those provisions were designed to give full impact to the rule of equitable utilization.

51. Whereas draft article 11 referred only to a use which could cause appreciable harm to other States, draft article 13 referred both to appreciable harm and to depriving a State of its equitable share. Moreover, the Special Rapporteur used the conjunction "and", rather than "or", so that the notified State must show that both those conditions existed to be able to object to a contemplated use: hence the question of the link between them. Yet why did the notification provided for in article 11 relate solely to appreciable harm? As Mr. Calero Rodrigues (2010th meeting) had said, such lack of rigour had to do with the persistent difficulties with the wording of draft article 9. Clearly, the wording of articles 11 to 15 could not be decided on until the wording of article 9 had been finalized.

52. In draft article 9, setting out the prohibition on causing appreciable harm, the previous Special Rapporteur, Mr. Evensen, had provided for only one exception, namely the existence of a watercourse agreement or other agreement or arrangement between the States concerned. He had thus glossed over the question of the link between appreciable harm and the obligation regarding reasonable and equitable utilization. That had not always been the case, however. In draft article 8 (Responsibility for appreciable harm) as submitted by Mr. Schwebel in his third report,<sup>9</sup> the only exception

provided for had been equitable utilization. Paragraph 1 of that draft article had read:

1. The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.

Under those circumstances, appreciable harm arising out of equitable utilization would not be prohibited. It was thus possible to conceive of equitable utilization that harmed a State's interests and obliged the States concerned to attempt to reconcile their interests.

53. In paragraph 2 of draft article 8, Mr. Schwebel had also addressed the problem of whether the use of the watercourse was by the State or by private individuals. It had read:

2. Each system State is under a duty to refrain from, and to restrain all persons under its jurisdiction or control from engaging in, any activity that may cause appreciable harm to the interests of another system State, except as may be allowable under paragraph 1 of this article.

That provided an answer to the problems of the link between equitable utilization and appreciable harm, and of the type of utilization, which might be by the State or by persons acting under its control.

54. Paragraph 3 of the same draft article 8 dealt with the current question of the use of the term "contemplate" by using instead the terms "undertakes", "authorizes" or "permits" a project. If the Commission agreed to the exception of equitable participation, as provided for by Mr. Schwebel in draft article 8 on appreciable harm, there would be no need to refer to it in the procedural rules. It would simply be necessary to state in draft article 13 that a notified State which considered that the new use was contrary to the article in question should so inform the notifying State, without any further details. Naturally, the article in question must be clear and complete.

55. Draft article 11 posed a major problem by obliging a State to provide notice of a use which it considered unlawful because it would cause appreciable harm. How in international law was it conceivable to compel a State to provide notice of its intention to commit an unlawful act? Much more neutral wording should therefore be used. A passage of the arbitral award in the *Lake Lanoux* case required that consideration should be given "to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right" (A/CN.4/406 and Add.1 and 2, para. 73). Moreover, the Helsinki Rules laid down the obligation to provide notice of any use likely to affect the interests of another State (*ibid.*, para. 85). The terminology was quite different from that used in draft article 11. In those two examples, States were to some extent exempted from providing notice of uses affecting only their own territory. A provision drafted along those lines would in no way entail an assessment of the lawfulness of the conduct.

*The meeting rose at 1.05 p.m.*

<sup>8</sup> *Yearbook* . . . 1982, vol. II (Part One), p. 181, document A/CN.4/348.

<sup>9</sup> *Ibid.*, p. 103, para. 156.

## 2012th MEETING

Wednesday, 10 June 1987, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Benouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Co-operation with other bodies (continued)\*

[Agenda item 10]

#### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

1. The CHAIRMAN welcomed Mr. Hondius, Observer for the European Committee on Legal Co-operation. He recalled that it had been in 1966 that the European Committee had decided to establish working relations with the Commission and to invite it to attend discussions on questions within the competence of both bodies. Since then a most fruitful co-operation had been maintained. Areas of common interest included such matters as the jurisdictional immunities of States and their property. The Committee of Experts on Public International Law, within which the activities of the European Committee relating to public international law were concentrated, had on its agenda such subjects as liability and diplomatic law, which were also topics of interest to the Commission.

2. Exchanges between the European Committee and the Commission were to the mutual advantage of both bodies and he welcomed the opportunity to invite the Observer for the European Committee to address the Commission.

3. Mr. HONDIUS (Observer for the European Committee on Legal Co-operation) thanked the Chairman for his welcome and said that, in December 1986, the European Committee had been fortunate enough to hear a statement by a distinguished representative of the Commission, Mr. Reuter.

4. Reporting on the progress of the legal work of the Council of Europe, in particular the work carried out under the auspices of the European Committee on Legal Co-operation, he pointed out that in 1987 the Council of Europe had entered the first phase of implementation of the Third Medium-Term Plan (1987-1991), entitled *Democratic Europe: humanism, diversity, universality*.<sup>1</sup> That plan placed greater emphasis than the preceding plans on the political role of the Council of Europe and on the role of its ministerial conferences. An informal

conference of European Ministers of Justice was currently taking place at Helsinki and the next formal conference would be held in 1988 at Lisbon.

5. The chapter of the Medium-Term Plan devoted to legal co-operation was entitled "A law to match Europe's future". The legal work undertaken in that context would focus on the elaboration of instruments to meet the challenges of science and technology, such as biomedical sciences, informatics and pollution, and on certain legal problems arising at the social and political levels, such as changing family structures, poverty, refugees and, unfortunately, terrorism.

6. The European Treaty Series—many treaties in which had been elaborated by the European Committee on Legal Co-operation—now numbered 124 instruments, 106 of which were already in force. The latest of them—the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations—had been opened for signature in 1986 and had been signed by six States, including Switzerland, which was the seat of a great many non-governmental organizations. Three draft conventions had been, or were being, prepared on financial and fiscal matters. The first, dealing with mutual assistance in tax matters, had been prepared in collaboration with OECD and had been adopted; the second concerned the communication of information between States to combat "insider trading"; the third dealt with bankruptcies involving assets in more than one country.

7. Other Council of Europe conventions were the responsibility of steering committees outside the European Committee on Legal Co-operation. The Steering Committee for Human Rights had submitted to the Committee of Ministers, for adoption, a draft convention for the prevention of torture and inhuman or degrading treatment or punishment, and the Steering Committee on the Mass Media had begun drafting a convention on transfrontier broadcasting. Two conventions dealing with water were still before the Committee of Ministers, but problems of international law or technical difficulties had so far prevented their adoption. They were the draft convention for the protection of international watercourses against pollution and the draft convention for the protection of the underwater cultural heritage.

8. The Council of Europe was aware of its responsibility with regard to monitoring the application of treaties. That applied especially to conventions which did not provide for special implementation machinery: wherever necessary, the Council had to take action to improve their implementation or to overcome practical difficulties.

9. The Council of Europe had also made a number of new recommendations to the Governments of its member States, the texts of which had been prepared by the European Committee on Legal Co-operation. One of those recommendations reflected certain changes in the world of diplomacy: it contained a model agreement to enable family members forming part of the household of a member of a diplomatic mission or consular post to engage in a gainful occupation in the receiving State.

\* Resumed from the 1996th meeting.

<sup>1</sup> Council of Europe publication (Strasbourg, 1986).

10. The Council of Europe was proud of its position as a dynamic regional organization within the worldwide framework of the United Nations. On 11 May 1987, it had signed in New York the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. That Convention was important for the Council of Europe, which not only was itself the depositary of many international conventions, but also entered into international agreements with other institutions.

11. All the items on the agenda of the International Law Commission were of interest to the 21 member States of the Council of Europe, which was currently giving priority to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. That topic was to be examined from 23 to 25 June 1987 by the Committee of Experts on Public International Law, in connection with the work of the Group of Ministers' Counsellors on Terrorism, which had been set up following the Conference of European Ministers responsible for combating terrorism, held at Strasbourg in November 1986.

12. He thanked the Commission for giving him the opportunity to address it and would be glad to hear members' comments and answer any questions.

13. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for his interesting account of the Committee's valuable work.

14. Mr. REUTER, speaking on behalf of the members of the Commission, thanked the European Committee on Legal Co-operation for having invited the Commission to participate in its work. The Council of Europe had undertaken the long-term task of elaborating a whole network of conventions on widely different subjects. The work it had engaged in was a model of modesty, patience and hope. Whereas the Commission had decided to centre its work on public international law, to the exclusion of private international law and even of international commercial law—although some subjects such as immunities had unexpected relations with other disciplines—the Council of Europe was not confining its work to questions of public international law. There were, however, questions such as terrorism and the traffic in narcotic drugs which public international law could not always ignore.

15. The Observer for the European Committee on Legal Co-operation had said that it was an achievement for two international organizations to be in agreement in studying the same subject. But he would point out that the Council of Europe and the United Nations had never had any disagreement and that, while the Council had followed the Commission in taking up the law of treaties and diplomatic relations, of which it was studying marginal aspects, it was the Council which had opened the way for the study of immunities by the Commission, which showed the solidity of the relations between the two organizations.

16. Mr. KOROMA said he noted from the interesting statement by the Observer for the European Committee that the medium-term plan on legal co-operation covered, among other subjects, that of refugees. There

was, however, another important problem which did not appear to be covered, namely that of immigration, which was not only a social and economic problem, but also a legal one. It was worth recalling that, in the seventeenth century, Grotius had examined that problem in terms of economic development and had expressed the view that immigration could be restricted only in the interests of the State, that was to say if it was harmful to a State's economy. At the present time, restrictions were unfortunately being imposed on immigration for purely social reasons. The topic of immigration thus seemed an appropriate one for consideration by the legal bodies of the Council of Europe.

17. Mr. HONDIUS (Observer for the European Committee on Legal Co-operation) thanked Mr. Koroma for mentioning the subject of immigration. He had not alluded to it in his statement, because it was being dealt with by the Council of Europe through bodies other than the European Committee on Legal Co-operation. Apart from the work being done on the problem of refugees, the Council of Europe had a Committee of Experts on the Movement of Persons, which was dealing with immigration matters. The bodies in question reported directly to the Committee of Ministers.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>2</sup> A/CN.4/406 and Add.1 and 2,<sup>3</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPporteur  
(*continued*)

CHAPTER III OF THE DRAFT:<sup>4</sup>

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)<sup>5</sup> (*continued*)

18. Mr. BENNOUNA, continuing the statement he had begun at the previous meeting, again stressed the need to strengthen the logical connection between the substantive provisions of chapter II of the draft and the rules of procedure in draft articles 11 to 15. He had concluded his earlier statement by saying that the notification formula should be more neutral and refer to substantial harm to the interests of another State, and that in its response the State objecting to the new utilization should allege unlawful conduct on the part of the

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>4</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/4/381.

<sup>5</sup> For the texts, see 2001st meeting, para. 33.

State contemplating that utilization. It was at that point that the mechanism of consultation and negotiation would come into play to prevent a possible dispute.

19. In order to differentiate between the treatment to be applied to harming of interests and that to be applied to infringement of rights, it was necessary to bear in mind the distinction already made by the ICJ on many occasions, in particular in the *Barcelona Traction* case,<sup>6</sup> between rights and interests. The Court had held that a right was a legally protected interest. That being so, a State could allege injury only to a legally protected interest, in other words to a right. It could also claim that a utilization might affect its interests, but it would then have to prove that those interests were legally protected in order to open discussions and dispute-settlement procedure.

20. To maintain the necessary balance between the rights of the notifying State and those of the notified State, the notification would probably have to be accompanied by technical data and guarantees of the confidentiality of certain information. It was obvious that industrial or economic secrets might be involved, which should be protected by imposing an obligation of confidentiality on the State receiving the information.

21. It was also necessary to ensure that the notified State did not engage in delaying tactics, as Mr. Shi had stressed at the previous meeting. For although the reply to the notification had to be made within a certain time, no time-limit was prescribed for the holding of consultations and negotiations. Hence it was necessary to make a choice, by deciding either that the machinery set in motion would lead automatically to compulsory dispute settlement—which did not appear to be the solution adopted by the Special Rapporteur—or that a time-limit would be set for consultations and negotiations, after which the notifying State would regain its freedom of action—although that would not prevent responsibility from being attributed to it if necessary.

22. As for the settlement of disputes, Mr. Reuter, although in favour of arbitration, had said (2008th meeting) that the draft should not go so far as to provide for compulsory arbitration, because in the present state of international law that solution would not be acceptable. The example of the law of the sea in regard to the settlement of disputes had been frequently cited. In fact, both recent international practice and the law of the sea showed that dispute-settlement procedures were offered *à la carte*, as it were. The Commission could therefore adopt that course and propose several procedures, from which States would be invited to choose those that suited them best.

23. In his opinion, draft article 14, which sanctioned failure to notify and provided for a cumbersome procedure, was not necessary. It would be sufficient to provide that failure to fulfil the obligation to notify would engage the responsibility of the State.

24. He considered that the debate had been very useful, because it had revealed the links between the procedural and substantive aspects of the draft articles.

He was inclined to think, however, that it would be premature to refer the draft articles on procedure to the Drafting Committee before the Commission had been able to form a precise idea of the substantive provisions, that was to say the essential framework of the draft. But if the Commission nevertheless decided to submit the articles to the Drafting Committee, the Committee should also have before it draft article 9 on appreciable harm, to which the procedural articles appeared to be linked.

25. Mr. MAHIOU noted that the draft articles under discussion were intended to define co-operation between watercourse States and the procedure to promote such co-operation. He did not wish to contest the view of those members of the Commission who regarded draft article 10 as a substantive provision to be distinguished from the procedural provisions and be more appropriately placed in chapter II, but he thought that was a secondary matter. It was the scope and content of draft article 10 that were essential, whether it was placed in chapter II as a general principle or in chapter III to introduce the various articles dealing with the mechanisms and procedures of co-operation.

26. The fairly general character of the obligation to co-operate had been duly emphasized. It had even been questioned whether such a vague obligation existed in international law and what its foundations would be. He hesitated to open a debate on that point, which would lead the Commission to raise other questions and even to discuss its own mission and the value of the distinction between progressive development and codification of international law. He would therefore confine himself to comments of more limited scope on the treatment of draft article 10 and its wording.

27. Draft article 10 as submitted by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2) was drafted in such spare terms that it might appear rather disappointing, especially when compared with the corresponding draft article submitted by Mr. Evensen, the text of which had been somewhat overloaded. But he found the new version satisfactory and would like to see it examined by the Drafting Committee.

28. With regard to the link between the principle of co-operation between watercourse States and the mechanisms and procedures provided for in draft articles 11 to 15, he thought that, even after review, draft article 10 would still be rather general and would state a flexible rule. On that point he agreed with the interpretation made by Mr. Bennouna and Mr. Barboza (2011th meeting), who considered that the object of co-operation was to promote good relations between States, and especially to avoid disputes. It was the preventive aspects of article 10 that should be emphasized, rather than the idea of participation in a common enterprise. The main point was adherence to certain conduct in the utilization of watercourses, but the obligation to co-operate being essentially a flexible notion, it was difficult to judge whether the rule was being broken. In studying the utilization of watercourses, the Commission was entering the sphere of the economic activities of States, for the evaluation of which it was often necessary to adopt an approach that was more statistical than legal, and in any case less legal than the

<sup>6</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

Commission's approach in other spheres of international relations. Because of the diversity of utilization of watercourses, co-operation between States presupposed a constant evaluation which brought out the position and importance of the mechanisms for consultation, negotiation and perhaps also the settlement of disputes.

29. An over-legalistic approach aiming at exact determination of every right and obligation of States was not necessarily the best. It must sometimes give way to a spirit of co-operation, for it might well be asked what the content of the obligation to co-operate was—whether it was an obligation of conduct or an obligation of result—and it might be thought that the answer lay somewhere in between. The obligation to co-operate was certainly an obligation of conduct; but at the same time States were called upon to act with a view to obtaining a result. Consequently, the mechanisms and procedures for co-operation would be insufficient unless they were imbued with a spirit of co-operation seeking to give effect to a legal régime. He even went so far as to think that certain minor breaches of an obligation could be accepted by a State because that spirit of co-operation prevailed. A State would tolerate a slight departure from the established régime if it was in agreement with the offending State on safeguarding the essentials. Besides, co-operation was not omnipresent, as Mr. Njenga (2007th meeting) had shown.

30. The procedures for notification, consultation and negotiation were all the more necessary because their subject-matter could be technical, because the legal rule could not cover all the concrete situations resulting from that technicality, and because the rule was relative and must permit of a reasonable and equitable result. The subject with which the Commission was dealing opened the way for differences or even disputes. The procedures for notification and consultation must be precise, since they were indispensable for establishing a climate of co-operation and permitting States to act in good faith and to achieve reasonable and equitable results.

31. Several members of the Commission had remarked on the wide gap between the very general nature of the obligation to co-operate and the technical, not to say restrictive, nature of the procedures provided for in draft articles 11 to 15. That was understandable, but the paradox was explained by the fact that a very general rule required precise procedures for its practical application and, conversely, a very clear rule did not require such mechanisms. There was thus an inversely proportional relationship between the generality of a rule of international law and the precision of the procedure for its practical application.

32. Rather than make a textual examination of draft articles 11 to 15, he would discuss the scope of the obligations it was proposed to place on States. For it was by the content of those obligations that States would judge the draft. Four procedures had been submitted in ascending order of the importance of the obligations provided for: information, consultation, negotiation and settlement of disputes. Those obligations were not all on the same level and would evoke different questions, and even anxieties, on the part of

States, according to their effect on the sovereignty and sovereign equality of States.

33. The duty to provide information did not appear to raise any real difficulties. Since the action of one State could cause injury to another, it was natural that there should be an exchange of information, and that duty was generally recognized in international relations. He did not share the fears expressed about it by some members of the Commission and pointed out that States already exchanged information on activities conducted in even more sensitive areas, where sovereignty was claimed *a fortiori*, such as national defence. A State or a group of States might inform other States of military manoeuvres held in their territory, in order to prevent those manoeuvres from being mistaken for an act of intimidation or for mobilization. The information to be supplied would depend on the circumstances, that was to say the possible harmful consequences and technical factors relating to them. In some cases mere notification would be enough; in others additional particulars would be necessary, and perhaps even consultations.

34. If the notifications made were not sufficient to dispel anxieties, particularly where States required complicated data concerning large projects, they would have to proceed to the stage of consultations in order for the situation to be clarified and explained. If difficulties remained, they would be under an obligation to negotiate. That was a real constraint, more serious than the previous ones. As many arguments could be advanced in favour of one view as of another: it was more useful to know what the negotiations should relate to and by what procedures they should be conducted. It was important to reassure States by specifying that sovereignty was not a subject for negotiation. It was necessary to act in such a way that the exercise of its powers by a State did not injure another State. In other words, the utilization of a watercourse was only a practical manifestation of the exercise of sovereignty, but it was limited by respect for the sovereignty of other States. The freedom of action of one State ended where that of another began, and it was in the light of two general principles—reasonable and equitable utilization and the prohibition on causing appreciable harm—that the exercise of the powers of each State was to be understood. There should be no unnecessary negotiations and the emphasis should be on the obligation of the notified State—hence the importance of stressing the reasonable and equitable utilization of a watercourse, which operated in favour of both the notifying State and the notified State. Some defence must be found against the manoeuvres possible for a notified State acting in bad faith, either by preventing the use of delaying tactics or by providing for consequences unfavourable to that State. That was why the time-limit, the forms of procedure and their exact consequences were so important.

35. Thus it was clear how the draft articles should be formulated to take account of those elements. That was where the balance had to be struck between the States concerned. The absence of mechanisms and procedures for negotiation, or provision for inadequate ones, would cause serious problems and lead to unilateral acts that would appear dictatorial and be a source of disputes between States. In short, it was necessary to ensure that a State initiating a new utilization did not do so

to the detriment of another watercourse State and that the notified State did not have excessive power, or a power of veto, against the notifying State. If the exclusion of those two extremes was taken as a starting-point, only appropriate mechanisms of consultation and negotiation could provide a possible compromise resulting from improvement of draft articles 11 to 15.

36. There remained the last obligation: the compulsory settlement of disputes. On that point, it would suffice to invoke the tradition of the Commission. Any procedure for compulsory settlement would take the Commission into a sensitive area where States often had firmly established positions, even though some development had certainly taken place. Several members of the Commission had alluded to the 1982 United Nations Convention on the Law of the Sea, which, among other major innovations, provided for the compulsory settlement of disputes. But there again, as Mr. Barsegov (2011th meeting) had pointed out, derogations were possible, particularly where the sovereign rights of a State were involved. It was in the light of that development and of the positions of States that the compulsory settlement of disputes should be considered. He believed, first, that such settlement should indeed be provided for; secondly, that it should constitute an option for States; and thirdly, that the provision should be placed in an annex to the draft. Thus the draft would appear acceptable to States and would not provoke objections by those in favour of the substantive rules for a convention which the Commission was preparing rather than mere recommendations, because it would not force States to choose an obligatory and rigorous procedure for the settlement of disputes.

37. Mr. PAWLAK said that he wished to discuss what he considered to be the three most crucial and difficult issues raised by the topic under consideration. The first was the question of the legal basis, if any, of the obligation to notify other States of new watercourse uses—in other words, whether customary international law provided any legal basis for the draft articles on notification, consultation and exchange of information. On that question he shared the views of Mr. Ogiso (2010th meeting), Mr. Shi (2011th meeting) and other members that no such basis existed.

38. For a long time international law had existed only as customary law. With the growing number of international treaties, however, the status of customary international law had been considerably reduced, although it had not lost its value, which was recognized in Article 38 of the Statute of the ICJ.

39. State practice by itself did not constitute customary international law: for a rule of customary law to exist, two elements must be present, namely *usus* and *opinio juris vel necessitatis*. The traditional doctrine required that State practice should be long-standing or *diuturnus usus*. In the days of jet aeroplanes and satellite broadcasting, it was perhaps possible to accept a faster development, but the time factor was still necessary. He did not share the view of lawyers of the common-law tradition that customary law could grow out of court decisions, since decisions did not always show the legal basis on which they were taken. For a given State practice to become a norm of customary inter-

national law, it was necessary for State organs to be convinced that the practice constituted a norm of public international law. That point had been stressed by the PCIJ in the “*Lotus*” case.<sup>7</sup>

40. Probably the most important factor, however, was the acceptability of customary rules to States. Their consent could sometimes be tacit. In his own country, Poland, legislation such as the Maritime Code of 1961 recognized the validity of rules of customary international law. The Polish Supreme Court, in its judgment of 15 May 1959, had allowed immunity from jurisdiction claimed by a foreign State on the basis of the relevant rule of customary international law.

41. The abundant material presented by the Special Rapporteur did not, however, provide evidence of any rule of customary international law on which to base an obligation to notify and consult. In particular, international treaties and court judgments did not constitute custom, because they were not of a general character. Moreover, States other than those bound by the treaties or judgments in question would not consider that they had established such a rule of customary law: *opinio juris* was not present. There was accordingly no basis in customary international law for procedural articles requiring co-operation between watercourse States. Any such articles would have to be formulated as new norms forming part of the progressive development of international law.

42. The second issue he wished to discuss was whether draft articles 11 to 15 were acceptable in the light of existing international law. In his third report (A/CN.4/406 and Add.1 and 2, paras. 40-41), the Special Rapporteur said that

... the basic norm governing the use of international watercourses, that of equitable utilization, is predicated upon good-faith co-operation and communication among the States concerned. . . .

State practice therefore reveals a recognition of the need for a spectrum of procedures relating to the utilization of international watercourses, ranging from the provision of data and information . . . to notification of contemplated actions with regard to an international watercourse that may adversely affect another State. . . .

43. For his part, much as he favoured the concept of co-operation in good faith, he could not agree that the obligation to co-operate could be derived from the State practice cited by the Special Rapporteur. That obligation derived rather from general principles of international law such as the sovereign equality of States, and from notions such as the interdependence of States and good-neighbourliness. He agreed on the importance of procedures relating to utilization—although he would have preferred to speak of co-operation in utilization—but those procedures could not be placed on the same level as co-operation itself. Co-operation was the goal and the manifestation of the behaviour of States; provisions on information and notification were only the means of achieving co-operation.

44. Draft articles 11 to 15, in their present form, were not adequate to serve as effective and convenient instruments for co-operation between watercourse States. They set out procedures ranging from notification, consultation and negotiation to third-party dispute settle-

<sup>7</sup> Judgment No. 9 of 7 September 1927, *P.C.I.J.*, Series A, No. 10.

ment, but they did not provide an instrument for co-operation between States. New uses should obviously be covered by the process of co-operation, but co-operation should not be confined to such uses. Co-operation was needed not only to settle disputes, but above all to achieve and maintain the equitable uses and benefits of a watercourse. Furthermore, the draft articles should be formulated so as not to give any State a power of veto over the utilization of a watercourse by other States. As he saw it, such a veto by a notified State was envisaged in draft article 13, paragraph 5.

45. The third issue he wished to discuss was the course to be adopted by the Commission to meet the need for an international notification procedure that would facilitate the fulfilment by States of their obligation to co-operate in the utilization, preservation and development of international watercourses. In his view, draft articles 11 to 15 did not provide a basis on which the Drafting Committee could formulate suitable provisions. The discussion had revealed a marked division of opinion among members of the Commission, which could not be bridged in the Drafting Committee. He therefore supported Mr. Bennouna's suggestion that draft articles 11 to 15 should be reformulated in conjunction with other articles, among them article 9.

46. A workable procedure for notification and consultation would have to be established, but that procedure should create a minimum of obligations for watercourse States. It should also be recognized that co-operation between watercourse States must be based on the fundamental principles of international law, and on good faith and good-neighbourliness.

47. Mr. NJENGA said that on the whole he agreed with the criticisms of draft articles 11 to 15 made by other members.

48. The purpose of draft articles 11 to 15, as stated by the Special Rapporteur in the first sentence of paragraph 61 of his third report (A/CN.4/406 and Add.1 and 2), was an admirable one; but the articles created an intricate and mostly one-sided web of obligations which would seriously erode the sovereign right of a State to utilize its resources for the benefit of its people, with due regard for the legitimate rights and interests of other States. The Special Rapporteur cited a wide variety of authorities and said that they provided ample support for the inclusion in the draft of "a set of articles on notification and consultation regarding contemplated new uses of an international watercourse" (*ibid.*, para. 88).

49. His own reading of the authorities, however, did not lead him to conclude that the practice of States had developed far enough for the rules in question to be codified. Nor could it be said, even taking progressive development into account, that the existing authorities would make the draft articles generally acceptable to that section of the international community which was vitally interested in international watercourses, namely riparian States.

50. The extent of what could be achieved had been revealed by the arbitral award in the *Lake Lanoux* case (*ibid.*, para. 48). The tribunal had held that States were required, in accordance with international practice, "to

seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement"; it had also held that States recognized the need to reconcile some of the conflicting interests involved by making mutual concessions and that "the only way to achieve these adjustments of interest is the conclusion of agreements on a more and more comprehensive basis". It had been recognition of the basic needs of neighbouring States which had motivated the 1972 statute of the Senegal River and the treaty régime governing the Niger River (*ibid.*, paras. 21 and 43), which provided for extensive co-operation, including the prior approval of other contracting States, before any projects were undertaken that might appreciably affect the characteristics of those rivers.

51. A similar instrument was the Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin,<sup>8</sup> signed in 1977 by Burundi, Rwanda and the United Republic of Tanzania, and subsequently acceded to by Uganda. That Agreement provided for the integrated management and development of the entire basin, for under article 3 its operation was extended to such other geographical areas as would facilitate or make possible the study and planning of projects and programmes for the harmonious development of the Kagera Basin. Under article 7, the Commission of the Organization was vested with regulatory powers, including the assessment and, where appropriate, approval of project proposals, with power to sign agreements with Governments and international institutions for technical assistance and financing.

52. The requirement under draft article 11 that a State contemplating "a new use of an international watercourse which may cause appreciable harm" must provide other States "with timely notice thereof" would be counter-productive, since the notifying State was, in effect, being asked to admit a possible wrongful act in advance, with all the consequences that entailed. Furthermore, while the term "appreciable harm" might have a special meaning for a legal tribunal, it would involve a subjective determination by a State contemplating a new use and by a notified State.

53. Article 11 also implied that an obligation was created for the upper riparian State, but not for the lower riparian State. That was as cavalier an approach as that characterizing the 1959 Agreement between the United Arab Republic and Sudan for the full utilization of the Nile waters,<sup>9</sup> under which major projects, such as the Aswan High Dam and the Jonglei Canal, had been agreed without even consulting Ethiopia—which contributed 85 per cent of the waters of the Nile reaching Khartoum—or the other upper riparian States. If there was to be such an obligation, it should apply to all rivers that might be significantly affected by contemplated uses, either in the short term or in the long term. He therefore proposed that the first sentence of draft article 11 should be amended to read: "If a State contemplates a major new use of an international watercourse which may significantly affect the use of the watercourse by

<sup>8</sup> See 2007th meeting, footnote 14.

<sup>9</sup> *Ibid.*, footnote 15.

other riparian States, it shall provide those States with timely notice thereof.”

54. Great care should be taken to ensure that draft article 12 could not be used to delay a project unreasonably by making repeated requests for data. He supported alternative B of paragraph 1, but thought it would be preferable to refer to a period of time “not exceeding nine months”, rather than to a period “which shall not be less than six months”. A nine-month period would leave the notified State sufficient time to request additional information under paragraph 2, and there would then be no need for paragraph 3.

55. Draft article 13 came very close to imposing a veto on any contemplated new use. All the notified State had to do was to claim that a proposed new use would, or was likely to, cause it appreciable harm, and a whole set of obligations would be created for the notifying State. For instance, it would have to “consult with the notified State with a view to confirming or adjusting the determinations” and, if that was not successful, it would have to enter into negotiations “with a view to arriving at an agreement on an equitable resolution of the situation”, in other words one that was acceptable to the notified State, and it might even have to pay that State compensation. If all those efforts failed, it would have to accept a compulsory third-party settlement under paragraph 5—a procedure that would be totally unacceptable to States, since it would undermine their territorial sovereignty and the principle of the sovereign equality of States. The most that would be acceptable would be provision, in paragraphs 1 and 2, for adequate consultation in good faith with a view to arriving at an amicable adjustment of the interests involved. Paragraphs 3 and 4 dealt only with details that need not be expressly stipulated.

56. Draft article 14 would place any State that contemplated a new use in an impossible position. If it failed to notify a new use, even if it acted in good faith in the belief that no appreciable harm would result, the other watercourse State or States could still call upon it to fulfil all the obligations of negotiation, compensation and third-party settlement. If it made a notification and the notified State did not react, it could proceed under paragraph 2, but would still have to comply with all the obligations under articles 11 and 12 regarding notification and the waiting period. And if a State failed to provide notification, it would incur liability for harm, even if such harm did not amount to “appreciable harm” under article 9. Article 14 was a Draconian provision unlikely to be accepted by States.

57. Draft article 15, under which a State could proceed with a new use on the grounds of “public health, safety, or similar considerations”, was a positive provision. But it was hard to see how it would be possible, in the event of an emergency project, for a State to comply with the requirements of article 11 on notification and article 13 on consultations. Paragraph 3 of article 15, in particular, required closer examination, since a State could not properly be penalized for appreciable harm in cases involving what was, in effect, *force majeure*.

58. He would have no objection to articles 11 to 15 being referred to the Drafting Committee, if they could be

sufficiently improved to remove certain difficulties that had arisen.

59. Mr. REUTER said that, without wishing to appear unduly optimistic, he had the impression that the Commission was agreed on a starting-point, namely that the régime of international watercourses would be regulated by negotiations, since recourse to arbitration had been rejected. The Commission’s task was therefore to help States to negotiate, which it could do in two ways: by stating the general principles to be respected in the negotiations in an article which might be rather vague but was accepted by all members, and by drawing up rules of procedure.

60. He did not think that any member of the Commission had spoken against the idea of notification, even though the content and modalities of the notification, as well as the sanction for failure to notify, remained to be specified. Similarly, although the questions connected with responsibility had not yet been sufficiently discussed, there was one point on which everyone seemed to be in agreement, namely that the case in which there was an obligation to notify was that of a change in the physical conditions of the watercourse—that was to say a change in the quality, volume or régime of the waters—which would alter the situation for other States in regard not only to current exploitation of the watercourse, but also to its potential exploitation.

61. He was not so sure that members of the Commission were in agreement on draft article 12, which placed States under an obligation to refrain for a certain time from undertaking works that might change the physical conditions of the watercourse. Personally, he was in favour of alternative B of paragraph 1 as proposed by the Special Rapporteur, which provided for a fixed period. But the freezing of the works provided for in article 12 seemed essential in any case, since it was important for the success of negotiations that they should begin in good faith, which would hardly be the case if a State could create a *fait accompli* before the negotiations had even started.

62. In short, he believed that there was a basis for agreement, minimal perhaps, but sufficient to enable the Commission to refer some articles to the Drafting Committee. It was indeed necessary to draft a few articles by the end of the present session, for otherwise the Commission would always be reopening its general discussion and would never complete the study of a topic which, unlike some others, was a good one on which agreement was possible. In addition to those articles, the Commission could of course also draft certain recommendations: for instance, as some members had proposed, an annex containing optional provisions on arbitration, or optional procedures for setting up technical organizations when the régime of a watercourse raised particularly difficult scientific problems.

63. In any case, it seemed obvious that a text stating only a minimum of obligations accompanied by certain recommendations would be better than no text at all.

*The meeting rose at 1 p.m.*



## 2013th MEETING

Thursday, 11 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome to Mr. Ruda, a Judge of the International Court of Justice, a former member of the Commission and a former staff member of the Codification Division.

### The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)

[Agenda item 6]

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

##### CHAPTER III OF THE DRAFT:<sup>3</sup>

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)<sup>4</sup> (*continued*)

2. Mr. ROUCOUNAS said that the discussion of draft articles 11 to 15 had shown that the Commission first had to give draft article 10 precise legal content and then, once the principle of co-operation had been established, decide what forms co-operation might take. Articles 11 to 15 should thus be read in such a way that emphasis would be placed not on disputes arising in connection with watercourses, but rather on co-operation, since the purpose of those provisions was to

safeguard the common interests of notifying and notified States.

3. Some of the misunderstandings with regard to draft article 11 had arisen because of the origin of that provision. The provisions now contained in articles 11 to 15 had originally been included in draft article 8, submitted by Mr. Schwebel in his third report and entitled "Responsibility for appreciable harm".<sup>5</sup> Having established that each State was entitled to equitable participation in the watercourse, provided that it did not cause appreciable harm to the interests of another State, that article then laid down procedural rules. It provided, for example, that the "proposing State" had to notify other system States before undertaking, authorizing or permitting a project or programme that might cause appreciable harm to their interests. That provision might answer Mr. Reuter's question (2008th meeting) about the time when notification became compulsory, as well as Mr. Tomuschat's question (2009th meeting) concerning activities undertaken not by a State, but by individuals under its jurisdiction.

4. The former draft article 8 provided for a graduated set of procedures ranging from notification to the peaceful settlement of disputes. That gradation was, however, less the result of the system concept used by Mr. Schwebel than of the idea of equitable utilization. Subsequently, part of that draft article 8 had become draft article 9 as submitted by Mr. Evensen, and the rest had become draft articles 11 *et seq.* as submitted by the present Special Rapporteur. Draft article 10 on the obligation to co-operate had then been inserted between articles 9 and 11, thereby breaking the continuity that had originally existed between the provision prohibiting appreciable harm and the articles containing procedural rules.

5. If the "harm" referred to in draft article 11 was taken to be the same as the "appreciable harm" referred to in draft article 9, article 11 could be said to duplicate article 9, since a State was responsible for any appreciable harm it might have caused, whether or not it had fulfilled its obligation to notify. In his view, the scope of article 11 had to be enlarged, by referring, for example, to a new use which might "appreciably alter the volume, quality or régime of the waters of a watercourse".

6. The meaning of the term "new use" should also be spelled out in greater detail. In paragraph (3) of his comments on draft article 11, the Special Rapporteur indicated, of course, that the term comprehended "an addition to or alteration of an existing use", but he did not define the term "use". In his second report (A/CN.4/399 and Add.1 and 2, footnote 80), the Special Rapporteur had, however, explained that the term "use" was employed in its broad sense and "should be understood as denoting every possible utilization or use . . . including . . . the prevention of water pollution". However, since draft article 11 might also refer to the case where the pollution of an international river had been caused not by a new use, but by an increase in existing activities, he personally thought that reference should be made to "uses and activities".

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the texts, see 2001st meeting, para. 33.

<sup>5</sup> *Yearbook* . . . 1982, vol. II (Part One), p. 103, document A/CN.4/348, para. 156.

7. Once the obligation to provide notification had been established, it should be possible to make the provisions of draft articles 12 to 15 more flexible by expanding the scope of article 11. In order to avoid any misunderstanding with regard to the possibility that the other watercourse States might have veto power, draft article 13 might refer to the obligation "to act in such a way as to safeguard the legitimate interests of all watercourse States".
8. The question of the peaceful settlement of disputes did not come within the framework of chapter III of the draft and should be dealt with in an annex. Questions of international responsibility also had no place in that chapter. He was certain that the Drafting Committee would be able to find satisfactory solutions to those problems.
9. Mr. SOLARI TUDELA said that the law of the non-navigational uses of international watercourses was a sensitive subject because States were suspicious of anything that might be regarded as a limitation on their territorial sovereignty. That was, however, not at all unusual in the history of international law, and many existing institutions established as a result of international solidarity and co-operation would once have been unthinkable because States had had such a narrow view of sovereignty. Although a very ambitious set of draft articles might not be accepted by States, that must not stop the Commission or prevent it from making progress in its work.
10. The draft articles should begin with a provision defining terms such as "appreciable harm", "new use" and "proposed new use". In his view, the term "watercourse system" clearly and objectively described hydrographic components constituting a unitary whole, but he could also agree to the term "international watercourse", provided that it had the meaning referred to in the provisional working hypothesis and would make the draft easier for States to accept.
11. Draft article 4 on the obligation to negotiate system agreements as and when necessary for the optimum utilization of a watercourse was particularly important. That provision represented a step forward in the progressive development of international law and the rule it embodied must not be watered down or weakened. The term "equitable utilization" called for further clarifications, such as those provided in the text adopted by the Drafting Committee, which contained a list of factors to be taken into account.
12. The title of chapter III of the draft seemed to place the general principles of co-operation, notification and provision of data and information on an equal footing, but in fact the chapter contained a substantive rule, namely that of co-operation, as well as a set of procedural rules designed to give effect to the principle of co-operation and to such principles as equitable utilization and the prohibition on causing harm. Although a legal obligation to co-operate existed on the basis of the Charter of the United Nations, that obligation was of a general nature and the forms such co-operation would take had to be spelled out in each particular case. Draft article 10 should therefore indicate the areas in which States should co-operate in respect of the use of international watercourses.
13. With regard to draft article 11, members of the Commission had been unable to agree whether there was a customary rule requiring States to provide notification. However, since one of the Commission's tasks was the progressive development of international law, he thought that that rule should be embodied in the draft, it being understood that the obligation to provide notification would be limited to cases where it could be objectively determined that appreciable harm would be caused to another State as a result of a proposed use of a watercourse. There again, the term "appreciable harm" would have to be defined more precisely.
14. Of the two alternatives proposed for paragraph 1 of draft article 12, he would prefer the one that set a fixed time-limit, provided it was a maximum period that could be extended at the request of the notified State. The Commission might, for example, decide to set a maximum period of six months, which could be extended for three months.
15. He agreed that the dispute-settlement procedures provided for in draft articles 13 and 14 should be included in an optional protocol or in an annex to the draft.
16. Mr. SEPÚLVEDA GUTIÉRREZ said that, as a new member of the Commission, he was rather concerned about the debate on international watercourses. His main concern was that the Commission would be unable to take a decision on draft articles 11 to 15 for quite some time and that it would go before the General Assembly practically empty-handed, perhaps with a few isolated articles on basic general principles, but without any provisions to give effect to those principles, and that the 14 new members of the Commission would be blamed.
17. He was firmly convinced of the importance of the present draft articles, which the General Assembly had been urging the Commission to complete rapidly, and he would be very discouraged if the Commission failed in its task. He also agreed with Mr. Reuter (2012th meeting) that the law of the non-navigational uses of international watercourses was a good topic and one that was likely, once the work on it had been completed, to enhance the Commission's prestige for a long time to come. He was quite certain that the members of the Commission were basically in agreement as to substance and that their differences of opinion related only to the wording of the articles and should therefore not be difficult to reconcile.
18. Draft articles 11 to 15 were a logical and essential adjunct to the articles on general principles, particularly that on co-operation, to which effect could be given only by means of procedural rules.
19. Widely varying points of view had been expressed on what the Commission could or could not do. He was inclined to think that the Commission should steer a middle course by considering all the possibilities available to it and contenting itself, as Mr. Reuter had proposed, with a modest but workable text. It must not be forgotten that procedural provisions were not an end in themselves, but only a means of getting States to act in a certain way. His impression was that draft articles 11 to 15 were basically acceptable, since no one had

suggested that they should be deleted. The proposed approach was entirely logical and rational: the starting-point was that a State which was planning a new use of a watercourse had an obligation to inform the other States concerned, that obligation being based on the principle of co-operation. During the consultation stage, the States concerned might be able to reach an agreement, but if they were unable to do so they could then go on to the negotiation stage, which was based on the sovereign equality of the parties. If negotiations broke down, the States concerned would have to resort to one of the third-party procedures for the peaceful settlement of disputes and he saw no reason why that possibility should not be referred to in the draft.

20. The Commission's problem was to find wording for articles 11 to 15 that would dispel the doubts and calm the suspicions of those who thought that an attempt was being made to require a certain type of conduct of States, which had to be given some guarantees. A satisfactory balance also had to be established between legal principles and rules, between the legitimate interests of States, reasonable and equitable use, optimum utilization and the need to co-operate, and between rights and obligations. That was a difficult task, but not an impossible one. In addition, a link had to be established between draft articles 9 to 10, which the Drafting Committee was still considering, and the procedural rules contained in draft articles 11 to 15. Much unnecessary discussion might have been avoided if the Drafting Committee's text had been made available earlier.

21. He was convinced that, with the Special Rapporteur's assistance, the Commission would be able to agree on satisfactory wording for draft articles 11 to 15. It should not strive for perfection, for experience had shown that multilateral conventions, many of which were excellent, took years to ratify, although that did not prevent them from serving as guidelines for other instruments, from establishing rule-making practice or from helping to weave the fabric of customary law.

22. Mr. THIAM said that draft articles 11 to 15 were too narrow in scope. The use of an international watercourse could be viewed either as joint use, in co-operation with other States, or as individual use; but he had the impression that the proposed articles referred only to the latter, even though they came after draft article 10 on co-operation. There was thus something missing between draft article 10 and draft articles 11 to 15.

23. In his view, co-operation was not a legal obligation. But there was a need for it and the draft articles should contain more detailed provisions relating to it. A genuine positive law of co-operation existed and it included many conventions that had set up joint bodies, of which the Organization for the Development of the Senegal River was a prime example. Perhaps chapter III of the draft should be divided into two parts, one containing more detailed provisions on co-operation, and the other the rules proposed in draft articles 11 to 15, which were based primarily on the idea of the prevention of harm and compensation for damage.

24. With regard to the text of the draft articles, he had some doubts about the use of the word "available" in

draft article 11, which should refer instead to "necessary" technical data and information. He was also concerned about the period of time to be provided for in draft article 12. It must be borne in mind that the situations that could arise were not all the same and that States did not all have the same resources. For example, when a technologically advanced country contemplated a new use of a watercourse and so notified a neighbouring State, that State would need more than six months to reply to the notification if it was a developing country. The Commission should give further thought to that problem in order to find an equitable solution. Furthermore, the wording of draft article 15 relating to proposed uses of utmost urgency was not precise enough. The words "or similar considerations" were much too vague and situations that were of the utmost urgency had to be clearly defined.

25. Mr. BARBOZA said that he was in favour of referring draft articles 11 to 15 to the Drafting Committee, provided of course that the Special Rapporteur so agreed. That had always been the Commission's practice once it had considered draft articles carefully enough to give the Drafting Committee all the elements it needed to prepare texts taking account of all the views expressed. If, contrary to that practice, the Commission requested the Special Rapporteur to submit revised texts, what would happen was exactly what Mr. Reuter (2012th meeting) had predicted: the Commission would again begin to discuss general questions, such as the characteristics of customary international law and the existence of an obligation to negotiate, and the General Assembly would, with good reason, begin to wonder whether the Commission was really the right body to help it in the task of the progressive development and codification of international law. The General Assembly might also begin to wonder whether, after 13 years of general debate, the Commission really had to start discussing a handful of procedural articles and whether the resolutions it had adopted year after year to encourage the Commission to make headway in its consideration of an important, urgent and controversial topic had had any effect at all. The Commission would thus deserve criticism concerning its methods of work.

26. As Mr. Sepúlveda Gutiérrez had just pointed out, the texts of the draft articles were good. All that remained to be done was to reconcile diverging points of view, but that was not possible in plenary meetings. In a spirit of compromise, he was prepared to agree that an exception should be made in the case of draft article 14, although he was fully aware that the predictions to which he had referred might come true. However, if the Commission at least referred the other draft articles to the Drafting Committee, it would have made some progress in its work.

27. Mr. Sreenivasa RAO said that the draft articles on the procedural requirements of notification, consultation, negotiation and the compulsory third-party settlement of disputes were as important as the substantive provisions which the Commission had earlier referred to the Drafting Committee. They not only gave practical effect and content—or what had been called "teeth"—to the more general substantive principles, but also were closely related to agreement, or lack of it, within the international community. They also

established obligations of a specific nature and involved a series of steps that had to be taken before any binding settlement of a dispute arising out of the interpretation and implementation of the more general principles could be arrived at. They therefore called for the most careful examination.

28. Commenting on some of the basic principles to which the procedural requirements were designed to give effect, he said that rivers provided mankind with a perennial source of water for a wide variety of uses, ranging from agriculture and navigation to the protection of the environment and recreation. With the progress of science and technology, newer uses involving extensive planning and river development were being introduced to serve mankind's growing needs. In the case of international rivers flowing through more than one State, there was a need for accommodation based on a reasonable and equitable apportionment of the waters. That applied not only between riparian States, but also between the different categories of user within a particular State. It was, however, unnecessary to reconcile each and every use with other uses, since some uses could by their very nature be enjoyed by one or more States without affecting the quality or quantity of the water available to other States.

29. A State exercised exclusive authority and control over that portion of a watercourse that lay within its territorial boundaries, subject to the duty not to interfere unreasonably with or affect adversely and to an appreciable extent the interests and uses of other riparian States. The duty not to cause harm was a legal concept which applied solely to such uses as appreciably affected reasonable and equitable use by other riparian States.

30. The right of a State to reasonable and equitable use of a watercourse and its waters flowing through its territory had to be exercised so as to achieve, first, optimum benefits and uses for the people of the riparian States, and secondly, the protection and development of the watercourse itself. The principle of optimum utilization entailed the reconciliation of two other basic principles: the enjoyment of reasonable and equitable use and the avoidance of causing legal harm to other riparian States. Those sometimes conflicting principles gave rise to understandable controversy among planners and users. International watercourses were not unique in that respect, however, for the same conflict between the relevant principles gave rise to numerous claims and counter-claims in such fields as marine space, outer space and the Antarctic, with their respective resources, as well as in other legal fields such as diplomatic privileges and immunities, immigration and extradition.

31. The aim should therefore be to avoid underplaying one principle to the advantage of another and to define priorities, while recognizing that, in Mr. Schwebel's words, "no automatically applicable fixed sets of factors, or a given formula for ranking or weighing the factors, can be devised that would fit all situations".<sup>6</sup> Although the Commission had identified some of the principles and factors that would promote reconciliation in a given case, it had not completed the task and should therefore continue to search for common ground

and specific criteria. There was no substitute for the process of claim and counter-claim as advanced and evaluated by States themselves and the other relevant decision-makers, even if States could be persuaded in a given case to agree to suitable arrangements for assessing the facts at issue.

32. Most of the authorities cited by the Special Rapporteur attested to the willingness of States to engage in a common watercourse régime when their common interests so required. The various agreements and arrangements into which they had entered covered a wide variety of situations and indicated avenues for the settlement of disputes. Within the overall context of co-operation, they had adopted graduated sets of procedures to resolve any potential or actual conflict, a common feature of such arrangements being a system for the routine exchange of data and for consultation. The question, however, was to what extent those practices could provide the basis for a prescription of a mandatory nature that would govern the activities of riparian States even in the absence of prior agreement. It was necessary to distinguish between an arrangement involving institutional co-operation and any suggestion that there was a mandatory rule to the effect that States must have such an arrangement. There was no disagreement with the need for a graduated set of procedures to be used by States in a spirit of co-operation for the purpose of identifying mutual interests and avoiding misunderstanding and potential conflict. As other members had already noted, in most cases where information was exchanged and consultations held, the desired objective of co-operation was achieved. That was due not so much to any legal obligation as to a desire to make information available and to provide a mutual assurance of co-operation on all matters of common interest.

33. As was apparent from State practice, negotiation was also not so much a legal obligation as a means of resolving differences and disputes in an amicable manner. Negotiation, however, was a more formal process with claims and counter-claims being advanced and assessed in a spirit of co-operation. The time-frame within which negotiations were held and the speed with which they were concluded were determined by the circumstances of the case. The failure of negotiations did not generally result in an abrupt breaking off of friendly relations, since mediation, conciliation and even compulsory judicial settlement were also available if the parties so desired. The essence of all such means of resolving conflict was the spirit of co-operation and the free choice of means. Compulsory settlement of disputes as the inevitable outcome of notification should not be regarded as constituting a precedent in State practice on which a mandatory rule could be based. In that connection, he agreed in particular with the remarks made by Mr. Ogiso (2010th meeting), Mr. Barsegov (2011th meeting), Mr. Graefrath (*ibid.*) and Mr. Pawlak (2012th meeting). He also agreed that a mechanism for the compulsory settlement of disputes should not even be proposed within the context of the progressive development of international law, for that would be to ignore the diversity of State practice, the flexibility of the relevant principles and the lack of any precise and acceptable factors to determine the case with fairness. Another

<sup>6</sup> *Ibid.*, p. 89, para. 101.

significant reason for rejecting compulsory judicial settlement was the lack of generally acceptable principles. The best judges of the common interest were therefore the parties to the dispute themselves, for a conscious choice by the parties would guarantee that the decisions reached would be faithfully implemented. Arbitrary choices made by external sources tended to be less credible.

34. For all those reasons, careful consideration should be given to the Special Rapporteur's proposition in his third report that

... in the absence of procedures permitting a State to determine its equitable share in advance and in consultation with other concerned States ... [the] doctrine of equitable utilization would ... operate only as a *post hoc* check on the State's use of the international watercourse in question. ... (A/CN.4/406 and Add.1 and 2, para. 33.)

In his view, the process of claim and counter-claim was the only normal means employed by States to determine equitable allocation, whether or not a formal institutional structure existed to govern the uses of a particular international watercourse.

35. Compulsory third-party settlement had not always resolved differences satisfactorily and was no panacea. Even where States had organized institutional co-operation to regulate the use of an international watercourse, political adjustment and good faith were crucial for its optimum utilization. Institutional régimes were a reflection of the State's desire for co-operation and were not intended to serve as substitutes or remedies for the lack of co-operation. Any procedural requirement should therefore focus on co-operation and should not be predicated on a presumption of conflict among States, still less on the presumption that the geographically advantaged State not only had the opportunity, but was also willing to inflict a legal injury on a State or States that were less geographically advantaged with regard to the watercourse. In that respect, he agreed entirely that what was needed was a procedural framework focusing on co-operation, but not inevitably leading to a mechanism for the compulsory settlement of disputes.

36. Turning to the draft articles, he said that, in his view, appreciable harm was not a very appropriate criterion on which to base a State's obligation under draft article 11 to notify other watercourse States. Not only would the adoption of such a criterion involve an admission of guilt on the part of the notifying State, but it was also unrealistic to assume that under normal circumstances a State would knowingly and willingly attempt to cause appreciable harm or legal injury to the rights and interests of other riparian States. What was more likely to happen was that a State planning a new use would exceed its normal reasonable and equitable share of the use of a watercourse and its waters, genuinely believing that no real or legal injury would result for other riparian States. In such circumstances, notification would appear to invite opposition to the new use from the other riparian States merely because a new use was involved and because the notifying State might draw more than its usual share of water from the watercourse. "Reasonable and equitable use" and "appreciable harm" should therefore be interpreted so as to permit new uses unless the other riparian States could show that such uses would unreasonably and adversely

interfere with their right to make reasonable and equitable use of the watercourse. Accordingly, article 11 should be redrafted to provide for the obligation of States to share information upon request with other riparian States if those States had reason to believe that the new use could unreasonably and adversely affect their rights and interests. That would be more in keeping with the basic principle whereby a State was allowed to make reasonable and equitable use of a watercourse provided it did not cause legal injury to other riparian States. So far as a *fait accompli* was concerned, it was fair to assume that, in the absence of accommodation, a State would not proceed with a use that had a known potential for causing appreciable harm to other riparian States.

37. With regard to draft article 12, once the relevant information had been provided, the notified State should have a reasonable period of time to study the matter and arrive at its conclusion. It would be better not to impose any strict time-limit, but to leave the matter to be decided in the light of the particular circumstances and of what was reasonable. The question of freezing the project or new use until any doubts were eliminated should not normally arise.

38. As for draft article 13, the determination of "appreciable harm" by the State seeking information should be well reasoned and made in writing. The State planning the new use should have the opportunity to study the objections raised by the notified State and, if necessary, to seek further clarification. The emphasis at that point should be on the process of consultation, and negotiation should be provided for in a separate article so as to make it clear that it constituted a separate stage which might be necessary to resolve a difference or dispute. The settlement of a dispute after the negotiation stage should be in accordance with a free choice of means. Any insistence on compulsory judicial settlement would be rejected outright by States.

39. In the light of his comments on draft article 11, he believed that draft article 14 should either be deleted or be redrafted in such a way as to eliminate any notion of penalty or liability on the part of the State proposing a new use which, in its opinion, did not involve appreciable harm to other riparian States.

40. A question had been raised in connection with draft article 15 as to the appropriateness of dealing in the procedural articles with proposed uses of utmost urgency. The regulation of emergency situations and the basis for reconciling such situations with the principles of reasonable and equitable use and optimum utilization differed. Moreover, it did not seem appropriate to link the question of uses of utmost urgency to the question of liability for appreciable harm. The matter therefore required careful consideration so that the relevant policies and principles were taken into account.

41. He agreed with much of what had been said by other members and trusted that the Special Rapporteur would take account of all their comments. He had the utmost confidence in the Special Rapporteur's ability to redraft the articles with a view to making them more balanced.

42. Mr. ARANGIO-RUIZ said that the Commission had to find well-balanced solutions to the problems

dealt with in draft articles 11 to 15 on the basis of a provision relating to the principle of co-operation, which had to be understood and enunciated as a duty.

43. The Commission now had a choice between draft article 10 as submitted in the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2) and the amended text the Special Rapporteur had proposed at the 2008th meeting (para. 28). If those two texts were to be combined, the duty to co-operate had to be considered in the light of other fundamental principles, such as sovereignty and independence. The utmost care should, however, be taken not to encumber the principle of co-operation with references to the static principles of territorial sovereignty and sovereignty itself, although both those elements should, of course, be present and due account should also be taken of such basic principles as the equality of States, good faith and good-neighbourliness.

44. As he had stressed in his earlier statement (2007th meeting), account also had to be taken of the nature of watercourses, whose waters were comparable to resources—such as oil deposits—that formed the subject of the territorial sovereignty or of the exclusive sovereign rights of two or more States. The fact that they were in a constant state of flux made it essential to treat them as something that was shared, or to be shared, in an equitable manner.

45. It was therefore clear that no limitations should be placed on the obligation to co-operate. Moreover, the principle of co-operation should be formulated so as to cover not only the uses of water, but also its conservation, protection and development in the widest sense.

46. The topic under consideration had many points in common with the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and perhaps the most prominent of those points was interdependence. In that connection, he had welcomed Mr. Barsegov's reference at the 2011th meeting to the Soviet memorandum on the development of international law.<sup>7</sup> That document stated that international law must become *a law of comprehensive security and collective State responsibility towards mankind and a law based on recognition of the interdependence of today's world*. It also stressed that "a particularly important task of the international law of interdependence . . . is the . . . restructuring of international economic relations on a just, egalitarian and democratic basis" and that:

. . . Universal and comprehensive security is not simply the absence of war . . . Its foundation and central core is broad and comprehensive co-operation among States. This co-operation must expand in existing directions and encompass new ones. . . . *The further development of international law should stimulate international co-operation, ensuring that it is based increasingly on equality and mutual benefit, and promote the initiation of constructive, creative interaction of States and peoples all over the planet, so as to solve the problems facing mankind together and in the interests of all.*

47. That document was an illustration of the warning by Mr. Reuter (2008th meeting) that the intelligence of States must not be underestimated. It also brought to mind the following passage from the fourth report of the late Robert Q. Quentin-Baxter, the former Special

Rapporteur for the topic of international liability, as quoted by Sir Ian Sinclair at the Commission's thirty-sixth session:<sup>8</sup>

. . . In one sense, therefore, the question which underlies this topic is whether lawyers take so narrow a view of their discipline that they do not share the sense of responsibility of others who influence the behaviour of States, and wait until the latter have provided the materials from which general rules of prohibition may be discerned.

48. The Commission would soon have to decide whether draft articles 11 to 15 should be referred to the Drafting Committee. With regard to draft article 11, he agreed with those members who had warned against the adoption of a text that might offer the State under the obligation to notify the choice between failing to comply with that obligation and admitting that it might be committing a wrongful act involving international responsibility.

49. He also agreed that draft article 12 should not be couched in terms that would give the notified State veto power. But there was nothing about that article that could not be resolved by the Drafting Committee in the light of the Commission's discussion.

50. In conclusion, he supported the suggestion made by Mr. Reuter and other members that draft articles 11 and 12 should be referred to the Drafting Committee.

51. Mr. YANKOV said that divergent views had been expressed during the lengthy discussion of draft articles 11 to 15 and a number of procedural suggestions had been made with regard to the Commission's future work. Two factors lay at the root of the divergence of views. The first was that draft article 10 was inadequately formulated and the second was that draft article 9 had been prepared by the previous Special Rapporteur. Articles 11 to 15 had, moreover, been intended by the Special Rapporteur as an adjunct to the rule of co-operation embodied in article 10, which was unfortunately too narrow in scope and content.

52. If the principle of co-operation was to be meaningful, three requirements would have to be met. First, the provision to be drafted would have to indicate the scope and content of co-operation; secondly, the principle of co-operation had to be considered jointly with other basic principles of international law; and thirdly, reference had to be made to the means of implementing the duty to co-operate. As it now stood, article 10 lacked those three basic elements, which the Commission would therefore have to spell out in formulating the obligation to co-operate with a view to the reasonable and equitable utilization of international watercourses.

53. The duty to co-operate had to be stressed as a fundamental rule of international law, but the text as it now stood confined that duty to the observance of procedural rules and merely referred to the need to avoid causing appreciable harm and to compensation for such harm when it had occurred.

54. As a result of those shortcomings, there was an obvious lack of balance in the provisions of draft articles 11 to 15, which were biased against an upstream State contemplating a new use of a watercourse and tended to favour other riparian States. It was true that draft ar-

<sup>7</sup> See 2011th meeting, footnote 7.

<sup>8</sup> *Yearbook . . . 1984*, vol. 1, p. 208, 1849th meeting, para. 22.

article 12, paragraph 3, stated that the negotiations in question “shall not unduly delay the initiation of the contemplated use”, but unfortunately, as articles 11 to 15 now stood, delays were almost certain to occur.

55. In view of that lack of balance, articles 11 to 15 had to be reconsidered—and not only from the point of view of drafting. Account had to be taken of the fact that co-operation could relate to matters such as joint management, common activities for the protection of the environment and joint projects relating to water-courses, whereas the draft articles now dealt exclusively with the problem of appreciable harm and its avoidance. The Special Rapporteur should therefore consider that problem, since it was at the root of all the Commission’s present difficulties. An effort should be made to enunciate the principle of co-operation adequately, with due regard for the other relevant principles of international law, particularly sovereign equality, territorial sovereignty and good faith.

56. In conclusion, he urged the Commission to concentrate on solving those problems of substance rather than on the question whether articles 11 to 15 should be referred to the Drafting Committee. In their present form, he did not think that they were ready for such referral.

57. The CHAIRMAN, speaking as a member of the Commission, said that the debate on draft articles 11 to 15 had been valuable and wide-ranging and had not been confined to the draft articles themselves. The delay in studying the topic might perhaps be explained by the fact that it had unfortunately been entrusted to several special rapporteurs in succession. The discussion had shown, however, that the topic needed more thorough study.

58. The General Assembly had given the Commission a mandate defining the parameters of the topic. It had asked the Commission to draw up a set of legal rules applicable to the conflicts that might arise between sovereign States concerning the utilization of an extremely important natural resource, namely water. It had specified that the rules were to be residual and flexible ones that States could take as guidelines when concluding bilateral or multilateral agreements on the utilization of international watercourses. States therefore expected the Commission to prepare draft articles taking account not only of doctrine, jurisprudence, international agreements and State practice, but also, in accordance with the Charter of the United Nations and the Commission’s own rules, of the need to promote the progressive development of international law. If there was one topic that lent itself particularly well to progressive development, it was the law of the non-navigational uses of international watercourses.

59. Some took the view that every watercourse system or every international watercourse had its own characteristics and that only the riparian States could determine how to use it without harming each other. He drew attention to the provisional working hypothesis which the Commission had adopted in 1980 and on which it would be inadvisable to go back, unless the Commission adopted another.

60. In his view, draft articles 11 to 15 followed logically from draft article 10, which stated the general prin-

ciple of co-operation. Unlike other members of the Commission, Mr. Thiam (2006th meeting) believed that the principle of co-operation was not an obligatory legal rule. Mr. Bennouna (2008th meeting) had spoken, in that context, of the state of mind of States. Co-operation, as he himself had already pointed out (2007th meeting), was the goal to be achieved, whereas the draft articles proposed by the Special Rapporteur were the means of achieving it. Mr. Barboza (2011th meeting) had said that the origin of the draft articles was not to be sought in the obligatory nature of co-operation. In fact, the obligation placed on States was to avoid causing damage or harm to other States having rights over the waters concerned; and, as Mr. Bennouna had suggested at the previous meeting, those rights were to be understood as legitimate interests which should be protected. All riparian States had legitimate interests in an international watercourse and the protection of those interests called for the application of certain rules based on co-operation, which was a principle established by the Charter of the United Nations, but whose status as a binding legal rule could be challenged, as certain members of the Commission had shown.

61. He concluded from the debate that no member of the Commission was opposed to the substance of the draft articles, that the objections related to terminology and that legal expression must be given to the arguments for the protection of the legitimate interests of the States concerned. In his view, draft article 11 should specify that it was a “riparian” State which could contemplate a new use and that every State had a right to require notification of new uses and of changes in the uses contemplated. As to the qualification of the word “harm”, it would be for the Drafting Committee to find the appropriate adjective. It should also be specified that the notifying State must provide the other States with available technical data and information that were sufficient “and necessary” to enable them to evaluate the proposed new use and accept or oppose it.

62. So many opinions had already been expressed on the draft articles that the members of the Commission now had to agree on how they should be drafted to take those opinions into account.

63. He recognized that the ideal solution would be to make provision in the draft for the compulsory settlement of disputes, but he also knew that no State would accept that. He therefore believed that the formula allowing States to choose their own method of settlement in accordance with Article 33 of the Charter of the United Nations would be acceptable.

64. He would have no objection to the procedural articles being referred to the Drafting Committee together with draft article 10. Mr. Reuter (2012th meeting) had been right to ask the Commission to produce a minimum, even if it did not amount to much. It was important for the Commission to show that it had studied the topic and to propose texts which States could accept or reject. It should therefore endeavour to co-ordinate the procedural articles, which, like draft article 11, were of fundamental importance, since they determined the practical application of co-operation and the elements which States must take into account in co-operating. The Commission should therefore refer those articles to

the Drafting Committee so that it could find generally acceptable formulas.

65. Mr. TOMUSCHAT noted that some members of the Commission wished to refer draft articles 11 to 15 to the Drafting Committee, whereas others were against doing so because the texts had not yet reached "maturity". The difference between those two positions was, however, not very great. It was true that the principle of co-operation had been interpreted rather unilaterally in the sense of prevention of harm and, possibly, reparation for damage; but the scope of that principle could easily be enlarged. However, such a provision could be included in the draft only as an indication. He fully agreed with Mr. Graefrath (2011th meeting) that there were very fruitful forms of co-operation in the practice of States, such as river commissions, but he did not think that that form of co-operation could be imposed on a universal scale. The Commission could draw up some sort of list enumerating the different forms of co-operation, as an indication without binding force. The addition of a draft article of that kind need not hold up the work of the Drafting Committee.

66. There seemed to be agreement on the need to delete draft article 14, which stated very strict rules on responsibility—a matter that would continue to be governed by the general régime applicable. Members of the Commission also seemed to consider that the time had not yet come to propose rules on third-party settlement of disputes. He believed that, in order to fill a very definite gap in the draft, it was necessary to insert an additional draft article on structural pollution, which was a matter of particular concern to the industrialized countries.

67. Finally, he saw no need for the Special Rapporteur to draft new provisions, especially as the General Assembly expected the Commission to submit draft articles and the Commission was in a position to do so.

68. Mr. KOROMA said that, as he understood it, the duty to co-operate did not constitute a binding obligation that could give rise to penalties in the event of non-compliance. He saw co-operation as a means of preventing conflicts and of avoiding causing appreciable harm to riparian States.

69. It was regrettable that the discussion should have taken the form of a debate on whether the entire set of draft articles under discussion should be referred to the Drafting Committee. He did think that such an approach offered members a fair choice. It would be preferable, on the basis of the discussion, to decide whether any particular article or articles should be referred to the Drafting Committee.

70. He hoped that, in summing up the discussion, the Special Rapporteur would offer some suggestions to remedy a gap in the draft, which did not contain any provisions on multilateral co-operation. That point could not be left for the Drafting Committee to decide.

71. Mr. THIAM said that he thought it would be best to leave the decision on whether the draft articles should be referred to the Drafting Committee until after the Special Rapporteur had summed up the discussion. The referral of those texts to the Drafting Committee would not prevent the Special Rapporteur from proposing

others, if necessary, at the Commission's next session, including provisions on forms of co-operation.

72. Mr. McCAFFREY (Special Rapporteur), replying to the questions raised by Mr. Tomuschat and Mr. Koroma concerning the inclusion in the draft of provisions on broader forms of co-operation, recalled that, in his second report (A/CN.4/399 and Add.1 and 2, para. 59), he had suggested that the Commission should concentrate initially on the formulation of general principles and rules providing guidelines to be followed by States in negotiating and implementing international watercourse agreements and that, at a later stage, it could attempt to draw up articles or simply some indicative procedures to be used as models by States in making their own arrangements for co-operation with regard to the administration and management of international watercourses. As he had put it:

... Once that task has been accomplished, the Commission may wish to consider whether it would be advisable to go on to make recommendations concerning various forms of non-binding provisions, for example the establishment of institutional mechanisms for implementing the obligations provided for in the articles. (*Ibid.*)

The question of provisions on broader forms of co-operation, such as the joint management of watercourses, could thus be taken up at that later stage.

*The meeting rose at 1 p.m.*

## 2014th MEETING

*Friday, 12 June 1987, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.410, sect. G)**

[Agenda item 6]

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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



THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

CHAPTER III OF THE DRAFT:<sup>3</sup>

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)<sup>4</sup> (concluded)

1. Mr. McCAFFREY (Special Rapporteur) said that, in summing up a comprehensive discussion, he would endeavour not to repeat comments he had made earlier in response to observations or questions by members.

2. It was generally agreed that draft articles 11 to 15 as submitted in his third report (A/CN.4/406 and Add.1 and 2) were designed to promote co-operation and prevent disputes. Obviously, no one intended that the provisions of the articles should serve to create disputes, but as Mr. Mahiou (2012th meeting) and a number of other members had emphasized, co-operation had to be given some kind of concrete form in the context of reconciling the needs and interests of watercourse States in regard to international watercourses. In other words, the general rule of co-operation required specific rules for it to be implemented. Some of those rules—and only some of them—were contained in articles 11 to 15, a point that should be emphasized because those articles did not cover the entire scope of co-operation as envisaged in the draft as a whole. Care should be taken not to be carried away by the notion of co-operation, to the extent of failing to provide for the legal means whereby co-operation was to be carried out.

3. A second general point was that a set of procedures was necessary not only for new uses, but also for the maintenance of an equitable allocation of the uses and benefits of international watercourses. The maintenance of an equitable allocation of uses was covered by draft article 8, paragraph 2, and the procedures concerning new uses were dealt with in draft articles 11 *et seq.* Structural or “creeping” pollution could be dealt with under article 8, paragraph 2, and more specifically in an article on pollution that would be submitted in a future report. The procedures should be formulated so as to ensure, as far as possible, that one riparian State, in its utilization of an international watercourse, did not act to the detriment of another and also that the latter State was not given an actual or effective veto over the activities or plans of the first State. As emphasized by a number of members, the right of one State to exercise jurisdiction within its territory was limited by the duty not to cause injury to other States. Only in that way could the sovereignty of all the States concerned be respected.

4. A third general point was the need to take into account the relationship between draft article 9 and draft articles 11 to 15. It had been pointed out that the duty to notify under article 11 was brought into play by “a new use . . . which may cause appreciable harm”. It was not necessarily a legal wrong to cause appreciable harm. The idea of using “appreciable harm” to trigger the mechanism contained in articles 11 to 15 was to allow the notified State to determine whether the contemplated new use would result in it being deprived of its equitable share of the uses and benefits of the watercourse, an idea that was further explained in paragraph (5) of his comments on article 11. It should be stressed that the criterion of “appreciable harm” was meant to be a factual, not a legal, criterion, and it was intended to afford States an opportunity to determine whether the notifying State would, by its proposed new use, exceed its equitable share: such an excess would constitute a legal wrong. The criterion of appreciable harm was certainly not designed to force a State to admit in advance that it intended to commit an internationally wrongful act.

5. However, since the expression “appreciable harm” had led to some misunderstanding, it might be preferable to speak of a new use which “may have an appreciable adverse effect upon other watercourse States”. The adjective “appreciable” would thus indicate that the duty to notify would be triggered not simply by any adverse effect, but by a factual standard that could be established by objective evidence. Actually, the meaning of the term “appreciable” had been discussed by the Commission in the commentary to article 4, provisionally adopted in 1980,<sup>5</sup> and also in Mr. Schwebel’s third report.<sup>6</sup> The term “adverse effect” would not seem to have the same connotation as “harm” and would thus be more suitable for the articles under consideration. Several members, including Mr. Graefrath (2011th meeting) and Mr. Njenga (2012th meeting), favoured the criterion of an “effect” rather than “harm”. Article 13, paragraph 1, should nevertheless retain the reference to “depriving the notified State of its equitable share”, since that was precisely the wrong that was to be prevented. Accordingly, while the criterion for giving notice should be that the proposed new use might have an “appreciable adverse effect”, the test of whether the new use could lawfully be implemented would be that it should not deprive the notified State of its equitable share of the uses and benefits of the watercourse.

6. As to the individual articles, the first issue to be examined in connection with article 11 was the use of the word “contemplates”, which raised the question of the precise point in time at which a State had the duty to notify the other State or States of a contemplated new use. The notification should be early enough in the planning stage to allow meaningful consultations on the design of the project, but late enough for sufficient technical data to be available for the notified State to determine whether the new use was likely to result in ap-

<sup>3</sup> The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>4</sup> For the texts, see 2001st meeting, para. 33.

<sup>5</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 119, paras. (9) *et seq.* of the commentary.

<sup>6</sup> *Yearbook . . . 1982*, vol. II (Part One), pp. 98 *et seq.*, document A/CN.4/348, paras. 130 *et seq.*

preciable harm. The data should, according to article VII, paragraph 2, of the 1960 Indus Waters Treaty, be such “as may be available and as would enable the other Party to inform itself of the nature, magnitude and effect of the work”, in other words of the new use (see A/CN.4/406 and Add.1 and 2, para. 71). Mr. Reuter, among other members, had made a useful suggestion (2008th meeting) to the effect that the State contemplating the new use should provide notice when it had sufficient technical data for it and the notified State to determine the potential effects of the new use, and before the legal procedure to implement the project was initiated. Notification should thus be given as soon as practicable, but in any event before the watercourse State undertook, authorized or permitted the project in question. It would also appear—as rightly pointed out by Mr. Graefrath—that there would have to be an initial decision in principle by the State to begin the process of planning, feasibility studies and similar steps that usually preceded the actual authorization or initiation of a new use.

7. The use of the term “State”, at the beginning of article 11, was meant, as he had already explained, to include private activities within a State. That point could perhaps be clarified in the context of fixing the time at which notification would be required, namely “before a watercourse State undertakes, authorizes or permits” the new use in question. Accordingly, there should be no problem in making it plain that the article also applied to activities by private persons that were authorized or permitted by the State.

8. The main issue regarding article 12 was the “stand-still” or “suspensive” effect, and he had been asked during the discussion to indicate the authority for such an effect. It was to be found in a large number of treaties, declarations, etc. mentioned in his third report (A/CN.4/406 and Add.1 and 2, paras. 43 *et seq.*). Numerous European treaties had been analysed by F. L. Kirgis in his well-known book, *Prior Consultation in International Law: A Study of State Practice*,<sup>7</sup> and Kirgis had concluded that European practice recognized a norm of prior consent, not just a norm of prior consultation. The requirement of consent would obviously imply a suspensive effect until consent was forthcoming.

9. He agreed that, in order to avoid giving the notified State a veto, provision should perhaps be made for some fixed maximum period for reply to the notification, a period that could be extended at the request of the notified State, as suggested by Mr. Solari Tudela (2013th meeting). It has to be remembered that most projects that were likely to entail appreciable adverse effects would take a number of years to plan and implement, so that in many cases even a nine-month period would not seem unreasonably long. Indeed, a fixed period would encourage early notification by the State contemplating the new use, so that it could proceed with its plans as soon as possible. Paragraph 1 should be formulated on the basis of alternative B, modified in the way he had just indicated. Paragraph 3 would then be unnecessary, and could be deleted.

10. With reference to article 13, and particularly paragraph 1, Mr. Mahiou (2012th meeting) had rightly pointed to the need not to lose sight of the obligations of the notified State. A better balance would be achieved if the notified State were required to provide a reasoned and documented explanation of its grounds for considering that a proposed new use would result in the notifying State exceeding its equitable share of the watercourse. The question whether it should also establish that the new use would cause it appreciable harm would depend largely on the Commission’s final decision on the wording of article 9.

11. Paragraph 5 of article 13 referred to the “dispute-settlement provisions of the present articles”. He agreed that such provisions could usefully be set out in an annex to the draft and that the Commission could, in keeping with its usual practice, postpone a decision on whether the draft should contain such an annex. He would therefore recommend that the reference to “dispute-settlement provisions” be replaced by a reference to the means of peaceful settlement, other than negotiation, provided for in Article 33 of the Charter of the United Nations. The same change would have to be made in article 14, paragraph 1. It was worth noting that, for the present topic, where technical expertise played such a prominent role, compulsory conciliation or even fact-finding by an independent expert or experts would be the most appropriate solution. That point could, of course, be examined later.

12. Mr. Shi (2011th meeting) and other members had made suggestions for provisions specifying a time-limit to ensure that consultations, negotiations or other procedures did not unduly delay the initiation of a contemplated new use. In that regard, he would point out that the purpose of the draft articles was precisely to prevent abuse of the consultation and negotiation process by a State in order to prolong the proceedings. Paragraph 4 of article 13 was intended to deal with that point, but it might well be advisable to spell out the idea. That could be done either by providing that the process of confirming or adjusting the determination in question must not unduly delay the initiation of the proposed new use or by establishing a specific period of time within which those consultations and negotiations had to take place.

13. Of course, abuse was always possible, regardless of whether the present approach of article 13 was adopted, one that might favour the notified State, or whether provision was made for cutting off the negotiations, an approach that might favour the notifying State. Either type of procedure could be exploited by the party that stood to benefit most, but it had to be presumed that, at some point, the parties would act in good faith, as that concept was construed in the *Lake Lanoux* arbitral award (see A/CN.4/406 and Add.1 and 2, para. 73 (c)).

14. Article 14 had also been criticized for being unbalanced and tipped in favour of the notified State. He therefore proposed that a number of steps be taken to redress the balance. First, in paragraph 1, it should be made clear that failure to notify did not necessarily signify that the State contemplating a new use had failed to comply with article 11; it might simply mean that the

<sup>7</sup> Charlottesville (Va.), University Press of Virginia, 1983.

State in question had arrived at the conclusion that the proposed new use would not have an appreciable adverse effect on other States or cause them appreciable harm.

15. Article 14 could also include a provision requiring a State which believed it might be adversely affected by a new use to provide a reasoned and documented explanation of its grounds for considering that the proposed new use would result in the notifying State exceeding its equitable share of the watercourse. That provision would correspond to the one he had suggested including in article 13, paragraph 1. Of course, such an explanation would be possible only to the extent that the notified State possessed adequate information concerning the proposed use.

16. The subsequent procedures would then parallel those in article 13: consultation and, if necessary, negotiation and further procedures aimed at adjusting the notified State's determination or the notifying State's plans, so as to preserve an equitable balance in the uses and benefits of the watercourse.

17. The reference in paragraph 2 of article 14 to article 9, which stipulated the obligation to avoid causing appreciable harm, should perhaps be replaced by a reference to article 6, which laid down the obligation of equitable utilization. It had rightly been pointed out that the proviso at the end of paragraph 2 should be amended so as to refer to article 11 and to only paragraphs 1 and 2 of article 12. The Commission seemed to be generally agreed that paragraph 3 was not necessary, since the notifying State would, in any event, be responsible for a breach of its international obligations. The paragraph could therefore be deleted without loss to the system of procedural rules as a whole.

18. Some members regarded article 15 as indispensable, whereas others thought that a more precise definition of the term "utmost urgency" was necessary. Yet others considered that the article provided a loophole that would allow States to avoid their obligations under articles 11 to 14. His own view as Special Rapporteur was that some provision should be made for that kind of situation. What was needed was greater clarification of the criterion of "utmost urgency", or possibly of what kinds of situation would permit a State to proceed with a new use without waiting for a reply. That task could conveniently be left to the Drafting Committee. Paragraph 3 could be deleted for the same reasons as the corresponding paragraph of article 14.

19. It should not be forgotten that articles very similar to the ones under consideration had been discussed both in 1983 and in 1984. The texts proposed by Mr. Evensen in 1983 had been criticized by some members as too favourable to the notified State. They had been reworded and, in 1984, had been criticized as being too favourable to the State proposing the new use. Clearly, if the present articles were redrafted and submitted again in 1988, the same situation was likely to arise. There would never be unanimity within the Commission on so delicate a subject; compromise solutions would have to be found and the best place to begin that process was in the Drafting Committee. Articles 11 to 15 formed a coherent whole and the Drafting Committee would

have difficulty in dealing with one or two of them in isolation. He therefore proposed that they all be referred to the Drafting Committee for consideration in the light of the discussion, including the proposals he had just made.

20. The CHAIRMAN thanked the Special Rapporteur for his summing-up and invited the Commission to consider the Special Rapporteur's proposal.

21. Mr. CALERO RODRIGUES said that he supported the Special Rapporteur's proposal, but would point out that one question had not been answered. A time-limit was specified for the reply by the notified State and the Special Rapporteur was proposing a maximum rather than a minimum period. He would like to know how long the standstill clause would operate. It was not clear whether it came to an end with the consultations or with the negotiations. The expiry of a fixed period of time was one conceivable solution.

22. Mr. McCAFFREY (Special Rapporteur) said that the question raised two different problems: first, the actual period for reply, and secondly, the period during which negotiations would be held for the purpose of arriving at mutual adjustments. Provision would have to be made for some kind of limit on the suspensive effect with respect to both periods. Clearly, the standstill clause would have to operate during the adjustment of plans by the two States concerned. Two approaches were possible. One was to specify that the consultations and negotiations must not unduly delay the initiation of the project. The other was to lay down a specific time-limit. In that regard, a period of nine months would seem adequate. He had refrained, however, from suggesting a definite period, in the hope that an acceptable compromise would be reached to allow for all the positions taken by members.

23. Mr. Sreenivasa RAO said that, in his helpful summing-up, the Special Rapporteur had not covered all the points raised during the discussion. He therefore suggested that, when the articles were referred to the Drafting Committee, the Committee's terms of reference should be more flexible than usual and broad enough to take into account all the matters that had been raised.

24. Mr. REUTER said that any member of the Commission who did not sit on the Drafting Committee was entitled to submit suggestions in writing. Personally, he considered that the discussion on articles 11 to 15 could not be usefully continued in plenary. He wished to congratulate the Special Rapporteur on his moderation and conciliatory spirit.

25. Mr. McCAFFREY (Special Rapporteur) explained that he had done his best, on the basis of his own notes, to reply as fully as possible to the points raised during the discussion. He wished to apologize for not being able to deal with every single question: that would have been possible only with the help of the summary records, which took some time to produce but would be available to the Drafting Committee when it came to consider articles 11 to 15.

26. As to the Drafting Committee's terms of reference, it was the usual practice for the Commission to

refer draft articles to the Committee for consideration in the light of the discussion. The Committee would thus take into account all the points made during the debate, and not merely those to which he had been able to refer in his necessarily summary exposition.

27. Mr. BENNOUNA said that he, too, wished to congratulate the Special Rapporteur on his open-mindedness and his grasp of the discussion, as revealed in the suggested changes, which took full account of the comments made by members. Thanks to the Special Rapporteur's summing-up, the debate had proved constructive and had enabled the Commission to make progress in its understanding of the draft articles. It would be preferable to refer all the articles to the Drafting Committee, but he wondered whether the Committee should not first complete the substantive provisions, particularly draft article 9, before examining the procedural provisions.

28. The CHAIRMAN pointed out that a decision to refer the procedural articles to the Drafting Committee would not imply any kind of priority upon them.

29. Mr. BEESLEY said that he strongly supported the Special Rapporteur's proposal. He had been impressed by the Special Rapporteur's willingness to accommodate the different views expressed. For his own part, he preferred the concept of accommodation to that of compromise. As a result of the Special Rapporteur's efforts, the articles would be much more acceptable to States.

30. Surely it would be enough to refer the articles to the Drafting Committee for consideration in the light of the discussion, for there was no material difference between the suggestions made by Mr. Sreenivasa Rao and those made by Mr. Reuter. During the discussion, some members had said that articles 11 to 15 were not yet ripe for referral to the Drafting Committee. Following the Special Rapporteur's summing-up, the situation had changed and the Committee could fulfil its traditional role of bridging the existing differences, a task which went well beyond mere drafting.

31. He wished to point out that the Commission would be judged on an important issue. Everyone knew that water was a diminishing resource, but pollution was not a diminishing problem. Moreover, disputes between States were bound to occur and the questions involved could not be left for settlement on a purely bilateral or regional basis. That was why the Commission was working on a "framework convention", although he would prefer the term "umbrella convention", which had already been used in other contexts.

32. The Chernobyl incident had raised a number of issues and, to its credit, the country concerned had adopted a co-operative regional approach to some of the problems involved. Another case was the recent catastrophic pollution of the Rhine and the action taken by Switzerland in that connection. He therefore reluctantly supported the Special Rapporteur's suggestion that paragraph 3, relating to liability, should be deleted from articles 14 and 15.

33. Mr. GRAEFRATH said he had initially thought that the Drafting Committee might have difficulty

reconciling the various positions adopted during the discussion. In the light of the Special Rapporteur's summing-up, however, he would not object to referral of articles 11 to 15 to the Drafting Committee.

34. Mr. NJENGA said that he, too, endorsed the proposal to refer articles 11 to 15 to the Drafting Committee.

35. Mr. AL-BAHARNA said that certain views and proposals regarding articles 11 to 15 had yet to be considered and might lead to a discussion of substantive issues in the Drafting Committee, which should be concerned with matters of drafting. The Special Rapporteur could therefore perhaps be asked to redraft the articles to reflect the views that had been expressed in the Commission, before they were referred to the Drafting Committee. That would assist the Committee in its task and also save time.

36. Mr. THIAM said that he welcomed the changes suggested by the Special Rapporteur to accommodate the views expressed by members. As usual, the Drafting Committee would not fail to take them into account. In his opinion, the Special Rapporteur should not be asked to recast the draft articles and submit them again to the Commission.

37. Mr. BARSEGOV thanked the Special Rapporteur for taking account of the views expressed by members of the Commission, but thought that it would be preferable to revise the draft articles before submitting them to the Drafting Committee, a course that would simplify the Committee's task. Unquestionably, the more thorough the preparation of the texts submitted to the Drafting Committee, the faster it could deal with them. Apart from those pragmatic considerations, matters of principle were involved. There was a wide divergence of views in the Commission concerning the articles which had been discussed, and many suggestions had been made. Taking them into account was not a matter of drafting; it called for analysis, reflection and the preparation of new texts. He was convinced that the Special Rapporteur could perform that task, as was clear from his summing-up.

38. Generally speaking, differences of opinion on matters of principle would not be eliminated by referring draft articles to the Drafting Committee. On the contrary, such an approach would protract the work of the Drafting Committee and, at a later stage, severely slow down the work of the Commission itself, especially on such topics as the draft Code of Offences against the Peace and Security of Mankind. The fact that the first 10 draft articles on the present topic had been discussed in the Drafting Committee could not serve as an example, because they related to more general aspects, whereas the Commission was now engaged in examining articles of a specific nature, to which there were different approaches. There was no reason to fear that the debate would be reopened; that would happen only if the Special Rapporteur failed to take into account the opinions expressed by members of the Commission, and that was not the case in the present instance.

39. Furthermore, the Commission should not lose sight of the fact that the General Assembly would judge its performance by reference to its methods of work. It

had been said during the debate that, if the articles were not referred to the Drafting Committee, the General Assembly might come to the conclusion that the new composition of the Commission was hindering progress in its work on the topic. Anyone would think that work on the 13-year-old topic had proceeded apace in the Commission as formerly composed. However, in its new composition, the Commission had already succeeded in working out some 10 draft articles. The General Assembly would more likely be surprised at a method of work which involved referring articles to the Drafting Committee even though there were divergent views on questions of principle. If the majority insisted on such a referral he would not disrupt the consensus, but he asked the Commission to bear in mind that further work on the articles could not be regarded merely as an editing exercise. It would therefore be necessary to recognize the right to use square brackets if it proved impossible to reach agreement on a text. In conclusion, he requested the secretariat to compile an exhaustive list of the proposals and observations made during the discussion in plenary, so as to allow the Drafting Committee to take into account the views of all members of the Commission.

40. Mr. MAHIU said that he endorsed the Special Rapporteur's conclusions and the proposal to refer draft articles 11 to 15 to the Drafting Committee. As he recalled, the Drafting Committee had not always been asked to deal solely with articles on which the Commission was unanimous. Actually, draft articles 1 to 9 had given rise to even more divergent views than draft articles 11 to 15, but had none the less been referred to the Drafting Committee. It was difficult to know which solution was best. Sometimes the Drafting Committee was able to bridge certain differences, but in other cases that was done by the Commission itself. Yet the Commission had sometimes reopened the debate on questions which had been settled in the Drafting Committee. In his view, the practice followed so far had none the less proved positive and constructive.

41. Mr. FRANCIS said that problems did not disappear simply by being discussed in plenary. The Drafting Committee was a more flexible body and nearly always found it possible to solve a particular problem. Articles 11 to 15 should therefore be referred to the Drafting Committee, since that was the place where agreement was most likely to be secured.

42. Mr. KOROMA said that the time had come to review the Commission's methods of work. It was not necessary for each and every article before the Commission to be referred to the Drafting Committee. Indeed, he understood that that had not been the case in the past. Mr. Al-Baharna had made a constructive proposal: the Special Rapporteur should be requested to re-draft articles 11 to 15 before their referral to the Drafting Committee.

43. Mr. McCAFFREY (Special Rapporteur) said that the articles submitted in his third report (A/CN.4/406 and Add.1 and 2) were revised versions of those submitted in his second report (A/CN.4/399 and Add.1 and 2), and had been redrafted in the light of the comments made in the Commission and the Sixth Committee of the General Assembly. It was, however, standard

practice for special rapporteurs to submit a number of redrafts in the Drafting Committee and he would no doubt do so in the case of articles 11 to 15.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 11 to 15 to the Drafting Committee, on the understanding that the Committee would take into account all the proposals made in plenary, including those made by the Special Rapporteur, as well as any written comments by members who did not sit on the Drafting Committee.

*It was so agreed.*

45. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.45 a.m.*

## 2015th MEETING

*Tuesday, 16 June 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2')**

[Agenda item 7]

### THIRD REPORT OF THE SPECIAL RAPPORTEUR

#### ARTICLES 1 TO 6

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/405), as well as draft articles 1 to 6 contained therein, which read:

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

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

### Article 1. Scope of the present articles

The present articles shall apply with respect to activities or situations which occur within the territory or control of a State and which give rise or may give rise to a physical consequence adversely affecting persons or objects and the use or enjoyment of areas within the territory or control of another State.

### Article 2. Use of terms

For the purposes of the present articles:

1. "Situation" means a situation arising as a consequence of a human activity which gives rise or may give rise to transboundary injury.

2. The expression "within the territory or control":

(a) in relation to a coastal State, extends to maritime areas whose legal régime vests jurisdiction in that State in respect of any matter;

(b) in relation to a flag-State, State of registry or State of registration of any ship, aircraft or space object, respectively, extends to the ships, aircraft and space objects of that State even when they exercise rights of passage or overflight through a maritime area or airspace constituting the territory of or within the control of any other State;

(c) applies beyond national jurisdictions, with the same effects as above, thus extending to any matter in respect of which a right is exercised or an interest is asserted.

3. "State of origin" means a State within the territory or control of which an activity or situation such as those specified in article 1 occurs.

4. "Affected State" means a State within the territory or control of which persons or objects or the use or enjoyment of areas are or may be affected.

5. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a State of origin and which affect persons or objects or the use or enjoyment of areas within the territory or control of an affected State.

6. "Transboundary injury" means the effects defined in paragraph 5 which constitute such injury.

### Article 3. Various cases of transboundary effects

The requirement laid down in article 1 shall be met even where:

(a) the State of origin and the affected State have no common borders;

(b) the activity carried on within the territory or control of the State of origin produces effects in areas beyond national jurisdictions, in so far as such effects are in turn detrimental to persons or objects or the use or enjoyment of areas within the territory or control of the affected State.

### Article 4. Liability

The State of origin shall have the obligations imposed on it by the present articles provided that it knew or had means of knowing that the activity in question was carried on within its territory or in areas within its control and that it created an appreciable risk of causing transboundary injury.

### Article 5. Relationship between the present articles and other international agreements

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

### Article 6. Absence of effect upon other rules of international law

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

2. Mr. BARBOZA (Special Rapporteur) said that, for two reasons, he believed that the Commission should reopen the general debate on his first two reports;<sup>5</sup> first, because the amount of time it had devoted to them at the previous session had been entirely insufficient and all members had not had an opportunity to state their views; and secondly, because the Commission's composition had changed a good deal since 1986. The Commission's replies to the questions that would be discussed again were all the more necessary because there was no general convention on the topic. Although there were, as he had indicated in his second report (A/CN.4/402, para. 50), various conventions which established a régime of liability for risk in the case of certain activities, there was no rule that the Commission could take as a model for the preparation of the draft.

3. The question of strict liability was a particularly thorny one. The previous Special Rapporteur, the late Robert Q. Quentin-Baxter, had referred to it as little as possible in his five reports, attempting instead to explain the obligation of reparation in the absence of a treaty régime on the basis, for example, of a somewhat hypertrophied concept of prevention and, secondarily only, in terms of the idea of strict liability. Mr. Quentin-Baxter had nevertheless recognized in his third report that:

At the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss.<sup>6</sup>

In that connection, he himself wished to repeat that the Commission's problem was not whether it should base the draft on strict liability, which was only a legal technique and could not serve as a basis for anything. The Commission had been entrusted by the General Assembly with the task of preparing a draft on international liability arising out of acts which were not wrongful. But such liability was no more than strict liability, since there were only two types of liability, namely that arising out of wrongful acts and that arising out of lawful acts (which could also be described as "liability for risk", no-fault liability, etc.). The only thing the Commission could do was to elaborate a mechanism of strict liability which was adapted to international law and which would take account of the sovereignty of States by limiting the automatic application of that type of liability through the conditions under which it would come into play. In that connection, he noted that, in the report entitled *Our Common Future*,<sup>7</sup> the World Commission on Environment and Development had formulated legal principles in which it had proposed solutions similar to those contained in the schematic outline.

4. In the summary records of the 1972nd and 1976th meetings,<sup>8</sup> members would find his introduction to his first two reports and his summing-up of the brief discus-

<sup>5</sup> Preliminary report, document A/CN.4/394, reproduced in *Yearbook . . . 1985*, vol. II (Part One); second report, document A/CN.4/402, reproduced in *Yearbook . . . 1986*, vol. II (Part One).

<sup>6</sup> *Yearbook . . . 1982*, vol. II (Part One), p. 60, document A/CN.4/360, para. 41.

<sup>7</sup> Oxford University Press, 1987.

<sup>8</sup> *Yearbook . . . 1986*, vol. I, pp. 196-200, paras. 23-55, and pp. 215-217, paras. 1-23, respectively.

sion the Commission had devoted to them at its previous session. He would therefore refer again only to certain points on which he particularly needed to know members' views. He especially wished to know what they thought of the first three principles contained in section 5 of the schematic outline, namely: (1) that the articles must ensure to each State as much freedom of choice within its territory as was compatible with the rights and interests of other States; (2) that the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; (3) that, in so far as might be consistent with those two principles, an innocent victim should not be left to bear his loss or injury. The fourth principle was less important because it was of a procedural nature and derived from the first three. Members of the Commission might, of course, also propose additional principles.

5. He also looked forward to hearing members' comments on his analysis in his second report of the obligations deriving from the schematic outline (A/CN.4/402, paras. 14-28, 34-41 and 62-67), and especially on his theory of obligations of prevention under régimes of strict liability (*ibid.*, paras. 64-67).

6. The question of machinery was also quite important and he could not see how the principles of section 5 of the schematic outline could be implemented if provision were not made for negotiation, third-party fact-finding or compulsory settlement procedures, since it was clear that different ways of assessing facts and their implications were at the heart of most disputes and that the success of negotiations would probably depend on whether such disputes could be settled.

7. He would also like to know the Commission's thoughts on the limitation of strict liability, either through the introduction of exceptions such as those referred to in the second report (*ibid.*, paras. 59-61), or in the case where, for example, the State of origin and the affected State had "shared expectations" (*ibid.*, paras. 55-57).

8. Introducing his third report (A/CN.4/405), he said that, of the six draft articles it contained, articles 1, 2, 5 and 6 were roughly the same as articles 1 to 4 as submitted by Mr. Quentin-Baxter in his fifth report,<sup>9</sup> which corresponded to section 1 of the schematic outline. He had not reproduced the content of the former article 5, relating to the role of international organizations, which would be considered at a later stage for the reasons explained in his third report (*ibid.*, paras. 72-75), and had proposed two new articles, namely article 3 (Various cases of transboundary effects) and article 4 (Liability).

9. In order to understand article 1 on the scope of the draft, reference should be made to the passage of Mr. Quentin-Baxter's fifth report dealing with articles 1 and 2 which he had proposed<sup>10</sup> and which corresponded to the first two articles of the text now under consideration.

10. A first approach to the idea of dangerous activities, which were characteristic of the topic under consideration, had been made in the second report (A/CN.4/402), in section C of chapter I, relating to the scope of the topic, and in section A of chapter III, relating to activities. He wished to make it clear from the start that the new draft article 1 referred not to "dangerous activities", but rather to activities "which give rise or may give rise" to transboundary injury. Article 2 on the use of terms might, of course, include a more precise definition of what constituted a "dangerous activity" for the purposes of the draft articles. At the previous session, moreover, some members of the Commission had proposed that a list should be drawn up of the activities to which the text would apply. He had not followed that suggestion because he considered that, if the Commission drew up such a list, it would not be complying with its mandate, since it would not be considering the consequences of all lawful activities as the General Assembly had requested it to do, but rather the consequences of only some of them, and also because the adoption of such a list would have the disadvantage of not including dangerous activities that might emerge as a result of technological advances. He had also not proposed a definition of such activities in article 2, because it would be almost impossible and perhaps even inadvisable to do so; he had preferred to indicate the main characteristics of those activities in his comments on article 1, since, on first examination, it was not difficult to determine which activities might involve risks and since the schematic outline also recommended that experts should be consulted on the possible transboundary effects of new activities.

11. In his view, what characterized the activities covered by the draft articles was that they involved an appreciable risk, either *a priori* because of the type of products used, or *a posteriori* as in the case of agricultural pesticides that might ultimately prove to be dangerous, since the transboundary nature of the injury implied that the effects of an activity were felt some distance away. Consequently, activities which might be considered dangerous at the internal level could be excluded from the scope of the draft. In addition to being appreciable, the risk was relative because it depended mainly on the geographical location of the activity in question and on other factors, such as prevailing winds. The risk was also generally foreseeable, in that it could be predicted more or less statistically. He had not tried to make the definition more precise, but members of the Commission might do so if they wished, although it might not be possible to go much further, if only because of the general nature of the mandate from the General Assembly.

12. Paragraph 16 of the third report (A/CN.4/405) went to the very heart of the topic. Without going into the question of fault in respect of international liability—since, in the case of lawful activities, international liability would assume only a link of causality between conduct and injurious effects—it might be said that any dangerous activity involved a kind of "original sin", which consisted in creating a risk in the hope of deriving some benefit from it. What would happen when an activity whose dangerous nature could not have

<sup>9</sup> *Yearbook . . . 1984*, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para. 1.

<sup>10</sup> *Ibid.*, pp. 156 *et seq.*, paras. 3-34.

been foreseen nevertheless caused transboundary injury? In such a case, the internal law of some States provided that the injured party should receive compensation. He did not believe that that solution could be transposed to international law, for, as things now stood, no such compensation would be possible.

13. Another problem was whether activities that caused pollution came within the scope of the draft articles. In that connection, he referred members to the relevant passages of the second report (A/CN.4/402, paras. 30-31 and footnotes 32 and 33). The conclusion (*ibid.*, para. 31) that, as long as an activity had not been prohibited—and, it should also be stated, as long as it was not governed by a special treaty régime—it was covered by the draft articles might have to be reconsidered. For the sake of methodological purity, he himself now had some doubts about characterizing as “dangerous” an activity which involved not a risk, but the certainty of appreciable harm, and about whether such an activity should not rather be characterized as “harmful”. He also thought that the attitude of a State which authorized or engaged in that type of activity constituted wrongful rather than dangerous conduct. It was true that, in the absence of a specific rule, such conduct could not be penalized, except perhaps under the general principle *sic utere tuo ut alienum non laedas*, but he was not sure that the régime of liability for risk should apply to conduct which could not be characterized as dangerous. He did, however, think that the conclusion (*ibid.*, para. 30) that accidental pollution came within the scope of the draft articles was still valid.

14. With regard to “situations”, the comments contained in the third report (A/CN.4/405, paras. 24-30) were quite different from the earlier ones. There, too, he had endeavoured to purify the methodology of the draft. Obviously there had been certain problems with some of the situations to which the former article 1 had referred, namely situations that were not the consequence of a human activity (forest fires, floods, epidemics, etc.). It had seemed to him that, in such cases, an act or, more likely, an omission by a State would not justify the application of a régime of liability for risk and that, ultimately, such an act or omission would be excusable if the State provided evidence that it had done everything it reasonably could to avoid injury—something that, in a strict régime of strict liability or liability for risk, would not constitute a ground for exoneration. The other “situations”, which were the consequence of a human activity involving a general risk, did come within the scope of the topic because the risk was created by an activity—such as the construction of a dam—which, although it might not in itself be dangerous, nevertheless contributed to the creation of a dangerous situation. A few changes had been made in that regard: he had specified that the effects had to be “adverse” and that they had to be adverse for “persons or objects”, as he explained in the report (*ibid.*, paras. 41-43).

15. Again for the sake of methodological consistency, he was of the opinion that the draft articles should apply only to dangerous activities: paragraph 32 of the second report should therefore be read in the light of paragraphs 31-36 of the third report.

16. Article 2 was also slightly different from the earlier text. Paragraph 1 reflected what he had just said with regard to situations. Paragraph 2 had largely the same content as the three subparagraphs of paragraph 1 of the former article 2. Subparagraph (a) was almost identical to the first subparagraph of the former text, except that, in the Spanish text, the words *a cualquier cuestión* had been replaced by *a cualquier materia*. Subparagraph (b) referred to ships, aircraft and space objects which caused transboundary injury and were regarded as being within the territory or control of a flag-State, a State of registry or a State of registration, even when (*aun cuando*) they exercised rights of passage or overflight through an area over which the affected State had some jurisdiction. The earlier wording (“while exercising a right of continuous passage or overflight”) might have meant that such a situation would be excluded when it occurred in an area that was not within the jurisdiction of any State. It might be advisable to add the word “navigation” between the words “rights of passage” and the words “or overflight”, since the article also applied to the exclusive economic zone. Subparagraph (c) referred to the situation of two ships on the high seas, both of which exercised rights or asserted interests beyond national jurisdictions. Since ships, like aircraft and space objects, were regarded as being within the territory or control of a flag-State, a State of registry or a State of registration, any adverse effect by one on the other would be a transboundary effect.

17. In his comments on article 2 (*ibid.*, paras. 54-59), he had attempted a first approach to the concept of injury for the purposes of the draft articles and had tried to distinguish it from injury arising out of wrongful acts. The main distinction lay in the different types of conduct giving rise to injury: under the present draft articles, the conduct was lawful and injury was the result not of failure to fulfil an obligation, but of the occurrence of a risk. Since the activity in question would imply some benefit—for the affected State as well, in some cases—the injury would be the result of a disruption of the balance of the various factors and interests at stake. The amount of compensation would be calculated so as to redress the balance and that explained why, in most cases, it would be lower than the actual cost of the injury.

18. The absence of compulsory jurisdiction gave rise to the need to negotiate in order to assess the complex factors involved (in principle, those referred to in section 6 of the schematic outline). The task would obviously be easier if the parties had agreed to apply a particular régime to the activities in question.

19. In order to distinguish between the injury referred to in the draft articles and that resulting from a wrongful act, account also had to be taken of the two complementary concepts of “appreciable injury” and the “threshold” of injury. Below the threshold, there was no injury within the meaning of the draft articles, but merely an unpleasantness which the State had to bear for reasons of good-neighbourliness and also because, with modern technology, a State might not only be affected by, but also cause, an injury. In his comments (*ibid.*, para. 60 (b)), he had recognized that the combination of appreciable injury and the threshold



of injury was not characteristic exclusively of liability for risk, since it was also to be found in the law of the non-navigational uses of international watercourses, in which liability was none the less the result of failure to fulfil an obligation. He had also referred to the question of the inclusion of injury caused by polluting activities, which had already been discussed. Finally he had referred to injury caused by an unforeseeable event (*ibid.*, para. 60 (c)).

20. Article 3 was new. Subparagraph (a) should not give rise to any problems, for its inclusion was necessary so that the scope of the draft would not be too narrow. Subparagraph (b) dealt with a question on which few precedents existed. Some concern had been expressed in the Commission and in the Sixth Committee of the General Assembly about harmful effects occurring in areas beyond national jurisdictions. The question was an interesting but difficult one, particularly when it came to determining who would have a right of action in such cases, since, by definition, those areas were not within the jurisdiction of any State. The solution might be to set up a United Nations authority—a possibility that should not be ruled out if pollution continued to occur so frequently in all parts of the world. The draft articles were, however, not the right place in which to recommend such a solution. For the time being, article 3, subparagraph (b), and article 2, paragraph 2 (c), gave the affected State a limited right of action when its territory or an area beyond national jurisdictions in which it had a specific interest was affected by transboundary injury originating within the territory or control of another State, the terms “territory or control” being used within the meaning of article 2, paragraph 2. The Commission’s reaction would determine the fate of that provision, whose implementation might possibly involve participation by international organizations.

21. Article 4, which was very important, meant, in a sense, that a stand had been taken, for neither the schematic outline nor the five original articles had used the word “liability”, although the statement of principles in section 5 of the schematic outline did give some idea of the type of liability envisaged. He was submitting that article primarily in order to find out what the Commission thought of it. Two conditions were needed to engage such liability: first, the State of origin had to know or have means of knowing that the activity in question was being carried on within its territory or in areas within its control; and secondly, it had to know or have means of knowing that such activity created an “appreciable” risk of causing transboundary injury. As explained in the third report (*ibid.*, para. 66), the first condition met the concerns expressed with regard to developing countries, some of which had vast expanses of territory but no means of knowing what was going on in that territory, and it applied particularly to the exclusive economic zone. In that connection, he noted that the provision was based on the judgment of the ICJ in the *Corfu Channel* case, but it was not as strict for the State of origin because it did not make it an obligation for that State to know everything that was happening in its territory as a prerequisite for exclusive territorial jurisdiction. It was also based on the arbitral award in the *Trail Smelter* case concerning liability for transboundary injury caused by smoke emissions. It had

often been held that those two decisions applied to cases of State responsibility for wrongful acts. In addition to the arguments he put forward in his report (*ibid.*, paras. 67-68), he noted that, in the *Trail Smelter* case, the State of origin had been declared liable for transboundary injury even though all the necessary precautions had been taken—a typical case of liability for risk. With regard to the *Corfu Channel* decision, there was no reason why the presumption that the State had knowledge of everything that was happening in its own territory should be limited to responsibility for wrongful acts; it was, rather, linked to the general obligation not to cause injury to others.

22. The second condition related to what, as had been seen, constituted the basis for liability, namely knowledge of an “appreciable” risk. While it limited liability by requiring knowledge, it also established a presumption of knowledge, since the State possessed means of knowing. The word “appreciable” made it clear that the risk involved was neither concealed nor difficult to deduce from the nature of the means used for the activity in question. It could be a small risk of a major disaster, as well as a great risk of less important or cumulative injury. What counted was the possibility of perceiving or deducing the risk, for without such a possibility there could be no liability within the meaning of the draft articles.

23. The CHAIRMAN thanked the Special Rapporteur for his informative introduction to his third report (A/CN.4/405).

24. Mr. KOROMA congratulated the Special Rapporteur on his comprehensive and lucid introduction to the topic. He noted that the word “liability” was not defined either in draft article 2 on the use of terms, or in draft article 4, which dealt with liability itself. It would be helpful, however, if such a definition could be furnished at the outset.

25. He also noted that the Special Rapporteur had stated that the basis of liability was knowledge, whereas he had always understood that it was the injury caused. Thus, in certain specific circumstances, liability would be incurred whether or not the State of origin had knowledge of the injury. He appreciated that the trend of the topic was away from absolute liability, but there was a body of recent international legislation on outer space activities, for example, which still provided for absolute liability. He also considered that a distinction should be made between injury originating in the territory of a State and injury caused by objects, such as oil tankers or space objects. Such a distinction would help to determine whether or not knowledge was necessary in order for liability to be incurred.

26. Mr. TOMUSCHAT expressed appreciation to the Special Rapporteur for his introduction, which had provided enlightenment on a number of crucial issues. It would assist members in preparing their statements if the Special Rapporteur could provide some indication of the future structure of the draft and of how he proposed to proceed. One central issue to be considered was the relationship between the many conventions on specific aspects of environmental pollution and the draft rules which the Commission was to elaborate. Did

the Special Rapporteur see those rules as a kind of general framework or would they apply solely where no other convention applied?

**Co-operation with other bodies (concluded)\***

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN  
JURIDICAL COMMITTEE

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

28. Mr. MACLEAN (Observer for the Inter-American Juridical Committee) said that the Commission performed on a world-wide scale similar functions to those performed by the Inter-American Juridical Committee for the region of the Americas and the two bodies had a long tradition of co-operation, as was shown by the annual visits of the Chairman of the Commission to the Committee. At a time when social, political, scientific and technical changes were rapid, violent and confused, the Commission and the Committee were performing a necessary task governed by reason.

29. Being convinced that it was possible to establish peace and justice and to secure the co-existence of different cultures and different political, economic and legal systems, the Committee had worked on many subjects, notably the following: international judicial co-operation in criminal cases; the serving of criminal sentences abroad; measures of economic coercion; interpretation and development of the principles of the Charter of OAS, as amended by the 1985 Cartagena Protocol,<sup>11</sup> with a view to strengthening relations between the States members of OAS; international legal problems relating to multilateral guarantees of foreign private investments; trends in international law; environmental law; improvement of the administration of justice in the Americas; expulsion and international law; returning of minors as between States; directives concerning extradition in drug-trafficking cases; and the draft additional protocol to the 1969 American Convention on Human Rights.<sup>12</sup> During the past year, however, the Committee had given most attention to two matters of crucial importance for life on the American continent: the first, which was the subject of two draft conventions, comprised certain aspects of international criminal law relating to one of the great scourges of modern times, namely international crimes; and the second was measures of economic coercion.

30. With regard to international criminal law, he noted that the American continent, like other regions of the world, had been suffering for several decades from a new form of crime. The traffic in narcotics and terrorism had become so widespread that crime was no longer a purely national concern. No country, however powerful, and still less a small country, could fight

alone against those scourges. The unexpected growth of the drug traffic, corruption and related crimes had forced States to take measures which they would not have thought of taking a few years ago. But those measures had proved insufficient, as had the judicial machinery established by the First International Conference of American States (1889-1890). For the contribution of INTERPOL, and the process of extradition of criminals, had brought a decline in co-operation between States themselves. Quite often the evidence of a crime was in one country and the *corpus delicti* in another, while the ramifications of the crime extended to three or four more countries. For instance, drugs were produced in one country, refined in another and consumed in a third. Unfortunately, a paradox had to be faced. If, for instance, a Costa Rican trader contracted a small commercial debt to a Peruvian and his creditor wished to recover the sum due to him, the Peruvian legal authorities could apply to their Costa Rican counterparts to take the necessary measures; on the other hand, if it was a question of finding a drug trafficker who had hidden the fruits of his crime in a company or a foreign bank account, there was at present no means of ensuring judicial co-operation between States—not because States were opposed to it, but because the technical-legal machinery was lacking.

31. In view of that situation, the Inter-American Juridical Committee had undertaken, a few years previously, a study of the question of international co-operation in criminal cases and had just completed a draft convention on mutual judicial assistance in such cases, which comprised 39 articles divided into five chapters. Although that draft convention covered all offences coming under criminal law, the Committee had been mainly concerned to combat the offence most frequently committed on the American continent, namely trafficking in narcotic drugs.

32. The draft convention provided for co-operation between judicial systems only in the case of offences that were punishable in all the States parties. The request for co-operation could, however, be refused in certain cases: if a prosecution for the offence in question was already in progress before a court of the party receiving the request; or if the request for mutual assistance related to an offence which the party receiving the request considered to be of a political nature, to be related to a political offence, or to be an ordinary offence prosecuted for political reasons, or to be a tax offence—although there seemed to be no reason to exclude co-operation in the case of tax offences, as had been shown by the discussion to which that exception had given rise. A State could also refuse the request for co-operation if it had good reason to believe that an inquiry had been opened with a view to prosecuting a person or group of persons for reasons of sex, nationality, religion or ideology; if the person prosecuted had already served a sentence or been amnestied or pardoned in respect of the offence prompting the request for assistance, or had been acquitted, or if the charge had been dismissed; if the request was made by an *ad hoc* court; or if the party receiving the request considered that to grant it might be prejudicial to public order.

\* Resumed from the 2012th meeting.

<sup>11</sup> See OAS, *Anuario Jurídico Interamericano 1985* (Washington D.C.), 1987, p. 113.

<sup>12</sup> United Nations, *Treaty Series*, vol. 1144, p. 123.

33. The mechanism provided for—the rogatory commission—had already been used for centuries in Europe and for 200 years in the Americas for the purposes of judicial co-operation in civil and commercial cases. By means of the rogatory commission, a judge in one country could request a judge in another country to take the necessary action to collect evidence. Witnesses or experts could be questioned by a judge in one country at the request of a judge in another, and in certain cases they could be sent to the country of the judge making the request and appear before him. During their stay abroad, witnesses, whether free or detained, who went to testify in legal proceedings could not be prosecuted for an offence committed previously. If proceedings were opened against them, they must first be returned to the country from which they had come and could only be brought back by extradition procedures.

34. The exchange of information was another important feature of the draft convention. The ramifications of the international network of drug traffickers and terrorists were so complicated that countries were not always aware of everything that concerned them. The draft convention therefore provided that, if a court in one country convicted a foreigner, it must immediately inform the country of which he was a national. But if the person concerned had been convicted of drug trafficking, traffic in persons or terrorism, the court must also transmit the information to all countries participating in the inter-American system.

35. The second draft convention, which the Inter-American Juridical Committee had completed in 1986, was also concerned with criminal law; it dealt with a humanitarian question, being concerned with the person of the offender. Very often, and particularly in drug-trafficking cases, it was young and inexperienced people used by traffickers to carry drugs from one country to another who fell into the hands of the police and found themselves in prison in a foreign country. Deprivation of liberty was always distressing, but it was even more so when suffered in unfamiliar surroundings. The draft convention therefore aimed to ensure that, under certain conditions, an offender sentenced to imprisonment in a country of which he was not a national could be allowed to serve his sentence in his own country.

36. In that matter, the Committee had been largely guided by work done in the United States of America and Canada. The United States had in fact concluded agreements on the subject with many Latin-American countries. Jurists, whose ideas were often too nationalistic and who were jealous of the sovereignty of their national courts, had been disconcerted at the idea that an offender could serve his term of imprisonment in a country other than that in which he had been convicted. But it must not be forgotten that all modern works on penal science and criminology urged the readaptation of the offender in spite of the difficulties involved. Some countries had obtained impressive results in that regard, whereas in others, unfortunately, the conditions of detention were an obstacle. It was the country of which the offender was a national that was most concerned with his re-education and rehabilitation, since it was to that country that he would return to live after being expelled from the country where he had served his sentence. Thus a country which convicted a foreigner

did not suffer the consequences of his inadequate readaptation. That being so, the interest of the offender's country of origin in his re-education was justified, and from a humanitarian point of view it was less distressing for the offender to serve his sentence in surroundings with which he was more familiar.

37. Those arguments, which were easily understandable at the intellectual level, were opposed by a distrust rooted in the idea of the sovereignty of the administration of justice. Hence the convention could be applied only with the consent of the offender himself, of the State in which he had been tried and was supposed to serve his sentence, and of the State that was to receive him. If any one of them opposed the transfer of the offender, he would remain in the country where he was imprisoned. The draft convention further provided that the offender must have been convicted for an act which also constituted an offence in the State where he was to serve his sentence. Once he had been transferred to that State, the modalities of application of the sentence would be determined by its laws (with possible remission of sentence by probation, etc.). Nevertheless, the country in which the conviction took place retained full jurisdiction with respect to review of the trial. In none of the countries of the American continent belonging to OAS did a criminal conviction have the force of *res judicata* and a trial could be reopened at any time for the court to hear new evidence and possibly acquit a convicted person. Thus the country in which the conviction had been pronounced retained that faculty and its power of pardon, amnesty and remission of sentence. The country to which the offender had been transferred could in no case increase the period of imprisonment to which he had been sentenced; on the other hand it could allow him the benefit of a general amnesty. The draft convention on the serving of criminal sentences abroad, which was intended to apply to the whole American continent, comprised 19 articles and also applied to minors and persons whose physical or mental condition constituted grounds for exemption from responsibility.

38. The third draft convention prepared by the Inter-American Juridical Committee concerned measures of economic coercion. While there had been only five cases of economic sanctions, representing a cost of about \$90 million, between 1930 and 1935, there had been 22 cases representing nearly \$5 billion between 1980 and 1985—hence the need to study the question. The doctrine condemning recourse to economic coercion was essentially American; it had first been expressed in concrete form in what had become article 19 of the OAS Charter,<sup>13</sup> before being taken up in other multilateral instruments, including the Charter of Economic Rights and Duties of States.<sup>14</sup> But the Inter-American Juridical Committee had wished to define economic coercion or make the concept more precise, considering that article 19 of the OAS Charter had a very wide scope. It had also come to the conclusion that all coercive measures, both economic and political, were prohibited by the Charter of the United Nations, the Charter of OAS and general international law, except in the specific cases provided for in the Charter of the United

<sup>13</sup> See footnote 11 above.

<sup>14</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

Nations. It had considered that the text of article 19 of the OAS Charter was not satisfactory because it was open to subjective interpretation and had proposed that it should be amended to read:

“No State may use or encourage the use of coercive measures of an economic, political or other character in order to force the sovereign will of another State or obtain from it advantages of any kind.”

39. During the past year, the Inter-American Juridical Committee had adopted other resolutions of a more specific character on co-operation in criminal cases and a resolution on the improvement of the administration of justice in the Americas. It had also amended its rules of procedure.

40. Lastly, for the thirteenth year in succession, it had held a seminar on international law in which the most eminent jurists of the American continent and about 50 students had taken part. The Committee hoped that the Commission's representative would visit it in August, rather than at its January session, so that he could attend the international law seminar, thus enhancing the seminar's prestige and strengthening the Committee's links with the Commission.

41. The CHAIRMAN conveyed the Commission's warm appreciation to the Observer for the Inter-American Juridical Committee for his informative statement on the Committee's work. He thanked him for the invitation to the Commission and noted his request that the visit by the Commission's representative should take place in August, so that he could attend the Committee's deliberations at the time when its annual seminar on international law was being held.

42. He had been impressed by the Committee's responsiveness to current world problems, as well as by the number of draft conventions it had prepared and by the speed with which it had dealt with the many topics on its agenda. The Committee's record was indeed remarkable and he had been particularly struck by the fact that it had completed three very important draft conventions, two of them concerning international criminal law and the third economic matters. He sincerely congratulated the Inter-American Juridical Committee on its achievements and asked its Observer to convey to it a message of cordial greetings and encouragement from the Commission.

43. Mr. THIAM thanked the Inter-American Juridical Committee, through its Observer, for the warm welcome given him as representative of the Commission. The Committee was like the Commission in many ways, notably in the multiplicity of influences at work in it and the subjects in which it was interested.

44. Mr. FRANCIS, after thanking the Observer for the Inter-American Juridical Committee for his detailed account of the Committee's work in 1986, asked him to clarify the draft convention applicable to illicit drug trafficking by young couriers. His question related to the possibility of a young offender convicted in the courts of a foreign country being allowed to serve his sentence in his own country. The offence committed abroad by a young courier was simply the end-product of a much larger conspiracy and, that being so, his

country should be required not only to enforce the sentence of imprisonment, but also to go further and try to find the author of the crime. It was hardly necessary to add that drug trafficking had affected the whole of the region to which he belonged.

45. Mr. MACLEAN (Observer for the Inter-American Juridical Committee) said that the Committee had hardly begun to explore the many measures to be taken to combat the traffic in narcotic drugs. The few results it had obtained made it very modest when considering the task that remained to be accomplished in regard to the sufferings caused by drug addiction. Two of the draft conventions he had referred to in his statement met the concerns of Mr. Francis. First, if a minor was arrested in a narcotics case and tried in country A, that country could obtain the co-operation of INTERPOL and, under the draft convention on mutual judicial assistance in criminal cases, a judge in country A could request the co-operation of a judge in country B to make inquiries about the persons who had incited the minor to commit the crime with which he was charged. Secondly, the minor might not be sent to prison, but be put under some régime of supervised freedom. The second draft convention allowed a delinquent minor to serve his sentence in his own country, which then had every interest in seeing to his readaptation, since it was that country which would suffer the effects of an absence of re-education and any consequent recidivism.

46. The CHAIRMAN said that the meeting would rise to enable the Enlarged Bureau to meet.

*The meeting rose at 12.40 p.m.*

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## 2016th MEETING

*Wednesday, 17 June 1987, at 10.05 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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### Visit by members of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Evensen and Mr. Sette-Camara, Judges of the International Court of Justice, and said that their presence bore witness to the close relations between the Court and the Commission. The Commission was greatly honoured by their visit.

### Appointment of two new Special Rapporteurs

2. The CHAIRMAN said that, at its meeting the previous day, the Enlarged Bureau had agreed to recommend the Commission to appoint two new Special Rapporteurs: Mr. Arangio-Ruiz for the topic of State responsibility (agenda item 2) and Mr. Ogiso for the topic of jurisdictional immunities of States and their property (agenda item 3). If there were no objections, he would take it that the Commission agreed to appoint those two members as Special Rapporteurs for those topics.

*It was so agreed.*

3. The CHAIRMAN warmly congratulated Mr. Arangio-Ruiz and Mr. Ogiso on their appointment and assured them of the steadfast support of all members of the Commission. Their appointment would help the Commission to plan for the remainder of its five-year term of office, and he felt sure that the special rapporteurs for the various topics would usefully consult each other to that end.

### International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2<sup>4</sup>)

[Agenda item 7]

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

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (*continued*)

4. Mr. REUTER said that, in order to appreciate the effort made by the Special Rapporteur in studying the present topic, it must be borne in mind that the Commission had never really accepted the topic, and that it had doubts not only about the particular solutions contemplated, but also, and especially, about how the subject was to be tackled and related to other topics in its programme of work. The Special Rapporteur had made no secret of the difficulties and had accordingly put a number of questions to the Commission. He would not

try to answer them, but would only submit a few reflections for the attention of the Special Rapporteur.

5. There were perhaps two ways of considering the topic, the first and most logical probably being to approach it through the main problems it raised. The second way would be through the draft articles submitted by the Special Rapporteur. Having taken part in the Commission's discussions on the subject from the beginning, he would prefer to comment on the texts proposed before taking up the general problems raised by the topic.

6. Personally, he was prepared to accept the substance of the six draft articles. Moreover, it was not in the texts of the articles themselves that the Special Rapporteur had encountered the greatest problems, which he had discussed in his comments and in introducing his third report (A/CN.4/405). Nevertheless, he wondered whether most of those problems were really matters of drafting.

7. In draft article 1, he welcomed the use in all languages of the expression "physical consequence", which at least appeared to exclude for the time being any legal connotation; but the meaning of the word "situations" might be open to question, since it denoted something having a certain duration. That question deserved more careful examination; perhaps the Special Rapporteur would provide some clarification and other members of the Commission would comment on it. In article 1, the Special Rapporteur had also been faced with the problem of how to designate areas that were not strictly speaking part of the national territory, but over which a State exercised jurisdiction. He had used the term "control", which implied complete mastery by the State, and if he was contemplating areas other than the territorial sea and airspace, that would mean that the State exercised "control" over the exclusive economic zone or areas that were under lawful occupation, which would be an encroachment on the status of those areas. That was probably not what the Special Rapporteur intended.

8. The terminology used in draft article 2 did not always belong to the same philosophy in English as in French. For example, the expression "transboundary injury" in paragraph 1, which had purely physical connotations, had been rendered in French as *dommage transfrontière*, which had legal connotations. Paragraph 2 (c) referred both to a "right" and to an "interest". It had been said in regard to the draft articles on the law of the non-navigational uses of international watercourses that the interests in question were legally protected interests, which meant that they were comparable to rights. Was that so in the present case, or did the "interest" cover a more flexible notion? He regretted that there was no further mention in paragraph 3 of the physical origin of the activity.

9. He would not comment further on the terminology used in the draft articles, but pass on to the basic questions. The Commission was now working on three draft conventions which touched on responsibility, and another of which certain aspects were linked with responsibility. In each case it encountered important problems of terminology which were difficult to solve,

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

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

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

for it was drafting texts concerned not with "common law" or French law, but with international law, and it must not make *renvois* to national laws. It was thus obliged to choose its vocabulary in a somewhat arbitrary manner. The time had come for the Commission to make that choice and to draw up a sort of glossary for use by all the special rapporteurs.

10. The Commission had followed Mr. Ago in part 1 of the draft articles on State responsibility<sup>6</sup> and been convinced that injury was not a condition for international responsibility; that had had the obvious merit of introducing the concept of crime into the draft. Crime was not the only element, however, and injury played a large part in that field; but part 1 of those draft articles had not dealt with the fundamental legal problem of causality, which arose again now in draft article 3, subparagraph (b). If the Commission established a system of causal liability, would that liability be transmitted indirectly? The Special Rapporteur would have to take a position on that point in the part of his report dealing with liability in general. One example would be the case of an international crime committed against a State which left destitute one of its nationals who had creditors abroad. A causality was thus transmitted to the creditors, who could not recover what was owing to them. Had the State of which the creditors were nationals any grounds for invoking international responsibility?

11. Draft article 4 raised the problem of imputability or, as it would be better to say, "attribution", which was an unequivocal term. The attribution of an act to an entity raised a serious problem which also involved causality. In that connection, he was concerned to note that problems of pollution were dealt with at the same time as disturbances caused by a violent phenomenon. For whereas in the case of a nuclear accident the cause was simple and direct, it was much less so in the case of pollution of a river, for instance. On the assumption that water was never pure, the pollution of water meant exceeding a limit. While a new activity might suffice to make pollution reach or exceed that limit, the fact remained that other activities had contributed to the pollution of the river in question. How were all those activities to be treated which had also been the cause of the event—in that case, of pollution—though at a time when it had had no legal consequences? Could that case really be treated in the same way as cases in which the physical cause took the form of a single act?

12. He understood and accepted the Special Rapporteur's idea of preparing some rather general draft articles relating to only one of the possible cases of liability without a wrongful act, namely the case of the "dangerous object"—a notion familiar to the French courts, which had had to pronounce, for example, on the "dangerous" character of a motor car stolen from its owner, which had been the cause of an accident. After noting in passing that the sphere of liability and that of legal construction had only a very small part in written law, he raised the question whether the draft articles should give a definition of a dangerous object or include a list of dangerous objects. He had no fixed

opinion on that question, but knew that Governments would probably never accept a text that did not contain provisions enumerating dangerous objects. Liability without fault was an audacious concept for contemporary international law and presupposed unquestioned solidarity between States. Without being able to give a precise answer to the question put by the Special Rapporteur on that point, he believed that the Commission should make some kind of reservation according to which the future convention would apply only to clearly defined activities.

13. As he had already said, he had no objection to the idea of limiting the scope of the draft articles to "dangerous objects", but he thought it would be an illusion to believe that the Commission could always avoid the wrongful act. That view was borne out by the 1972 Convention on International Liability for Damage Caused by Space Objects and by the regional conventions on civil liability relating to nuclear energy. Moreover, the Special Rapporteur seemed to be aware of that fact. In conclusion, he hoped that the special rapporteurs, while retaining their freedom of action, would keep in touch with one another and act in concert, for the Commission often met with the same questions in the different reports submitted to it.

14. Mr. THIAM said that the delimitation of the scope of the topic caused him all the more concern because the study of the topic would be useful only in so far as did not duplicate the work on State responsibility. But a reading of the Special Rapporteur's third report (A/CN.4/405) was far from dissipating his doubts on that point. In speaking of "situations", for example, the Special Rapporteur appeared to be extending the scope of the topic. If, in the case referred to by the Special Rapporteur (*ibid.*, para. 26 (b)), a State must show that it had taken all the measures expected of it in a particular situation, that meant that it was bound by certain obligations; consequently, one came back to the question of responsibility for a wrongful act. Similarly, a situation due to a natural disaster could be assimilated to a case of *force majeure* and liability could then not be invoked.

15. Turning from the basis of liability to the subject that could be held liable, he drew attention to the distinction made by the Special Rapporteur (*ibid.*, para. 33) between State activities and the activities of private persons, who could not be made liable. If a State had authorized a private company to carry on certain activities, would it not be liable for damage caused by those activities? It would be difficult to answer that question in the negative if the State had not taken all the necessary precautions or placed the company concerned under an obligation to take those precautions.

16. He also noted that the Special Rapporteur made a distinction between "effects" and "injury", a distinction which did not seem justified and was not recognized in all legal systems. In codifying international law, reference should not be made to notions that were not recognized by all legal systems. With regard to injury itself, the Special Rapporteur gave the impression that full reparation might not be made if the State suffering the injury also benefited, to some extent, from the acts causing it. The Special Rapporteur even gave

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

the impression that it would be more practical to establish some sort of scale of compensation. Should the Commission go so far in analysing injury? Was it not rather for a judge to assess damage according to the circumstances? Questions of fact were within the judge's province. Admittedly there was a "tariff system" for damages in some legal systems; he was thinking in particular of accidents at work where account was taken of the fact that the enterprise benefited both the employer and the employee and that it was not in the interests of either of them that it should come to an end. But could it be considered that that was so in the present instance and that a State which suffered injury through the acts of a neighbouring State must suffer the consequences of only partial reparation of the damage, merely because the acts were not wrongful? Generally speaking, he believed that, in the field of liability, the aim was to repair the damage as fully as possible.

17. Mr. BENNOUNA said that the topic under consideration belonged largely to the future, and the reflections it provoked might have repercussions in other spheres. It could, indeed, be seen that a continuum extended between responsibility for wrongful acts and liability for acts which were not prohibited, and that any attempt to distinguish one from the other was artificial and arbitrary, for things took a different and more generalized form in practice; it would thus be for the courts to judge on a pragmatic basis, according to the circumstances of each case. Practice would probably take little notice of theoretical distinctions made by the Commission. But it must also be recognized that the topic was not purely theoretical and that technical developments would undoubtedly lend it increasing current interest. The question that arose was whether it could be dealt with on the basis of general principles.

18. During the Third United Nations Conference on the Law of the Sea, there had been long discussion in the Third Committee on the question of liability for risk, in order to decide whether the concept of strict liability should be introduced into the draft convention. The question was already far advanced in maritime law. Liability for risk presupposed the solidarity of users, the definition of dangerous activities, the institution of a system of prevention and the establishment of a guarantee fund to which all States engaged in dangerous activities would contribute. That kind of mechanism already existed in various fields.

19. The Commission had undertaken to draw up a draft convention of a general nature, and the difficulties were thus even greater. The Special Rapporteur, who was aware of the difficulties, intended to study dangerous activities and to provide for prevention machinery; but that meant providing for the intervention of third parties at various stages in the conduct of those activities. Everyone knew how reluctant States were to give their general consent to intervention by third parties, in other words fact-finding missions and supervision exercised by third parties over activities that were not prohibited. Personally, he was not opposed to the intervention of third parties or to prevention mechanisms including inquiries, expert reports, conciliation, etc., but he believed that that kind of obligation would be difficult for States to accept.

20. The draft articles submitted by the Special Rapporteur unfortunately did not enlighten the Commission on the scope and the basis of liability. If the Commission decided to adopt the concept of liability for risk, it would necessarily have to draw up a list of dangerous activities. But was it really possible to draw up such a list and secure its acceptance? The question could also be approached from the point of view of abuse of rights. A State had rights which it could exercise in its territory and in areas over which it had jurisdiction; but those rights were accompanied by obligations, including the obligation not to abuse them. It would then be necessary to specify what was meant by abuse and to define the consequences. Whichever approach was adopted, the Commission would have to demarcate the present topic and that of liability for fault and determine what belonged to one type of liability and what belonged to the other.

21. That being so, even if the Commission settled that question, it could not avoid dealing with the different technical problems raised by liability, including causality and attribution. He considered it essential to identify the link between a physical act, an injurious event and its possible author, especially as the Special Rapporteur had rightly pointed out that he was not dealing only with the situation of adjacent States, but with acts whose consequences had effects beyond neighbouring States. Everyone remembered the 1986 nuclear disaster which had had repercussions outside the continent in which it had occurred.

22. Mr. GRAEFRATH said that the Special Rapporteur's excellent third report (A/CN.4/405) summarized much of the earlier material and responded to many of the suggestions made during the Commission's debate at the previous session and in the Sixth Committee of the General Assembly. Since the report contained general provisions rather than substantive articles, it provided an opportunity for making some general remarks on the topic under consideration.

23. There was a wealth of legal literature which gave the impression that the principle of strict liability existed in international law. That fact, however, had simply strengthened the conviction of States that no such general principle of strict liability for injurious consequences arising out of lawful acts had been established in international law. State practice showed that that form of liability remained an exception; it was nowhere a general technique of damage allocation. The strict liability principle was applied only when States specifically agreed on it.

24. Despite the philosophical principles often invoked in support of that form of liability, the Commission itself had never attempted to formulate a general rule or principle of strict liability. It had confined itself from the outset to certain activities, and had not dealt with injurious consequences in general, but only with "physical consequences" adversely affecting other States, whatever that might mean.

25. It had often been said that the liability concept could be logically derived from the general principles of international law, and especially from the principle of the sovereign equality of States. Legal rules, however, were not the result of pure logic: they had to be agreed

to by States. Thus the existence of the principle of sovereign equality did not make it unnecessary for States to agree on the rules governing the freedom of the high seas, for example. On the contrary, detailed provisions were needed to regulate in a just and equitable manner the exercise by States of their sovereign rights in that sphere. That example showed how necessary and how difficult it was to draft sufficiently specific rules based on the general principle of sovereign equality when divergent interests had to be reconciled. That was an ongoing process: scientific and technological advances would always create new problems and require the formulation of new rules to adjust the application of general principles to new situations. That process could not be replaced by logic or by reference to legal maxims such as *sic utere tuo . . .* or moral postulates such as "the innocent victim should not be left to bear the burden of his loss", which might sound reasonable, but did not create legal rules.

26. He fully agreed with the Special Rapporteur when he said that he "seriously doubts that this principle can be considered operative in general international law without a more specific norm, at a lower level of generality, which would make it operate" (*ibid.*, para. 67). He also agreed that there were two main ways of applying the principle of sovereign equality: either through rules prescribing a certain conduct or result, or through rules relating liability to the damage caused. On that point, the Special Rapporteur stated that "strict liability is simply a technique of law to achieve certain goals" (*ibid.*, para. 68). Precisely for that reason, he himself was convinced that strict liability could not be deduced from general principles. Since it was a legal technique and a means of achieving certain goals, it could become law only by virtue of an agreement between States to apply that particular technique to achieve those goals in certain circumstances.

27. Furthermore, since the same object could be achieved by different techniques, no legal consequence could be deduced from the object itself, and States must decide, as they constantly did, which technique to apply. When they wished to apply the technique of strict liability, they did so by concluding a treaty. Liability for lawful acts was neither a customary rule nor a general principle. It existed only to the extent that it was established by an international agreement.

28. There was accordingly no basis for asserting strict liability as a general rule of international law applicable to all transboundary harm, which would be tantamount to adopting the concept of "absolute liability". As pointed out by the Special Rapporteur, absolute liability was "difficult to accept at the present stage in the development of international law" (*ibid.*, para. 16).

29. With its work on the present topic, the Commission was attempting to develop rules of international law which States could use in their mutual relations in certain cases of transboundary damage caused by certain lawful acts. The Special Rapporteur had made it clear from the outset that no attempt was being made to impose strict or absolute liability, and that care was being taken to limit the field of application of the liability principle, so as to make it acceptable to States.

30. In addition the Commission should stand by the idea so well expressed by the previous Special Rapporteur that liability comprised two elements: rules directed at prevention and rules for minimizing, or compensating for, damage caused by lawful acts. The purpose of limiting the scope of liability could be achieved by two methods. One was the method of enumeration, which would consist in drawing up a list of all the dangerous activities in respect of which liability was considered the appropriate technique of damage allocation. That was more or less the method followed by States. They had singled out certain dangerous activities and had developed different formulas for implementing liability. With regard to nuclear activities and the transport of dangerous goods, some States had agreed to co-ordinate the civil liability of operators under internal law and had created compulsory insurance systems. States had also agreed to guarantee a certain amount of compensation over and above that to be paid by the operator. It had to be admitted, however, that even those treaties had been ratified by only a very few States. Moreover, IAEA was now working on proposals for harmonizing the two existing conventions on liability in the field of nuclear energy: the 1960 Paris Convention and the 1963 Vienna Convention.

31. The treaties to which he had referred were far from establishing the principle of the international liability of States; they merely co-ordinated the civil liability of operators. In other words, they co-ordinated rules of internal civil law relating to liability. The only international legal instrument that established strict liability for States was the 1972 Convention on International Liability for Damage Caused by Space Objects. Opinions were rather divided on whether that Convention could serve as a model for a multilateral instrument relating to claims brought by States against each other, for the Convention had remained an isolated case. State practice in the past 15 years had not produced a single other example of that kind, so it could be concluded that the 1972 Convention could not be generalized or used as a model.

32. When making preventive rules, State practice had preferred the method of enumeration, as could be seen from the many bilateral and multilateral treaties dealing with environmental problems. The other method, advocated by both Special Rapporteurs, would be to limit the scope of liability by laying down certain general criteria. That approach also created certain difficulties, however, and a reference to the dangerous activities to be covered by the criteria, at least in the commentary, could not be avoided. He noted from the Special Rapporteur's third report (*ibid.*, para. 37) that one of the three limitations or conditions by which it was suggested that the scope of the draft articles should be circumscribed was a physical consequence. The main purpose of that limitation was to exclude economic and social effects from the scope of liability, which was regrettable, since most of the adverse consequences affecting millions of people in the modern world were of an economic or social nature. The importance of economic and social consequences had been clearly recognized by R. Q. Quentin-Baxter, who had referred in his fourth report to two boundary lines, one forbidding "the abrupt adoption of a new system of obliga-



tion, based upon the principle of causality or strict liability”, the other forbidding “the wholesale transfer of pioneering experience in the field of the physical uses of territory to the even less developed field of economic regulation”.<sup>7</sup> It would be dangerous for the whole draft to omit either of those two boundary lines; hence he did not think that economic and social consequences could be excluded and strict liability established for the rest.

33. The Special Rapporteur had introduced a further criterion in his third report (*ibid.*, para. 12), namely “appreciable risk”, which he had dealt with specifically in article 4. That raised the question of the relationship between articles 1 and 4. It seemed to him—and he supported that approach—that the scope of the articles, as defined in article 1, was considerably narrowed by the provisions of article 4. It was possibly for that reason that the Special Rapporteur stated that it would be useful to include the adjective “appreciable” in article 4, since the description in article 1 was too broad and covered any type of risk (*ibid.*, para. 70). Why, therefore, had the criteria of appreciable risk and predictability laid down in article 4 not been included in article 1, which defined the scope of the draft? He agreed with the Special Rapporteur that the word “risk” was too broad, but was not sure that the expression “appreciable risk” was clear enough. In any event, determination of the matter could not be left to a settlement procedure that would come into operation only after damage had been caused.

34. Predictability within the meaning of article 4 comprised two elements: the State of origin must know that the activity was carried on in its territory, and it must know that the activity created an appreciable risk. That confirmed that the draft covered any activity—public or private—carried on in the territory of the State. It was not altogether clear from the Special Rapporteur’s report, however, whether pollution of the environment was excluded (*ibid.*, paras. 59 (a) and 60 (b)). If it was, that should be indicated in the articles; if it was not, the commentary should be more explicit. He would also be grateful if the Special Rapporteur could provide some examples of injury caused by an unforeseeable event (*ibid.*, para. 60 (c)).

35. Article 4 placed knowledge and the means of knowing on the same footing. There were two possible consequences of that approach. On the one hand, if a State had the means of knowing, liability would be incurred even if the State did not know what it should have known, in which case the predictability criterion formulated in article 4 would have an aggravating effect. On the other hand, if a State did not have the means of knowing and so could not have known of the activity, the criterion would have an exonerating effect and State liability would be ruled out. The Special Rapporteur explained (*ibid.*, para. 66) that the words “or had means of knowing” could protect developing countries, since they often lacked the means to monitor activities taking place in very extensive regions. More often than not, however, developing countries did not have the means of knowing whether an activity was likely to entail appreciable risk, for they frequently

lacked the skilled labour, technology and equipment necessary to monitor the modern chemical and other industries managed and controlled by foreign corporations. That was a far more important point, and raised the question whether a dangerous activity carried on by a corporation engendered the liability of the State of its nationality.

36. If it was accepted that the territorial State—the State in which the corporation was carrying on the dangerous activity—could not be held liable because it had no means of knowing, then the State of nationality of the corporation, which did have the means of knowing the risk, should be held liable for the damage caused, irrespective of whether it was the State where the corporation had its registered office or had been incorporated, or whether it was the State whose nationals held the majority of the shares. He wondered whether the point was really covered by paragraph 3 of article 2, which defined as the State of origin “a State within the territory or control of which an activity . . . occurs”. Furthermore, since the Special Rapporteur considered that paragraph 3 of article 2 did not need further explanation (*ibid.*, para. 54), he would like to know whether, assuming that a territorial State had no means of knowing about and therefore could not control the dangerous activity, and assuming also that the State which controlled the activity of the corporation working in a foreign territory did have such means, the latter State could be held liable for the physical consequences suffered by another State. That would seem to be the normal interpretation, given that the words “territory or control” were quite often used in international instruments to refer to a State which was in a position to monitor the activities of a legal person or an object, on account of its territorial sovereignty or because it otherwise had control over those activities. That interpretation would also be in keeping with the expanded scope of the draft under paragraph 2 (c) of article 2, and with the maxim, so often quoted in the report, that the innocent victim should not be left to bear the burden of his loss.

37. He believed that it would be well to group together all the conditions relating to scope, which were scattered through the draft, in order to establish an indicative list of the dangerous activities and consequences that would eventually be covered by the criteria. Such a list would clarify the position, and might also assist States not only in dealing with the subject, but also in reconsidering their approach.

38. A further point concerning the scope of the draft related to article 2, paragraph 5, and article 3, according to which transboundary effects included effects on persons or objects within the territory or control of an affected State. It was clear from article 2, paragraph 2 (c), and article 3 that the words “within the territory or control” applied beyond national jurisdictions. Moreover, as the Special Rapporteur pointed out (*ibid.*, para. 52), the situation envisaged in article 2, paragraph 2 (c), “could have a far-reaching and interesting consequence” when an activity conducted anywhere had repercussions in the territory of a State or on persons or objects under the control of that State. In addition, the Special Rapporteur stated that “every State would have a right—as soon as and as long as it was affected in

<sup>7</sup> *Yearbook . . . 1983*, vol. II (Part One), pp. 204-205, document A/CN.4/373, para. 12.

its territory—to set in motion the machinery and procedures provided for in the present articles” (*ibid.*, para. 53). That also applied to article 3. Careful thought should therefore be given to the consequences, which might be even wider than those mentioned in the report (*ibid.*). As the Special Rapporteur pointed out (*ibid.*, para. 43), the definition in article 2, paragraph 5, covered persons and objects and it would therefore include foreigners and their property as well as the property of foreign States. Thus the rights were not limited to the States in whose territory the adverse effects were felt. He was not sure that the cumulative effect of those two definitions was desirable or necessary, but if it was, attention should be drawn to it.

39. The expression “transboundary injury” was used to denote not only transboundary harm or loss caused by a wrongful act, as in article 6, but also transboundary adverse effects caused by lawful acts involving appreciable risk, as in article 2, paragraph 6, and article 4. The Special Rapporteur rightly pointed out in his report that there was a great difference between the duty to make reparation in the case of State responsibility for wrongful acts and the duty of reparation in the context of State liability. The difference arose when the claim to reparation in the latter context was reduced to a compensation claim, and continued as it became clear that it was dependent not directly on the damage caused, but on many other factors, as the Special Rapporteur explained (*ibid.*, paras. 57-58). Possibly, therefore, the word “injury” should be reserved for a breach of a legal obligation which might, but need not necessarily, entail material damage. In the context of liability, it would be better to speak of “harm” or “loss” rather than “injury”, to make it clear that the reference was to material damage and also to avoid any confusion with injury caused by wrongful acts.

40. In his report (*ibid.*, para. 17), the Special Rapporteur asked how the existence of an appreciable risk could be determined and then referred in passing to agreement between the States concerned. It was the latter element, however, which provided the real basis for any such determination; for even if States agreed to seek a third-party decision, the determination whether a certain activity involved an appreciable risk would be the outcome of agreement between the States concerned—just as the Commission’s draft would acquire legal force only as and when it was accepted by States. Hence he did not agree with the Special Rapporteur that it would be “imperative to resort to machinery for fact-finding” (*ibid.*). Nor did he accept the statements that “for the purposes of the present study, the objective opinion of a third party is the only way out of the impasse” (*ibid.*, para. 18), and that “if third-party involvement in ascertaining these facts is not accepted, no régime will be able to function” (*ibid.*, para. 19). He was convinced that it was for the States concerned to decide what activities should be deemed to entail appreciable risk, and what means or machinery they would use for the settlement of disputes.

*The meeting rose at 12.35 p.m.*

## 2017th MEETING

*Thursday, 18 June 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC (XXXIX)/Conf. Room Doc.2<sup>4</sup>)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

ARTICLE 1 (Scope of the present articles)  
ARTICLE 2 (Use of terms)  
ARTICLE 3 (Various cases of transboundary effects)  
ARTICLE 4 (Liability)  
ARTICLE 5 (Relationship between the present articles and other international agreements) *and*  
ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he would reply only to some of the issues raised in the discussion so far. In reply to a question by Mr. Tomuschat (2015th meeting), he explained that general lines for the development of the present topic had already been submitted in 1982 in the form of a “schematic outline”. That outline had two basic objectives, one being to propose to States certain procedures for the establishment of régimes to regulate activities which gave rise or might give rise to transboundary harm, and the other being to provide for situations in which such harm had occurred prior to the establishment of a régime.

2. The schematic outline had been well received by the General Assembly, and the then Special Rapporteur, R. Q. Quentin-Baxter, had been encouraged to proceed

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

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission’s thirty-fourth session, is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter’s fourth report, submitted at the Commission’s thirty-fifth session, are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

along those lines. In particular, the outline included three important principles. The first drew on Principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration),<sup>6</sup> which proclaimed that all human activities could be conducted with as much freedom as was compatible with the interests of other States. The second was the principle of prevention, together with the related principle of reparation for harm if any occurred. The third was the principle that an innocent victim should not be left to bear his loss, subject to certain conditions.

3. Those were the principles on which he had asked for the opinion of the Commission, since that opinion was essential in the task entrusted to the Commission by the General Assembly. In his second report (A/CN.4/402), he had explained how those principles derived from that of the sovereign equality of States:

. . . At the very root of the international legal order is sovereignty, conceived in the only way it can be, given the fact of international coexistence, namely in the context of interdependence. In turn, such coexistence is inconceivable unless the coexisting States are equal before the law. To disregard a State's right to undisturbed use and enjoyment of its territory (and therefore to refuse to be a party to a régime which regulates the rights and obligations of every State with respect to an activity), or to refuse to make reparation for damage caused, only upsets the balance, destroys the equality between States. The principle of equality before the law is very general, and if it is to be implemented, there must be more specific rules, which would be either primary or secondary depending on the nature of the topic. Therefore, proposing rules to implement it amounts to nothing more than the inevitable application of a legal technique to the situation. (*Ibid.*, para. 53).

He did not believe that the Commission was facing an impossible task in being asked to pronounce on such principles, which had already been the subject of many declarations by international conferences and bodies, some of them having the same membership as that of the General Assembly. From those principles, the Commission could endeavour to construct the remaining articles, but the principles themselves were essential. Of course, accepting the principles did not mean that the Commission would have to accept the concept of strict liability or any other form of liability.

4. On another point, a number of members had expressed the opinion that there was not, or should not be, any separation between the present topic and that of State responsibility: a *continuum* was said to exist between the two topics and any attempt to break it would be artificial and arbitrary. The Commission had actually considered that question at the outset of its examination of the topic of State responsibility. It had then taken the view that:

. . . Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. . . .<sup>7</sup>

By thus speaking of "the different nature of the rules governing" the two fields, the Commission had no doubt meant to refer to the distinction between primary

rules and secondary rules. Rules of State responsibility were secondary rules because they came into play when an obligation was violated. Rules of international "strict" liability were primary rules because they established an obligation and came into play not when the obligation had been violated, but when the condition that triggered that same obligation—in other words, the harmful event—had taken place; such a situation was in fact a constituent element of the primary rule.

5. If it was thought better not to resort to that division into primary rules and secondary rules, exactly the same statement could be made by saying that State responsibility dealt with wrongful conduct, namely conduct that entailed the breach of an obligation, and strict liability dealt with conduct that was lawful. The difference was important. To begin with, wrongful conduct was prohibited, whereas lawful conduct was protected by the law.

6. There was, moreover, an enormous difference between the effects of the two situations. In part 1 of the draft articles on State responsibility,<sup>8</sup> the closest thing to the present topic was the obligation to prevent a given event; but even in that regard there were important differences. In the realm of State responsibility, the harmful event which triggered the effect of that obligation was the breach of the obligation itself. In the present topic, on the other hand, the harmful event was a foreseeable event which did not constitute a breach of any obligation. In the case of State responsibility, the respondent State could discharge its responsibility simply by proving that it had used all the reasonable means at its disposal to prevent the event, but had none the less failed. Under a régime of strict liability, that would not be so, since the respondent State would have to pay in all circumstances. It was a particularly important difference and was connected with the very philosophy of strict liability: the person liable had to pay compensation in all cases, with very few exceptions. The source of liability was not a fault, but rather the advent of a situation.

7. There were other differences between the two topics, such as those relating to damages. In the field of State responsibility, the obligation imposed on the author State was aimed at restoring the conditions existing prior to the breach. In the present topic, however, reparation was determined in the context of a number of different factors and might well not be equivalent to the actual damage suffered.

8. Other differences touched upon the typical mechanisms of strict liability, such as attribution and causality. In the present topic, attribution, however it was ultimately formulated, took a completely different form from attribution in the case of State responsibility. In part 1 of the draft articles on State responsibility, an act, if it was to be attributable to a State, had to be an "act of the State", in other words the act of "any State organ having that status under the internal law of that State" (art. 5). It could also be the conduct of entities empowered to exercise elements of the governmental authority (art. 7), of persons acting in fact on behalf of

<sup>6</sup> See *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), chap. I.

<sup>7</sup> *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 38.

<sup>8</sup> See 2016th meeting, footnote 6.

the State (art. 8), of organs placed at the disposal of the State by another State or by an international organization (art. 9), or even, in certain cases, of organs of a State acting outside their competence or contrary to instructions concerning their activity (art. 10).

9. In contrast, what would be the conditions necessary for a certain act causing transboundary injury to be attributed to a State? The only condition, according to draft article 4, was that the State knew, or had means of knowing, that the activity in question was carried on within its territory or in areas within its control. That was the only condition, although it might be formulated in a different way. The concept of "control", as Mr. Reuter (2016th meeting) had suggested, was perhaps not entirely appropriate and the concept of "territory" might also be amended somewhat. Nevertheless, the conditions of attribution in the present topic would always remain substantially different from those in the topic of State responsibility.

10. As to the question of causality, in the case of responsibility for wrongful acts, the imputation of a certain material result—which was different from that of a certain act—to a particular person was more in the nature of "authorship" than of "causation". The person was the author of a certain offence through which damage had been caused, even if it was no more, and no less, than violation of the legal order. The wrongful conduct was usually described in the law as being conduct contrary to that required by the legal norm which had established the obligation. The will of the author of the breach had to be directed at violating the obligation, or there must at least have been negligence.

11. In the present topic, the position was completely different: the will of the person liable might well have been directed at avoidance of the harmful event, but the fact that all the necessary precautions had been taken did not exonerate him from liability if damage occurred. The causal chain of events could be traced to an area within the territory or control of the State, and that was enough to make the State liable for the damage.

12. The fact that, in real life, matters of responsibility for wrongful acts and matters of strict liability normally presented themselves together did not mean that they should not be treated separately. Any other approach could lead to unacceptable results. For example, in Argentina a criminal court or judge usually ordered a criminal to pay damages to the victim or the victim's family. Such a decision was clearly a civil matter, but it did not make the judge a civil judge; still less did it make the matter of compensation a criminal matter.

13. Another question that had been raised was that of preparing a list of dangerous activities. It would certainly facilitate the Commission's work if agreement could be reached on activities forming the subject-matter of the topic. There were, however, two drawbacks to such a list. The first was that it would be obsolete in 10 years' time: in view of the pace of technological development, new dangerous activities were bound to emerge and would be at least as numerous as the ones considered dangerous at the present time. Thus the Convention of the Continental Shelf, signed in 1958, had been rendered obsolete in a

few years owing to technological developments permitting the exploitation of the continental shelf practically anywhere. The second drawback was that the General Assembly had assigned the Commission the task of progressively developing and codifying the law governing the injurious consequences of acts not prohibited by international law. That task covered all the consequences of all acts of that nature and not the consequences of only certain activities. It was preferable to get closer, if possible, to a definition of "dangerous activities" than to draw up a list with the drawbacks he had mentioned.

14. Mr. FRANCIS expressed his warm appreciation to the Special Rapporteur for his excellent presentation of the topic. He found himself in a somewhat difficult position. His original view on the topic was reflected in paragraph 67 of the Special Rapporteur's third report (A/CN.4/405); article 4, as drafted, would thus have been acceptable to him. He had, however, altered his original stand in the interest of the consensus that had subsequently emerged. The Special Rapporteur's perception as disclosed in the third report now constituted a radical departure from the path carved out by that consensus. In the circumstances, therefore, he felt duty bound to enter a reservation, since he did not wish his silence to be taken as an indication of support for the main conclusions reached in the report. Should the Commission revert to its earlier stand, he would of course reconsider his position.

15. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on the care and thought he had put into his third report (A/CN.4/405), as indeed into all his reports. It was gratifying to see that the Special Rapporteur was continuing along the same lines as those traced by R. Q. Quentin-Baxter and had put his finger on several important aspects of the topic. That would enable the Commission to focus more sharply on the major issues.

16. The problems identified by previous speakers should give no cause for discouragement. The topic was not a traditional subject of international law. New ground was being broken, and State practice was being extended to new technologies. In that connection, the Secretariat had prepared a remarkable study of State practice (A/CN.4/384) which would help the Commission to assist States in coping with problems arising out of new technologies.

17. The kind of problem with which the topic was concerned often arose because a State decided to undertake or authorize a particular activity despite the fact that the activity posed an unavoidable risk—usually a very slight one—that some harm, which could be of catastrophic proportions, might result in the event of an accident. The reason why States authorized such activities was, of course, because the socially beneficial effects outweighed any adverse effects. Scholars spoke of "risk-benefit analysis": the risk—or the probability of an accident occurring, coupled with the gravity of the accident—had to be weighed against the beneficial aspects of the activity.

18. If a State decided to authorize an activity which created a risk—even the slightest risk—of catastrophic harm, the question that arose was whether that State

had an obligation to notify other potentially affected States and to consult and negotiate with them. A further question concerned the obligations of the State of origin in the event of an accident, and it was that question which differentiated international liability very sharply from State responsibility. There were instances in which State responsibility shaded into the topic of international liability, but he agreed with the Special Rapporteur that, for the purposes of legal analysis, the two should be treated separately, since they were governed by entirely different legal régimes.

19. He would illustrate his proposition by reference to the *Trail Smelter* case. In that case, there had been no dispute that the damage initially caused by the smelter had given rise to responsibility for activities that were not prohibited by law. Indeed, the kind of activity involved was now covered by rules such as Principle 21 of the Stockholm Declaration,<sup>9</sup> under which a State could use its territory as it wished so long as no harm to other States ensued. The arbitral tribunal in the case had, however, introduced a régime designed to prevent unacceptable levels of injury to the United States of America, and specifically to the State of Washington. Under that régime, so long as the smelter complied with certain regulations concerning the times and quantity of emissions of fumes, the smelter, and indeed Canada, would not be acting wrongfully. The question which had then arisen was what would be the position if the smelter complied with the régime but unreasonable levels of harm were still produced. Obviously, there could be no responsibility in such a case, and it had therefore been agreed that compensation would be paid for any harm resulting from activities of the smelter carried out in compliance with the régime (see A/CN.4/402, para. 30, *in fine*). What had been at issue, therefore, was not responsibility for wrongfulness, but rather a duty to compensate for action that was not wrongful.

20. Other similar situations had arisen, for example in connection with nuclear power plants. They would have to be dealt with and clarified, more particularly with reference to the obligation which arose in the event of an accident that occurred despite the best efforts of the State of origin to prevent it. Admittedly, conventional régimes dealt with some of those situations, but what would happen in the absence of a conventional régime, since such régimes were not universal? It would, moreover, be difficult to have a series of separate conventions for all the specific situations that might arise. He therefore agreed that a general treatment of the subject was necessary. He also agreed that the Special Rapporteur could perhaps provide an indication in the commentary or in a future report of the kinds of activity which, in his view, would be covered by the topic. It would not be advisable to include a list of such activities in the body of the articles themselves.

21. Speaking as Chairman, he said that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 10.55 a.m.*

<sup>9</sup> See footnote 6 above.

## 2018th MEETING

*Friday, 19 June 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2<sup>4</sup>)

[Agenda item 7]

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

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Various cases of transboundary effects)
- ARTICLE 4 (Liability)
- ARTICLE 5 (Relationship between the present articles and other international agreements) *and*
- ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (*continued*)

1. Mr. TOMUSCHAT said that the Special Rapporteur's three reports should enable the Commission to gain a better grasp of the topic and begin to determine the direction its endeavours were to take. Some major questions still had to be resolved, and he would like to mention them in an effort to provide some answers.

2. The first related to the mandate assigned to the Commission by the General Assembly. The impression to be gained from reading the topical summary of the discussion in the Sixth Committee (A/CN.4/L.410, sect. F) was not one of very firm resolve on the part of the General Assembly that the Commission should succeed in its work, and it could not be said that the Assembly had given the Commission much guidance in

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

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

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

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

its task. In his opinion, the General Assembly, in entrusting the matter to the Commission, had not been aware of the enormous problems that the topic raised. After confirming Mr. Ago's decision to deal under State responsibility solely with responsibility for wrongful acts, the Assembly had, in its concern for legal logic, simply decided to instruct the Commission to study liability for risk, which was viewed as the other aspect of responsibility. But it had never been demonstrated that such a study met the needs of States. Accordingly, the Commission could, to some extent, rightly stand aloof from the Assembly's directives at the present time.

3. The second question concerned the practical value of the topic. In his view, the example of Chernobyl and the destruction of forests in central Europe as a result of air pollution were clear indications that it was advisable, indeed necessary, for the international community to have rules to deal with the matter, particularly for preventive purposes, and hence for the Commission to complete its task successfully.

4. The third question concerned the relationship between the general convention that the Commission might elaborate and the many conventions that were designed to regulate particular aspects of the subject, especially in the field of environmental protection. The answer given by the Special Rapporteur in that regard in draft article 5, whereby the present articles would apply subject to other international agreements, seemed inadequate, for in each instance it would be necessary to determine whether another agreement provided a definitive and exhaustive answer to the problem it sought to regulate. A review of the existing conventions showed that they provided specific solutions for specific problems, that the parties had sought to adapt the legal régime to the particular features of each situation; hence it did not seem possible to eliminate all those nuances, distinctions and gradations by imposing the stifling uniformity of a general régime. Nor should it be forgotten that international environmental law had developed considerably over the past 10 years.

5. Consequently, a more concrete approach should be adopted, beginning with a scrutiny of the multilateral conventions cited in the study of State practice prepared by the Secretariat (A/CN.4/384), in an effort to see which gaps the draft was to cover and the way in which the draft would develop existing law—something that States themselves would need to know clearly before they agreed to submit to it. However, while it seemed quite clear that air pollution and nuclear hazards should come within the scope of the draft, what about, for example, genetic experiments, which could well have harmful effects beyond the boundaries of States which undertook or authorized them; and what about the clearing of tropical forests, which could lead to changes in climate? It was certainly possible to speak in both those examples of "physical consequences", but was it the Commission's intention to include them in the scope of the draft?

6. The text proposed by the Special Rapporteur for article 1 was indeed convenient because it was general and could thus be applied to virtually all new problems, without resorting to devices for interpretation. Yet it was dangerous precisely because it was far too flexible.

He was therefore not persuaded by the Special Rapporteur's arguments against drawing up a list of the activities to which the draft would apply. Admittedly, such a list could well become outdated very quickly, but legal techniques existed to offset that risk: for example, an executive body or assembly of the States parties could revise the list when necessary by a resolution adopted with a qualified majority, thereby avoiding the need to resort to an additional protocol.

7. Naturally, questions of orientation could not be left aside. The Special Rapporteur was right to say that States were in need of legal protection against activities undertaken by other States that involved a major risk. Such protection was necessary for the sovereign equality of States to be effective, for nowadays the territorial integrity of States could be threatened much more seriously by hazards to their environment than by the risk of aggression or foreign intervention. For instance, a small European country could be completely annihilated in the event of a serious accident at a nuclear power plant situated close to its borders, and some members took the view that international law offered no recourse, for the maxim *sic utere tuo ut alienum non laedas* was simply a legal precept. A State's existence and well-being could not be left to the mercy of its neighbours, and if those neighbours engaged in activities entailing a particular risk they should at least bear the cost. He therefore endorsed the three principles mentioned by the Special Rapporteur (2015th meeting, para. 4)—which should be set out in the form of articles—namely that each State was in principle free to act as it wished in its own territory, that it should respect the sovereignty not only of its neighbours, but of all other States that might suffer harm from its activities, and that a victim of major injury should not be left to bear his loss when the injury was caused by another State. Members should none the less agree on the significance to be attached to those principles, particularly the scope of the *sic utere tuo* rule, which was too imprecise and general, as the Special Rapporteur recognized in his third report (A/CN.4/405, para. 67), and which could not by itself engage the responsibility of States under the rules contained in part 1 of the draft articles on State responsibility.<sup>6</sup>

8. Even if the principles pin-pointed by the Special Rapporteur were taken as the point of departure, the result in every instance would not necessarily be responsibility viewed as an obligation to make reparation, whether monetary or otherwise. Emphasis should be placed above all on prevention. Very often, damage such as destruction of the ozone layer, alterations in climate, nuclear contamination of an entire region, etc. was irreparable. Moreover, even the wealthiest State might not have the means to make reparation, particularly in the case of nuclear disaster. Reparation *a posteriori*—satisfactory perhaps from the point of view of legal logic—was totally ineffectual in the most serious situations. If the accent was placed on prevention, it was also necessary to move outside the excessively narrow framework of bilateral inter-State relations. The formulation of suitable concrete rules called for a forum for exchanges of views, consultations and

<sup>6</sup> See 2016th meeting, footnote 6.

negotiations, a forum that could only be an international organization—as was already the case in most risk sectors. That was one of the differences compared with the other drafts that the Commission had adopted so far.

9. In part 1 of the draft articles on State responsibility, a breach of any obligation under international law constituted an international offence and, in Mr. Riphagen's view, part 2 of the draft was based on the idea that any breach of a rule of international law entailed the obligation to make reparation, yet it could be inferred from the draft articles under consideration that no such automatic effect existed. In any event, the authors of the Stockholm Declaration had taken care to specify in Principle 22<sup>7</sup> that recognition of the *sic utere tuo* principle, which was the basis for Principle 21, did not necessarily imply recognition of the duty to compensate for damage caused by pollution. He endorsed such a cautious approach and considered that the reticence regarding the *sic utere tuo* maxim could be explained by fear that acceptance of it might entail all the consequences of international liability. Things were simpler if the maxim was taken merely as a point of departure to provide an internal logic and a structure for the rules to be elaborated.

10. The Commission's work on the topic lay between the progressive development and the codification of international law. The basic concepts were firmly anchored in positive law, whereas everything that would make the draft valuable and useful was not. Consequently, the Commission was facing a very great risk of failure. It should be less ambitious and confine itself to starting on regulations that could always be supplemented and improved later, once the foundations had been laid.

11. Mr. MAHIOU said that it was his intention to speak on questions of a general nature and that he would discuss the draft articles themselves at a later stage. The first general question related to the Special Rapporteur's second and third reports: it was rather an abstract question which might seem to be a theoretical digression, but it was a digression that seemed useful, for the Commission should clarify a number of theoretical bases in order to move ahead in codifying the topic. The question might also seem to rake over the debate held in 1970, when, on the proposal of Mr. Ago, the Commission had approved the idea that a State incurred international responsibility once a wrongful act could be attributed to it, thereby making the wrongful act the necessary and sufficient condition for responsibility. That choice, which stemmed from logical reasoning, had above all made it possible to demarcate the topic under consideration for the purposes of codifying part 1 of the topic of State responsibility. In basing its work on wrongful acts, the Commission had been on sure ground and had avoided adding to the difficulties inherent in the topic of State responsibility the further difficulties that were specific to the topic of liability for risk or strict liability. The Commission had been right to classify the difficulties, so as to resolve them one after the other. He understood and accepted

that distinction, more for practical than for theoretical reasons.

12. From a theoretical standpoint, he disagreed somewhat with the conclusions drawn by the Special Rapporteur, who had stated in his second report (A/CN.4/402, para. 9): "The fact that injury, whether actual or potential, is such a key factor makes for a clear-cut distinction between the present topic and that of State responsibility for wrongful acts", and who, in support of that argument, had cited Mr. Ago (*ibid.*, para. 10), according to whom: "It therefore seems inappropriate to take this element of damage into consideration in defining the conditions for the existence of an internationally wrongful act." It was on the basis of that analysis that injury was regarded as playing no role in the topic of responsibility for wrongful acts, whereas it lay at the very core of the present topic. What, therefore, was the place held by damage in the régimes of responsibility and of liability? In his opinion, it was important, at least for the purposes of a clear discussion, to revert to that analysis and indicate why he was not wholly convinced by the Special Rapporteur's reasoning.

13. Admittedly, in responsibility for wrongful acts, damage did not determine the wrongfulness of an act. An act of a State was wrongful once it violated an international obligation, regardless of the consequences, in other words the injury. However, the injury remained if the State that was the victim sought reparation. Mr. Ago had recognized as much, since he had taken the precaution of indicating that: "The extent of the material damage caused may be a decisive factor in determining the amount of the reparation to be made."<sup>8</sup> Personally, he considered that, in the absence of damage, responsibility seemed quite theoretical, and he wondered whether there was not some ambiguity in the analysis of both Mr. Ago and the Special Rapporteur, more specifically in regard to the distinction between the foundation and the conditions of responsibility. Writers had not always established such a distinction and it was not easy to make, yet from a comparison of responsibility and liability he wondered whether the distinction might not be relevant and of special significance. In the case of responsibility for wrongful acts, the wrongful act was the foundation of responsibility, in other words the act generating responsibility; consequently, the absence of a wrongful act meant the absence of responsibility. Damage, in that case, was simply a condition for implementing responsibility in order to obtain reparation. Conversely, in the case of liability for acts not prohibited by international law, injury was both the foundation and the condition of liability, in other words it was the act generating liability and the condition for implementing the procedure to obtain reparation. In short, injury existed in the régimes of both responsibility and liability, but it did not perform the same function in each case. Accordingly, the approach to liability for acts not prohibited by international law could be clarified.

14. It was a relatively new field and the Commission was perhaps engaged more in the progressive develop-

<sup>7</sup> See 2017th meeting, footnote 6.

<sup>8</sup> *Yearbook* . . . 1970, vol. II, p. 195, document A/CN.4/233, para. 54.

ment than in the codification of international law; hence the need for a better grasp of the foundation of the new rules and the new kind of responsibility. The reports by the previous and present Special Rapporteurs, while they did not entirely solve the problem, did provide serious food for thought. Nevertheless, the present Special Rapporteur displayed some hesitation in regard to the foundation or foundations of liability. His second and third reports revealed four foundations, namely risk, with the concept of a dangerous activity; shared expectations, a fertile concept that was open to discussion because of the novelty of the terms and because it was so difficult to delimit its content; unjust enrichment; and the breach of an obligation, particularly an obligation of prevention—hence the link with responsibility for wrongful acts. Mr. Bennouna (2016th meeting) had proposed yet a fifth: abuse of rights.

15. Perhaps there were too many foundations and, instead of taking a difficult path, or indeed entering a cul-de-sac, it would be more reasonable to simplify the problem and take the view that injury was the foundation and the condition of liability for acts not prohibited by international law. In that way, damage—potential or actual—could be made the central concept, one which would not act as a criterion for drawing a distinction with responsibility for wrongful acts but would help to define the origin of liability without too much concern for differentiating it from responsibility for wrongful acts.

16. To conclude on that point, while he fully appreciated the Commission's concern to draw the boundaries between liability for acts not prohibited by international law and responsibility for wrongful acts, he did not think that the difference should be regarded as final. The Special Rapporteur's analysis showed that responsibility and liability sometimes shaded into one another, particularly when he discussed the breach of an obligation of prevention. A more thorough investigation of lawfulness and wrongfulness revealed that lawfulness could prove to be a sometimes uncertain criterion, since it was open to variation and lay at the core of another controversy concerning soft law, to which the Special Rapporteur alluded in his third report (A/CN.4/405, para. 22).

17. Consequently, the evolving concept of lawfulness could well lead the Commission on to shaky ground on which it would be difficult to build a satisfactory normative edifice. The two régimes of responsibility should not be contrasted at all costs. A difference did exist and he agreed with the separation between the two régimes for the purpose of making headway in considering them, but it should come as no surprise that there were sometimes convergences and even a continuum from one to the other. Accordingly, the Commission should endeavour above all to explore the concepts and the rules that could be used to establish the two régimes. The responsibility was the same, but it was viewed from two different angles. Responsibility for wrongful acts was viewed from the angle of the author State and sought to prevent or limit wrongful acts by attributing to them a number of consequences that entailed reparation. The legal aspect prevailed over the aspect of reparation. In the other case, the problem was viewed

from the angle of the State that was the victim: the régime of liability sought essentially to make reparation for the damage suffered. The idea was not so much legality as justice, the purpose being to make sure that the State that was the victim did not bear the consequences of acts imputable to another State.

18. His second general remark related to the topic itself and what the Commission could do with it. It was a volatile topic that sometimes eluded the Commission when it sought to demarcate it, despite the impressive efforts of the Special Rapporteurs. However, the subtlety displayed by the present Special Rapporteur in his analysis might raise some doubts: were the elements analysed with such finesse ripe for codification or progressive development? It was a question with two facets that could guide the future work of the Commission. To begin with, was the schematic outline used to delimit the topic and added to by the Special Rapporteur an adequate basis for defining a régime of liability for acts not prohibited by international law? If the answer was in the affirmative, the question then was could it lead to a convention? His own position, one that could well change because the topic was bound up with technological developments, which held surprises for mankind with each passing day, was that a number of principles and rules on liability could indeed be set out. But he harboured doubts as to the nature of the instrument to be elaborated. In his opinion, the régime could only be a general framework, a set of recommendations to guide the conduct of States. If the Commission adopted that point of view, the draft articles would be easier to prepare and the Commission could move ahead in developing the relevant rules of international law without causing too much concern among States. Moreover, he wondered whether the Commission's future progress in considering the topic would not be bound up with the headway it achieved in the topic of responsibility for wrongful acts. A definition of the rules concerning responsibility for wrongful acts would be a great help in enunciating the rules on liability for acts not prohibited by international law.

19. The essential thing, however, was to achieve practical results, namely the establishment of a régime of compensation. Theoretical debate was inevitable at the stage now reached in considering the topic, for a useful normative framework could be devised only on clear foundations that commanded general consent. If the draft articles referred to theories that were excessively ambiguous or open to dispute, a dialogue of the deaf might well ensue. He hoped to speak later on the draft articles themselves, which were a more concrete field for discussion, and, at that time, to be more constructive. The role of members of the Commission was not solely to offer criticism; it was, above all, to help the Special Rapporteur in his task.

20. Mr. KOROMA said that, as stated by the Special Rapporteur in his second report (A/CN.4/402, para. 23), the Commission had a twofold objective in considering the present topic. The first was to provide States with a procedure for the establishment of régimes to regulate activities which, though not unlawful and not prohibited, gave rise or might give rise to transboundary injury. That was precisely the régime which was to



be found in most national legal systems. The second objective was to make provision for situations where such injury occurred prior to the establishment of such a régime.

21. During the debate, the autonomy of the present topic with respect to that of State responsibility had been questioned, and not for the first time. Mr. Graefrath (2016th meeting) had rightly said that, under customary international law, there was no general rule of liability for injurious consequences arising out of lawful activities. That consideration, and the link with the topic of State responsibility, had apparently obscured the present topic.

22. At the previous meeting, however, the Special Rapporteur had thrown further light on the subject by drawing a distinction between responsibility and liability. In 1973, the Commission itself had made a distinction between State responsibility for internationally wrongful acts and liability for injurious consequences arising out of acts not prohibited by international law, stating in its report on its twenty-fifth session:

... Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. . . .<sup>9</sup>

23. The Commission regarded the norms of strict liability as primary, not secondary norms. Responsibility imposed a duty or standard in performing an act, whereas liability designated the consequence of failure to perform that duty or to meet the required standard. He therefore concluded that the absence of customary rules did not relieve a State or an enterprise which had caused harm or injury of the duty to pay reparation to the injured State; nor did the absence of customary law deprive the injured State of its right to satisfy its claim at the expense of the State or enterprise which had caused the harm or injury.

24. In introducing his third report (A/CN.4/405), the Special Rapporteur had said (2015th meeting) that liability for the injurious consequences of acts not prohibited by international law could be understood only in the context of strict liability. Presumably, that proposition stemmed from the fact that the norms involved were primary norms, in the sense of the consequences of failure to perform a duty.

25. Even in treaty practice, the tendency had been to adopt the same method. For example, article II of the 1972 Convention on International Liability for Damage Caused by Space Objects specified:

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.

Under article VI of the same Convention, the only basis for exoneration from liability was gross negligence or intent to cause damage on the part of the claimant. Similarly, the relevant articles of the 1982 United Nations Convention on the Law of the Sea contained provisions on the responsibility and liability of States in respect of pollution of the marine environment.

26. Strict liability, however, could be viewed as an attempt to prevent harm and, where harm did occur, as an obligation to pay compensation. Should the concept of strict liability give rise to difficulties, the Special Rapporteur could perhaps recast the draft articles in terms of prevention and compensation.

27. The Special Rapporteur was right to say that any list of dangerous activities would soon be overtaken by new technological developments. In the draft articles, the Special Rapporteur had attempted to define the scope and the main elements of the topic. Article 1 defined the scope as transboundary injury giving rise to "a physical consequence". That expression lacked clarity, for it was not certain whether "physical consequence" covered, for example, the case of gas emissions escaping from the State of origin and affecting persons in another State. His comment was prompted by the statement in the third report (A/CN.4/405, para. 39) that: "The idea which this article seeks to convey seems to be that a given hazardous activity gives rise to specific changes or alterations of a physical nature." Yet it was well known that some of the most lethal gases had no smell and their impact on the physical environment could not be detected: the effect was felt only by man. He would welcome an explanation from the Special Rapporteur on that point.

28. He approved of the spirit behind draft article 4, in particular the idea of constructing a special régime for developing countries, as some conventions on pollution had done. However, given the scope of article 1, which covered activities or situations that were presumably created by man, the defence of lack of knowledge could not be admitted, even for harm caused by developing countries. The basis of liability in the present instance was not knowledge, but injury. In accordance with the provisions of article 1, the affected State had to establish that it had suffered some physical consequence. Accordingly, the basis of liability would be the harm or injury caused to the affected State.

29. In conclusion, he believed the topic should be developed so as to provide recognition of transboundary injury, and also to protect the sovereignty and territorial integrity of States from pollution or exploitation from outside.

*Mr. Díaz González, First Vice-Chairman, took the Chair.*

30. Mr. AL-BAHARNA congratulated the Special Rapporteur on his excellent reports and expressed appreciation for the way in which he had dealt with some of the most complex issues. The critical analysis of the schematic outline provided in the second report (A/CN.4/402) was particularly helpful in explaining the terms used in the draft articles.

31. The complexity of the topic lay in the fact that there were still no positive rules of customary international law on the subject. Yet the Special Rapporteur took the view that such rules could be developed and, in support of that opinion, had referred in his preliminary report<sup>10</sup> to the detailed survey of State practice prepared

<sup>9</sup> See 2017th meeting, footnote 7.

<sup>10</sup> *Yearbook* . . . 1985, vol. II (Part One), p. 97, document A/CN.4/394.

by the Secretariat (A/CN.4/384). As he had stated in paragraph 10 of the preliminary report, the material contained in the survey held out good prospects for identifying positive rules of general international law governing the topic or, at any rate, for determining the lawfulness of State policy with regard to future conduct. The Special Rapporteur had also recalled that many representatives in the Sixth Committee of the General Assembly had considered that the law of outer space and the law of the sea, particularly as the latter related to marine pollution, provided a firm foundation for the principle that States were under an obligation, first, to prevent damage, and secondly, to provide compensation if damage occurred. For his own part, he was in favour of the development of general rules and procedures on the basis of the revised draft articles submitted by the Special Rapporteur in his third report (A/CN.4/405), and thought that a multilateral convention on the topic was justified by the speed of technological progress.

32. The topic had first been included on the Commission's agenda in 1978, but, owing to its novelty and difficulty, much time had been spent on conceptualization and the preparation of a schematic outline, and the problems had been aggravated by the untimely death of the previous Special Rapporteur, R. Q. Quentin-Baxter. The present Special Rapporteur had had to consider the extent to which he could base his ideas on the work and reports of his predecessor, and had fortunately decided to accept Mr. Quentin-Baxter's schematic outline as the raw material for his work.

33. It was clear from the Special Rapporteur's third report that the door had been left open for members to discuss the general issues of concepts and scope, which remained unresolved, as well as the basic rules of general international law. Mr. Thiam had confirmed that approach when, as Chairman of the Commission at its thirty-eighth session, in 1986, he had introduced the report on that session to the Sixth Committee of the General Assembly and had referred to certain ambiguities which still existed, particularly regarding the interplay between different sections of the schematic outline.<sup>11</sup> There seemed to be general agreement, however, on the need for a link between the two main duties which formed the basis of the topic: prevention and reparation. The concept of injury in the sense of material harm, whether actual or potential, could provide that link.

34. The Commission's discussions on the scope of the topic had proved inconclusive. It was therefore one of the three points on which the Special Rapporteur had sought clarification from the Commission, raising the question in his second report (A/CN.4/402, para. 11) whether the scope of the topic should be confined to physical activities by the State of origin giving rise to transboundary harm. Members' views on the matter differed. Some favoured inclusion in the topic of all activities by the State of origin, while recognizing that State practice had not yet developed sufficiently in that direction. Others would prefer to include only ultra-

hazardous activities. Furthermore, the Commission had not settled the question whether damage caused in areas beyond national jurisdiction or to the common heritage of mankind should be covered.

35. The magnitude of the harmful effects of activities arising out of, for example, the use of nuclear energy, or the use of outer space (such as the passage of satellites over a State's territory), or the release of industrial waste into rivers, lakes, oceans or the atmosphere, and the cumulative effects of such activities on persons and objects in another State or territory, could not be ignored. It was therefore necessary to develop general rules to govern and control such activities. According to the previous Special Rapporteur, in the light of State practice the main thrust of the new topic was to minimize the possibility of loss or damage and to provide means of redress if loss or damage did occur, without, if possible, prohibiting or hampering activities carried out within the territory or control of a State which might be useful or beneficial.<sup>12</sup> That idea corresponded to the balance-of-interests test reflected in Principle 21 of the Stockholm Declaration.<sup>13</sup>

36. The duty of the State of origin to negotiate also posed various problems. In the present Special Rapporteur's view, the problems were not insurmountable because a number of variables, such as the location of the activity and the statistical data available on the injurious impact of certain activities, usually helped to determine the State with which the State of origin should negotiate. The Special Rapporteur had considered the twin obligations to inform and to negotiate in his second report (*ibid.*, paras. 35 and 37), but the idea of imposing a duty on the State of origin to inform and to negotiate in such a manner had not met with a sympathetic response in the Commission, since many members had thought it would jeopardize the sovereignty of that State.

37. With regard to reparation, it had been suggested that, in the case of certain activities resulting in catastrophic damage, the question of liability should be set aside and the problems regarded as coming within the field of co-operation between States as members of the international community. The principle of strict liability should, however, be generally accepted as the basis for reparation. The nature of liability remained controversial. On that subject, the United Kingdom representative in the Sixth Committee had observed that it might be helpful, in determining whether a State should be held liable for an activity which it did not know was likely to cause harm, to carry out a comparative study of relevant national laws; he had also noted a tendency in recent years for States to adopt absolute liability principles, which might suggest that in such cases the State of origin should at least share the cost of reparation with the affected State on an equitable basis, since the nationals of both States were innocent.<sup>14</sup>

<sup>11</sup> *Official Records of the General Assembly, Forty-first Session, Sixth Committee, 27th meeting, para. 69.*

<sup>12</sup> See *Yearbook . . . 1982*, vol. II (Part Two), p. 86, para. 116.

<sup>13</sup> See 2017th meeting, footnote 6.

<sup>14</sup> *Official Records of the General Assembly, Forty-First Session, Sixth Committee, 39th meeting, para. 14.*

38. The Commission had spent 10 years discussing the topic and it was therefore high time to decide whether or not to formulate articles along the lines suggested by the Special Rapporteur. The importance of the topic and the rapid development of technology militated in favour of the formulation of positive rules of international law, and the starting-point should be the draft articles which had been submitted. Naturally, those articles would require improvement in the light of the comments of members of the Commission, so as to ensure that the obligations of prevention and reparation placed on the State of origin were not unduly onerous. A balanced review of the articles that took account of the interests of both the State of origin and the affected State would undoubtedly facilitate the adoption of a framework agreement or multilateral convention on a vital and complex topic.

*The meeting rose at 12.30 p.m.*

## 2019th MEETING

*Tuesday, 23 June 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2<sup>4</sup>)**

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

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

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (*continued*)

1. Mr. CALERO RODRIGUES, thanking the Special Rapporteur for his well-thought-out third report (A/CN.4/405), said that the six articles proposed were based on those submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, in his fifth report<sup>6</sup> and dealt with fundamental concepts. The Special Rapporteur still had doubts about some of those concepts, and it was clear from the debate that the Commission had even more doubts. Even allowing for the fact that only eight of the present members of the Commission had participated since the outset in the consideration of the topic and the fact that half the members had not taken any part in the discussion of the previous Special Rapporteur's reports, there was something wrong when the scope and nature of a topic remained undefined after 10 years of study.

2. He agreed with the general and substantive reservation made by Mr. Francis (2017th meeting) regarding the way in which the work was proceeding. The Commission had moved away from the basic concept of liability and compensation to that of the duty of care and rules of prevention, with emphasis on procedures, which had become the focus of its attention. He had already had occasion to express doubts in the Sixth Committee of the General Assembly about the advisability of including matters relating to prevention within the scope of the topic, but had not foreseen that such matters would take over the topic, as they were now doing. The marked shift in approach from the duty of reparation to the duty of prevention was best illustrated by comparing the statement made by Mr. Quentin-Baxter in paragraph 72 of his second report:

. . . once an activity which generates or threatens transboundary harm has been made the subject of a régime to which other States affected have agreed, there is little left for rules developed pursuant to the present topic to regulate—except, perhaps, the question of liability for unforeseen accidents . . .<sup>7</sup>

with that made in paragraph 47 of his fourth report:

. . . Reparation has always the purpose of restoring as fully as possible a pre-existing situation; and, in the context of the present topic, it may often amount to prevention after the event. . .<sup>8</sup>

The result of that shift in approach was that the concept of liability for injurious consequences arising out of acts not prohibited by international law had faded away to be replaced by that of State responsibility for wrongful acts. Under the latter concept, damage would be compensated not on the basis of mere causality, but rather because a State, in failing to fulfil its obligation of prevention, had committed a wrongful act. It followed

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

<sup>6</sup> *Yearbook* . . . 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

<sup>7</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 121, document A/CN.4/346 and Add.1 and 2.

<sup>8</sup> *Yearbook* . . . 1983, vol. II (Part One), p. 214, document A/CN.4/373.

that, if a State fulfilled its obligations under a given régime but damage none the less occurred in another State, the first State was exonerated, for it had done no wrong and was therefore not responsible or liable.

3. The pre-eminence of rules of prevention was further highlighted by the Special Rapporteur's proposal to reject the provision in the schematic outline (sect. 2, para. 8) according to which failure to comply with procedural rules aimed at the establishment of a régime of prevention did not in itself give rise to any right of action.

4. The Special Rapporteur had continued along the path taken by his predecessor. He maintained, for instance, that the characteristic activities of the topic were those referred to as dangerous; that general predictability of the risk was a requirement for the reparation of an injury sustained in the absence of an agreed régime (A/CN.4/405, para. 15); and that "if an activity does not call for diagnosis of the risk involved and, for reasons that have nothing to do with it, it still causes isolated injury, the option available would be outside the scope of the present topic" (*ibid.*, para. 16). He presumed that that passage meant that, if an activity did not seem to be dangerous, but damage none the less occurred, the question whether the State of origin had an obligation to compensate would fall outside the scope of the topic. He would, however, like to know whether the expression "for reasons that have nothing to do with it" referred to cases of *force majeure* and whether the words "isolated injury"—which he would prefer to replace by "isolated damage"—also referred to the importance of the damage.

5. Basically, he did not believe that liability for damage could be incurred solely where risk was recognized. It was inconceivable that liability, in terms of an obligation to compensate, should be excluded when damage occurred if the possibility of such damage had not been foreseen. Risk, though a useful basis for the principle of prevention, should not be transformed into a basis for liability. The basis for liability, or for the obligation to compensate, should be harm or damage.

6. In his third report (*ibid.*, para. 16), the Special Rapporteur considered the hypothesis in which damage occurred and both the State causing the damage and the State suffering from it were innocent. It was difficult to understand the Special Rapporteur's reference in that connection to an "international agency" that would determine the lawfulness of an activity on the basis of the risks involved. In the first place, the case considered by the Special Rapporteur was one in which there was not even the "original sin" of having created the general risk"; and, secondly, the topic was concerned solely with lawful activities. There should therefore be no question of an activity being considered lawful only if it had been classified as such by an international agency.

7. The Special Rapporteur had also made the point that the concept of absolute liability was difficult to accept. Yet, regardless of whether the term used was "absolute liability" or "strict liability", if the obligation to compensate for harm done were not accepted within a well-defined framework, the topic would have no raison

d'être. The idea that harm, or damage, must be compensated for had been clearly recognized in the *Trail Smelter* case and had since been accepted in many multilateral and bilateral instruments, as noted in the report of the Working Group established by the Commission at its thirtieth session.<sup>9</sup>

8. It was an inescapable fact, as Mr. Quentin-Baxter had noted in his second report, that "not all transboundary harm is wrongful; but substantial transboundary harm is never legally negligible".<sup>10</sup> The main purpose of the draft articles should therefore be to delimit the legal consequences of harm caused in the absence of wrongfulness. It would also be useful to include in the draft rules of prevention, which, contrary to the opinion expressed by the Special Rapporteur in his third report (*ibid.*, para. 23), would be based on the principle of cooperation. Nevertheless, the essence of the articles should be to establish the legal consequences of transboundary damage.

9. If the rites of prevention were given a pre-eminent role, a situation would inevitably arise in which harm would be compensated for only in the event of failure to comply with the obligation to prevent it. There would then be a situation of wrongfulness, with all the consequences attaching thereto.

10. The significance of the provisions on compensation included in the schematic outline was lessened because they were mixed up with rules of prevention and so did not stand out clearly. His fear was that, if the ideas currently followed by the Special Rapporteur were taken to their logical conclusion, the provisions on compensation might become even less visible and possibly disappear altogether.

11. The draft articles were generally acceptable to him, but would require careful redrafting. It had been suggested that they should contain a list of the activities to be covered; but if they were to have any meaning at all, they should remain general in character and apply residually to cases not covered by other international instruments.

12. Mr. HAYES thanked the Special Rapporteur for his reports and expressed particular appreciation for his qualities of lucidity and patience, which were so valuable in dealing with such a complex subject. It had rightly been said that it was difficult to pin down the topic, and that was due at least in part to the lack of customary international rules of a general nature. Existing law on the subject derived mainly from treaties and judicial and arbitral decisions which tended to deal with specific problems and were not so much concerned, as was the Commission, with introducing coherence into the subject. That could be achieved only by adopting a conceptual basis, which was a *sine qua non* for the development and codification of any topic but would be difficult in the present case because the topic was new and its practical importance had increased rapidly in recent years. The international community could therefore not afford the luxury of waiting for further

<sup>9</sup> Document A/CN.4/L.284 and Corr.1, paras. 21-22, reproduced in *Yearbook . . . 1978*, vol. II (Part Two), p. 151.

<sup>10</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 117, document A/CN.4/346 and Add.1 and 2, para. 59.

developments in State practice to provide the basis for codification of the topic as a whole.

13. In seeking an appropriate conceptual basis, the previous Special Rapporteur had adopted the principle *sic utere tuo ut alienum non laedas*, which had been endorsed by the present Special Rapporteur and which, in his own view, provided an adequate legal foundation for the development of the topic. Such a conceptual basis also served to distinguish the topic clearly from that of State responsibility by underlining the primary nature of the rules with which the topic was concerned, as compared with the secondary nature of the rules of State responsibility. In that connection, he had found the present Special Rapporteur's explanation of the various aspects of the difference between the two topics extremely persuasive. The conceptual basis provided by the *sic utere tuo* principle also led to a régime based on strict liability, which was, in his view, essential if the problem was to be solved.

14. The schematic outline was likewise based on the principle, developed in section 5, that a State must use its property in such a way as not to harm the interests of another State. The Special Rapporteur saw injury, actual or potential, as the unifying element of the topic which led naturally to the duties of prevention and reparation, and it could therefore be said to be in the nature of a subtheme deriving from the basic *sic utere tuo* principle. There were a number of decisions which, together with various instruments, collectively revealed an emphasis on prevention of injury and reparation in the event of injury. He had in mind, for instance, the decisions in the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases, as well as the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, the 1972 Stockholm Declaration, particularly Principle 21 of that Declaration, the preamble to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1974 Charter of Economic Rights and Duties of States and the 1982 United Nations Convention on the Law of the Sea. Many relevant examples of State practice had, moreover, been cited in the Secretariat survey (A/CN.4/384, annex III), which referred, for instance, to what had been done with regard to the series of nuclear tests at *Eniwetok Atoll* and in the *Christmas Islands*; the arrangements between the United States of America and Mexico in the *Peyton Packing Company* and *Rose Street Canal* cases; the Canada-United States arrangement concerning the *Gut Dam Claims*; and the Netherlands-United States arrangement in the *Island of Palmas* case. The recent *Sandoz* case in Switzerland could also be mentioned. Sections 5 and 6 of the schematic outline, which reflected an emerging trend, were consistent with those decisions and instruments, inasmuch as the balance-of-interests test had been incorporated in the duties of prevention and reparation.

15. Strict liability was the basis on which a solution to the fundamental problem should be approached and the schematic outline and the third report (A/CN.4/405) provided for a modified version of strict liability. The schematic outline encouraged States to establish a régime for activities involving risk and only in the

absence of such a régime would reparation be determined in the manner proposed in the outline. Even then, the matter would be settled through negotiations, which would take account not only of the extent of the injury, but of many other factors, including the shared expectations of the States concerned, the efforts of the State of origin to comply with its duty of care—a significant modification of strict liability—and the balance of benefit and loss.

16. The place of strict liability in State practice was exemplified in English internal law by *Rylands v. Fletcher* (1868), which had set a precedent that had been followed in many common-law countries, including Ireland (see A/CN.4/384, para. 363). The principle it had established had also been incorporated in the codes of many civil-law countries. Strict liability was an element of many multilateral and bilateral conventions, including those dealing with the carriage of nuclear and other dangerous substances, damage caused by aircraft and pollution. Moreover, there was now a tendency to apply the “polluter pays” rule. Thus, although there was no customary rule of international law on strict liability, the concept was not unknown in international law. That should suffice to dispel any concern at the thought that the Commission might propose that a modified form of strict liability, as set out in the schematic outline, should form part of the progressive development of the law on the topic. The very logic of the topic called for such an element, and it would in any event constitute a residual rule.

17. There were two aspects to the exercise of State sovereignty. On the one hand, a State had the right to engage in lawful activities, particularly in its own territory, without having to answer to another State. On the other hand, a State had the right to enjoy the benefits of its own facilities and assets without any interference caused by the activities of another State. While those two rights were not absolute, the instances of potential for conflict between the two had been growing and, as such cases continued to increase, it would become less satisfactory to resolve them by a series of limited arrangements. Presumably, therefore, in giving the Commission a mandate to study the topic, the General Assembly had considered that a global approach was required and the Commission could not do less than respond with appropriate draft articles. The schematic outline and the draft articles submitted by the Special Rapporteur would require careful consideration. He trusted, however, that the Commission would approve the general thrust of the schematic outline, which pointed in the right direction, and endorse a régime that would require a State not to refrain from or prohibit activities that were lawful and beneficial, but to ensure that such activities did not cause injury to others.

18. With regard to the draft articles themselves, he agreed that, so far as the nature of the activities to be covered was concerned, article 1 was modified by article 4 and the relevant parts of article 4 should therefore be transferred to article 1. The relationship between the two articles should also be considered. It was unnecessary, in his view, to refer to “situations”, since the word “activities” was adequate. The questions raised regarding the suitability of the word “control” would have to be resolved, since some word was necessary to

cover the circumstances referred to in the commentary. It was clear from articles 1 and 4, taken together, that both private and State activities were covered, as indeed they should be.

19. Article 2 on the use of terms should perhaps be considered in detail at a later date. Article 3, a new provision, provided some useful clarifications. Article 4, despite its link with article 1, did have a *raison d'être*, since it introduced the concepts of knowledge and appreciable risk. A further explanation of the meaning of the words "means of knowing" might, however, be required. Did the knowledge test also apply to the presence of risk? He shared the view that it would be best to leave consideration of the role of international organizations until later.

20. He basically agreed with Mr. Calero Rodrigues's comments on the inclusion in the draft of a list of the activities to be covered. It should be borne in mind that the articles would in effect serve as residual rules to deal with matters that were not subject to existing agreements between States. In future, when States came to deal with the problem, they would actually draw up a list of activities covered in their own case. Any list prepared would, moreover, soon be out of date because of the rapid pace of development.

21. Mr. ROUCOUNAS said he had noted with satisfaction that the members of the Commission who had spoken on the topic had all referred to the basic issue of the theoretical approach to the draft, which the Special Rapporteur had also described in his introductory statement (2015th meeting). In dealing with such a complex topic, it was essential to agree on the major directions to be taken and not give in to a common temptation in today's world, namely "pragmatism", which pushed back general theories on all fronts and also led to the intellectual impoverishment of society.

22. The first major direction, which had been defined by R. Q. Quentin-Baxter and which was still valid, was that liability in the context of the draft articles did not stem from wrongfulness and that any conclusion to the contrary would have very serious consequences for the Commission's work. In the case of responsibility for wrongful acts, a State's responsibility was engaged, even where no injury had occurred, if that State had violated a primary rule of conduct, whereas the draft articles under consideration dealt with precisely the opposite situation, in which injury occurred even though the State had not violated a rule of conduct. The question whether such injury must be compensated for was, moreover, not a matter of abstract speculation. All activities that had been going on in the past few decades in such areas as nuclear energy, mining and outer space had been leading inexorably towards international regulations based on the idea of risk. The issue was then to establish primary rules by means of an intellectual exercise which would link reparation to injury without making any value-judgment, but which would at least be based on the assumption that the conduct in question was lawful. One safe way of doing that was obviously to draw up treaties in specific areas. Although few treaties of that kind had been concluded to date, they were of considerable interest to the Commission, as were the instruments adopted by international organizations in

that regard, and he hoped that the Secretariat would update its very useful survey of State practice (A/CN.4/384) and include in it an analysis of doctrine.

23. The special rapporteurs had thus defined the Commission's task as that of formulating a general set of primary rules which would establish a *continuum* between prevention and reparation that would be strengthened by the unifying criterion proposed by the present Special Rapporteur, namely injury. It would probably require painstaking efforts to prove that that approach was consistent and legally relevant and he had been most intrigued by what Mr. Calero Rodrigues had suggested in that regard. The approach outlined by the special rapporteurs was thus quite useful, for the issue would be not only to "pin-point" the cases which would not be covered by the régime of responsibility for wrongful acts, but also to establish a legal framework governing cases which might be doubtful either because there were no precedents in international relations or because the dividing line between lawfulness and wrongfulness was not clear and the State concerned might not want it to be. Mr. Quentin-Baxter himself had, moreover, pointed out in his third report that the phrase "acts not prohibited by international law" had been chosen "to make it clear that the scope of this topic was not confined to lawful acts".<sup>11</sup>

24. That approach was useful also because, by introducing the idea of prevention, it went beyond the framework of reparation and opened up the draft to international co-operation—a welcome development, even though the forms of co-operation had to be considered more carefully. As the two previous speakers had noted, moreover, the further the Commission went in the area of prevention, the more it pushed a number of hypotheses back into the "traditional" régime of State responsibility. If a State undertook, for example, to show due diligence, failure to comply with that obligation would be a breach of a primary rule, or in other words a wrongful act, and the other régime of responsibility would then apply. Moreover, the obligation of reparation itself created international responsibility of States in the traditional sense of the term. The régime which the Commission was now building, and which was in some respects residual, would in some cases also be provisional in nature, because it would cease to apply when activities that had originally been lawful became unlawful by being prohibited and because the system of prevention surrounding lawful activities would be the jumping-off point, in the event of non-fulfilment, for State responsibility.

25. Referring to the draft articles, and in particular to the scope of the draft, he noted that the Special Rapporteur had not proposed any definition of the term "activities" in article 2. In his own view, the meaning of that term had to be spelled out at the very beginning and in the text itself. He was, however, not sure that the word "situations" was necessary, since in most cases a "situation" could be understood as the logical and physical consequence of the existence of an "activity". With regard to the cases referred to by the Special Rapporteur in his comments on article 1 (prevention of pests

<sup>11</sup> *Yearbook* . . . 1982, vol. II (Part One), p. 59, document A/CN.4/360, para. 36.

and epidemics, etc.), it must be borne in mind that the competent international organizations, namely FAO and WHO, had very broad powers to lay down rules covering such cases that would be binding on member States. The use of the term “situations” might therefore only give rise to uncertainty. Moreover, the Special Rapporteur had deliberately not included in the scope of the draft injury caused by State acts whose wrongfulness had been precluded by virtue of the grounds set forth in articles 29, 31, 32 and 33 of part 1 of the draft articles on State responsibility (A/CN.4/405, para. 36). Although that approach was quite understandable from the point of view of methodological purity, it was too early, at the current stage, to provide that the draft would not apply in what might be typical cases of strict liability, since it would be a question of making reparation for injury caused by acts whose wrongfulness had been precluded. The Special Rapporteur had also decided that activities which did not call for diagnosis of the risk involved would be outside the scope of the topic, because otherwise the Commission would arrive at a concept of absolute liability “difficult to accept at the present stage in the development of international law” (*ibid.*, para. 16). Such activities could not, however, be excluded without further consideration, since absolute liability was, after all, not entirely unknown in international law and had, for example, been provided for in the 1972 Convention on International Liability for Damage Caused by Space Objects. The Special Rapporteur had also made a major change in the Spanish text by replacing the words *consecuencia material* by *consecuencia física*. He did not appear, however, to be referring only to environmental consequences, since he stated (*ibid.*, para. 40) that the definition could also be taken to cover product liability, which went well beyond the environmental framework. It would be helpful if the Special Rapporteur could provide further clarifications on that point.

26. With regard to the spatial framework proposed in the draft, he urged the Commission to pay close attention to the meaning of the terms used. Although the texts on the law of the sea referred to “land territory” and the “territorial sea”, it must not be forgotten, as the ICJ had recently recalled, that a coastal State exercised its territorial sovereignty over its own territory and over the territorial sea. In that connection, it might also be recalled that Kelsen and the Vienna school had defined territory as the sphere of validity of the State’s legal order. Care had to be taken to avoid any confusion between the terms “jurisdiction”, “territorial competence” and “territorial sovereignty”. He also had doubts about the meaning of the term *passage continu* in the French text of the report (*ibid.*, para. 50), which was probably the result of a translation error. With regard to the word “area”, it must also be borne in mind that in some cases it denoted the spatial framework of State jurisdiction, and in others the exact opposite (the “Area” in the 1982 United Nations Convention on the Law of the Sea). International law recognized that, beyond their own territory, States exercised “jurisdiction” and “control”, which might be neologisms, but were nevertheless useful terms. The term “jurisdiction” had, however, not been used at all in draft article 1. As to “control”, he noted that what

the ICJ had stated in its advisory opinion of 21 June 1971 on Namibia concerning the occupation of a foreign territory, namely that “physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”,<sup>12</sup> might also apply to the topic under consideration. Further thought should be given to the meaning of the term “control” in private international law and to whether the régime to be established would also apply to the problem of corporations operating abroad. That might be an unwarranted extension of the topic, but the Commission should at least consider the matter.

27. Lastly, the term “transboundary” was too narrow because it appeared to imply the existence of a territorial border and, as a result, the Special Rapporteur had had to clarify its meaning in draft article 3, subparagraph (a). That term should be replaced by a less laconic and more appropriate term.

28. Mr. YANKOV said that, in his third report (A/CN.4/405), the Special Rapporteur had made a further effort to consolidate the basic principles which had been enunciated in his previous reports and in those of his predecessor and which were reflected in the proposed schematic outline. The present debate had shown that there were differences of opinion with regard to the doctrine of liability for risk, but that was not at all surprising in view of the complexity and novelty of the topic and the absence of sound legal grounds for distinguishing it from the topic of State responsibility. The Commission had held lengthy discussions on general questions, such as the legal nature of the technique of strict liability, the relationship between prevention and reparation, and the notion of injury, on which he would like to comment.

29. With regard to the legal nature of the principles underlying the legal concept of strict liability, the Special Rapporteur had maintained in his second report that, in the case of injury caused in the absence of a régime, the principles of prevention and reparation constituted general rules of international law, adding that those principles “seem to contain a more peremptory element” (A/CN.4/402, para. 28). Actually, there was no sound basis in customary international law for such a contention. The principles in question could be established only by means of an agreement between the States concerned. Only by such an agreement could the obligation of prevention (comprising the obligation to inform and to negotiate) and the obligation of reparation be brought into play.

30. In the Special Rapporteur’s opinion, the obligation to inform and to negotiate was sufficiently well established in international law that any breach thereof would constitute a wrongful act. As he had stressed in his second report (*ibid.*, para. 51), however, there could be various types of mechanisms leading to régimes of varying strictness.

31. The Special Rapporteur seemed not to have taken account of the difference between State responsibility

<sup>12</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 54, para. 118, *in fine*.

for wrongful acts and liability for injurious consequences arising out of acts not prohibited by international law. It was difficult to see what he had meant when he had stated that the two types of responsibility differed "only in degree" (*ibid.*). Where an agreement expressly provided for the obligation to inform and to negotiate, a breach of that obligation would obviously constitute a wrongful act entailing State responsibility, and he failed to see how such responsibility could be equated with liability for physical consequences arising out of acts not prohibited by international law.

32. The Special Rapporteur had also maintained that: . . . as prevention and reparation fall within the domain of primary rules, it follows that, if injury is done which subsequently gives rise to the obligation to make reparation, that reparation is imposed by the primary rule in terms of the lawfulness of the activity in question; only if the source State fails in its primary obligation to make reparation does the question become one of secondary rules, with the notion of responsibility for the wrongful act which the State's violation of that primary obligation constitutes. . . . (*Ibid.*, para. 7.)

He agreed with the Special Rapporteur that, where there was an obligation to make reparation, the breach of that obligation would constitute a wrongful act entailing international responsibility. He could not agree, however, that there was a "symbiosis between prevention and reparation" (*ibid.*, para. 6) and that injury by itself justified prevention and reparation (*ibid.*, para. 8). Prevention and reparation could not be treated in the same manner. The obligation of prevention did not automatically entail an obligation of reparation, unless an agreement between the States concerned contained a specific provision to that effect.

33. Referring to State practice in the matter, he pointed out that there were many international treaties that required prevention of injury without necessarily imposing an obligation to make reparation. A number of multilateral conventions set forth the obligation to inform or to enter into consultations and negotiations and dealt with such matters as the type of information to be provided and the procedures to be applied for negotiation and the settlement of disputes. In all cases, the legal foundation of the obligations of prevention and reparation was an international agreement.

34. In his third report, the Special Rapporteur stated that "general predictability of the risk" was "a requirement for the reparation of injury sustained in the absence of an agreed régime" (A/CN.4/405, para. 15). He also pointed out that the potential risk must be "appreciable" (*ibid.*, para. 12). In fact, only a special arrangement could bring the mechanism of prevention and reparation into play. The rights of the affected State and the obligations of the State of origin could not be deduced from abstract rules of logic and justice. In any event, State practice did not support such a postulate, as shown by recently adopted international instruments relating to nuclear accidents, marine pollution and transboundary air pollution.

35. Thus the preamble to the Convention on Early Notification of a Nuclear Accident,<sup>13</sup> adopted by the General Conference of IAEA at Vienna in 1986, referred to measures taken aimed at "preventing nuclear accidents and minimizing the consequences of any such

accident, should it occur" and stated that the objective of the Convention was "to strengthen further international co-operation in the safe development and use of nuclear energy". Article 1 stated that the Convention:

. . . shall apply in the event of any accident involving facilities or activities of a State Party or of persons or legal entities under its jurisdiction or control, referred to in paragraph 2 below, from which a release of radioactive material occurs or is likely to occur and which has resulted or may result in an international transboundary release that could be of radiological safety significance for another State.

Risk was thus determined in relation to the specific activities referred to in paragraph 2 of the article. Article 5 of the Convention listed in a number of categories the data to be provided to IAEA and to the States which had been or might be physically affected by the transboundary radiological release.

36. The General Conference of IAEA had also adopted in 1986 the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,<sup>14</sup> which dealt only with the co-operation to be established between the States parties themselves, and with IAEA, to facilitate prompt assistance in the event of a nuclear accident or radiological emergency to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases (art. 1). The Convention provided that, in order to facilitate such co-operation, the States parties could agree on bilateral or multilateral arrangements for preventing or minimizing injury and damage which might result in the event of a nuclear accident or radiological emergency. The Convention contained detailed provisions on assistance, the direction and control of assistance, the functions of IAEA, the reimbursement of costs and the settlement of disputes.

37. The 1982 United Nations Convention on the Law of the Sea emphasized the general duty to prevent, reduce and control pollution of the marine environment and to promote international co-operation for that purpose. Article 197 of the Convention dealt with the duty to protect and preserve the marine environment and with general preventive measures, emphasizing that States should co-operate directly or through competent international organizations. Article 194 required States to take all measures that were necessary to prevent, reduce and control pollution of the marine environment; and, under article 198, "when a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution" it had a specific obligation to notify other States. The Convention also contained provisions dealing specifically with responsibility and liability, namely article 235 (responsibility and liability for damage caused by pollution of the marine environment), article 263 (responsibility and liability for damage resulting from marine scientific research) and article 304 (general provision on responsibility and liability for damage).

38. Emphasis was thus placed exclusively on prevention as a general duty not to cause harm and on the establishment of international co-operation for the protection and preservation of the marine environment. Reparation for damage was confined either to measures

<sup>13</sup> IAEA, *Legal Series*, No. 14 (Vienna, 1987), p. 1.

<sup>14</sup> *Ibid.*, p. 9.



for compensation under internal legal systems or to measures provided for in international agreements.

39. Another pertinent example was provided by the 1969 International Convention on Civil Liability for Oil Pollution Damage and its amending Protocols of 1976 and 1984;<sup>15</sup> those instruments established uniform international rules and procedures for determining questions of liability and ensuring adequate compensation to victims of oil pollution. Mention might also be made of the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and its amending Protocol of 1984.<sup>16</sup>

40. All those conventions had a number of points in common. First, they laid down the general duty to avoid causing harm and to minimize its adverse effects through co-operation. Secondly, they defined their scope very precisely. Thirdly, they provided for régimes based on agreements among the States concerned.

41. Turning to the draft articles submitted by the Special Rapporteur, he said that article 1, which was a key provision since it dealt with the scope of the entire draft, would require some clarifications. First, there was a gap in the article because it referred only to activities or situations which occurred "within the territory or control of a State". Since the term "control" did not, in his opinion, cover the idea of "jurisdiction", he urged that a reference to "jurisdiction" be included in the article. Moreover, many international instruments, including the 1986 Vienna Conventions already mentioned (paras. 35-36), referred specifically to "jurisdiction or control", and the United Nations Convention on the Law of the Sea contained provisions on jurisdiction over the exclusive economic zone. As to the criteria for "appreciable risk", the Special Rapporteur stated in his third report that "the risk involved must be of some magnitude and . . . must be either clearly visible or easy to deduce from the properties of the things or materials used" (A/CN.4/405, para. 70). Draft article 1 contained no such qualification and referred only to a "physical consequence adversely affecting persons or objects". Clearly there was a need in article 1 for an indication of what was meant by that expression.

42. With regard to article 2, he stressed that the meaning of the term "transboundary effects" in paragraph 5 and of the term "transboundary injury" in paragraph 6 had to be more clearly defined. If the texts of articles 1 and 2 were adequately redrafted, article 3 could be deleted as a statement of the obvious. Article 4 needed further elaboration in the light of article 2, paragraph 6. He had no comments to make at present on articles 5 and 6.

43. In conclusion, he stressed that attention should be focused on prevention and that the question of responsibility should be considered in connection with the topic of State responsibility, where questions of compensation and reparation properly belonged. It was also necessary to draw up a list of dangerous activities.

44. The conclusion of multilateral arrangements should be encouraged as a more appropriate means of solving the type of problems under consideration. It was unrealistic to impose on the State of origin the duty preventively to negotiate safety rules and standards with every potential victim. As recent State practice showed, it was much better to concentrate on the formulation of safety rules and preventive measures through multilateral agreements and, where appropriate, through the competent international organizations.

45. Mr. RAZAFINDRALAMBO, noting that the Special Rapporteur's reports were as clear, well-structured and erudite as those of the late R. Q. Quentin-Baxter, said he welcomed the fact that the Special Rapporteur intended to regard the schematic outline prepared by his predecessor as the main raw material for the topic. He also considered that the Commission had gone far enough in its study of the topic to be able now to make some headway in the formulation of a set of rules. To go on questioning the topic's relevance would thus be a purely academic exercise.

46. There were marked similarities between the present topic and that of the law of the non-navigational uses of international watercourses. In both cases, the aim was to avoid any potential conflicts between the right of one sovereign State freely to engage in activities in its own territory with no outside interference and the right of another sovereign State not to suffer the injurious consequences of such activities without adequate reparation. In both cases, the Commission's task was to find a solution that would ensure a balance of interests based on the sovereign equality of States, and that task was complicated by the need to reconcile the requirements of sovereignty with the principles of justice, good faith and good-neighbourliness.

47. He agreed with the Special Rapporteur's analysis of the key role of injury, which not only set the topic of international liability apart from that of State responsibility, but also formed the basis for the twin objectives set by the two Special Rapporteurs, namely the establishment of a régime designed to prevent potential injury or risk of injury, and the establishment of an obligation of reparation in the absence of a régime of prevention when injury actually occurred. States would thus be under an obligation to adopt regulations governing activities which might cause transboundary injury. The Special Rapporteur had also defined the modalities for reparation to be followed in the absence of a régime of prevention. That structure, for which Mr. Quentin-Baxter had been responsible, had not been received entirely unfavourably either by the Commission or by the Sixth Committee of the General Assembly. Mr. Quentin-Baxter had, however, advocated more flexible and cautious rules than those proposed by the present Special Rapporteur, with regard both to prevention and to reparation. He had considered that failure to take one of the steps required to inform the affected State and to set up fact-finding machinery or even to negotiate with that State did not in itself give rise to any right of action, as explained in section 2, paragraphs 6 (b) and 8, and section 3, paragraph 4, of the schematic outline. That was, however, apparently not the position that the present Special Rapporteur had adopted in his

<sup>15</sup> For the text of the Convention as amended by its 1976 and 1984 Protocols, see the IMO publication, Sales No. 456 85.15.E.

<sup>16</sup> For the text of the Convention as amended by its 1984 Protocol, *ibid.*

second report (A/CN.4/402). Noting that the obligation to provide information also existed in connection with reparation, the Special Rapporteur had concluded that it would be dangerous to exempt that obligation from the exercise of any right of action. In his view, the best solution would be simply to delete the part of section 2, paragraph 8, of the schematic outline relating to a right of action. That would be tantamount to making the obligations concerning the establishment of a régime binding. It was therefore understandable that doubts should have been expressed by members of the Commission who feared that such a solution would have the effect of blurring the basic difference between liability for risk and State responsibility for wrongful acts and that it did not have a sound basis in the international practice of States or an equivalent in their internal laws.

48. With regard to the regulation of activities which might cause injury to other States, the Secretariat's survey of State practice (A/CN.4/384) had given only examples of activities relating to the physical use and management of the environment. Even in that very specific and limited area, it had been recognized in the survey that "the materials examined . . . demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of the international liability topic" (*ibid.*, para. 10). It was therefore difficult to extrapolate in applying the principles deriving from the study of the environment more or less automatically to the topic as a whole.

49. In internal law, in legal systems which provided for liability for risk—in other words in the majority of countries—only injury caused by authorized activities was taken into account: such liability was characterized as "no-fault", "strict" or "absolute" liability. In those legal systems, there was no binding obligation of prevention combined with a right of action. Although strict liability was based on risk, it gave rise to a right of action only when injury had occurred. All civilian and commercial activity would come to a complete halt if, in cases where it involved risk, the person engaging in it, before undertaking the activity, had to initiate a costly public information procedure or even negotiations with persons who might be exposed to the risk. His country's legal system, which included a principle identical to the rule embodied in article 1384, paragraph 1, of the French Civil Code, provided that an individual was liable only for injury caused by his own action, that of his agent or that of things in his custody. Injury was thus a matter of concern only when it had occurred and when there was a link of causality between the injury and the action of the individual in question or his agent. Consequently, in recognizing the binding nature of the obligation to establish a régime of prevention and, in particular, of the obligation to provide information, the Special Rapporteur was going beyond both internal and international positive law.

50. He was aware that the Special Rapporteur's approach reflected a concern to make the draft more credible and workable and had to do more with the progressive development of international law than with its codification, but that daring approach would certainly not be favourably welcomed by those who would regard it as too great a restriction on the freedom of choice of

States with regard to activities carried out within their territory or control which they deemed useful. Like other members of the Commission, he was of the opinion that the question should be reconsidered in order to draw a clearer dividing line between the topic under consideration and that of State responsibility and to make it more acceptable to the majority of States as a set of residual rules.

51. Referring to the draft articles, he said that the new formulations and structures proposed in the third report (A/CN.4/405) represented a definite improvement over the texts submitted by Mr. Quentin-Baxter in his fifth report.<sup>17</sup> Some of the concepts referred to in draft article 1, such as that of "activities", nevertheless continued to give rise to problems. Like his predecessor, the Special Rapporteur was proposing that account should be taken only of specific activities giving rise to a physical consequence. Did that concept encompass radio and television broadcasting activities? In internal law, electric current was regarded as a specific object that could be appropriated and, similarly, radio waves were a physical substance that was just as tangible as factory smoke. There was no denying the fact that, to the extent that they were intended to cause disturbances and even terrorist attacks, some radio and television programmes had disastrous effects on the internal order of the countries where they were broadcast and were an affront to those countries' dignity and honour.

52. In an entirely different connection, he regretted that more detailed consideration had not been given to the injurious consequences of a particular type of economic and monetary conduct, which continued to be engaged in in international relations and of which the developing countries were often the helpless victims.

53. In addition to the problems raised in connection with the concept of jurisdiction, the concept of control had to be defined more clearly as far as private activities were concerned because it was a sensitive concept that could involve a number of aspects, especially economic, legal and political ones. It was not a purely theoretical question to ask which of those aspects predominated in the draft. That question had arisen in the case of the activities of multinational corporations, in which it was often difficult to identify the authority that was actually in control. He had in mind, for example, the disaster which had occurred at a Union Carbide factory at Bhopal in India. The mere fact that a multinational corporation which exported investments and technology was located in the territory of a State was not enough automatically to entail the responsibility of that State: the State actually had to be in control of the local subsidiary. He was therefore of the opinion that provision had to be made for the twofold requirement of territory and control. Although such a proposal might give rise to problems in the case of ships, aircraft or other air and space objects, where the two ideas were necessarily dissociated, it was still worth making.

54. Draft article 4, which was a key provision, would be of even greater importance if the Commission followed the Special Rapporteur's position that a right

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

of action should be associated with the obligation of prevention and negotiation with a view to the establishment of a régime. He appreciated the Special Rapporteur's efforts to take account of the interests of developing countries by making it a condition for liability that the State of origin either had to know or had to have the means of knowing that an activity might cause injury. With regard to the two other conditions which must, in the Special Rapporteur's view, be fulfilled—namely that the activity in question had to be carried out within the territory of the State of origin or in areas within its control, and that it had to create an appreciable risk of causing injury—he pointed out that that wording appeared to apply only to potential risk, in other words to the stage following the occurrence of any actual injury. Article 4 was therefore likely to give rise to the reservations to which he had referred in connection with the obligation to establish a régime of prevention. He had no particular comments to make on the other draft articles.

55. Mr. AL-KHASAWNEH congratulated the Special Rapporteur on his thought-provoking reports, which, together with those of his predecessor, R. Q. Quentin-Baxter, had enabled the Commission to make great strides in charting the boundaries of a challenging and complex topic. Mr. Riphagen, a former member of the Commission, had described the topic as “the unfinished part of public international law”,<sup>18</sup> but account now had to be taken of the fact that it had received a fair amount of approval both in the Commission and in the Sixth Committee of the General Assembly, even if that approval had been only tentative and somewhat tacit.

56. At the same time, it had to be recognized that, despite the progress made, the scope of the topic had been only partly explored and major questions as to its basis in international law and its usefulness remained to be settled.

57. It followed that the Commission was faced with difficult choices with respect to its future work on the topic. In that connection, it should be emphasized that responsibility for those choices lay with the Commission as a whole and not only with the Special Rapporteur. As Mr. Quentin-Baxter had pointed out in 1983:

... a special rapporteur was not an advocate for his topic: his duty was to offer his views on the best way to approach it and to marshal information and relevant arguments. The handling of the topic then became a matter between the Commission and the General Assembly. . . .<sup>19</sup>

58. With such collective responsibility in mind, it had to be decided what choices were open to the Commission. It might, for example, be concluded that conceptual differences were notoriously hard to reconcile and that work on the topic should therefore be discontinued, if only for the sake of rationalization. Yet what was at issue in the present case was the role the Commission should play in responding to the needs of States and of the international community as a whole at a time when the reality of the interdependence of States and awareness of how hazardous the world had become called for inventiveness and ingenuity on the part of the

Commission. Assharany, a fifteenth-century Egyptian mystic and jurist, had once said that “the wisest of men are those who can best interpret their times”. He himself was of the opinion that, if the Commission could not find ways of responding to the international community's changing needs, other bodies would—not only in the field of the environment, but also in other fields where physical phenomena made themselves felt.

59. To suggest that work on the topic should be discontinued because it had no basis in contemporary international law was not only to miss the point of the work, but also to make the concept of progressive development of the law meaningless, for that concept presupposed the formulation of new rules based on justice and equity, as well as on the rules of logic and morality. Unlike Mr. Graefrath (2016th meeting), he did not believe that international law developed on the basis of approval by States, rather than on the basis of logic and moral precepts. Without wishing to underestimate the principle of sovereignty, he had to point out that it could hardly be the exclusive source on which the Commission's work depended, even in areas where interdependence was less readily recognizable.

*The meeting rose at 1.05 p.m.*

## 2020th MEETING

*Wednesday, 24 June 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*later:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2<sup>4</sup>)**

[Agenda item 7]

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

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

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

<sup>18</sup> *Yearbook . . . 1983*, vol. I, p. 263, 1800th meeting, para. 16.

<sup>19</sup> *Ibid.*, p. 260, para. 1.

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

- ARTICLE 1 (Scope of the present articles)  
 ARTICLE 2 (Use of terms)  
 ARTICLE 3 (Various cases of transboundary effects)  
 ARTICLE 4 (Liability)  
 ARTICLE 5 (Relationship between the present articles and other international agreements) and  
 ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (continued)

1. Mr. AL-KHASAWNEH, continuing his statement from the previous meeting, said that maxims such as *sic utere tuo ut alienum non laedas*, or to express it in the terminology of Islamic law, *la dharar wa la dhirar*, and the principle that an innocent victim should not be left to bear his loss—which was also found in Islamic law and doubtless in other legal systems as well—were much too broad to constitute legal rules. That fact, however, should not obscure their relevance or applicability, for they were part of the reservoir of moral and intellectual ideas from which the principles and rules of all legal systems were derived.

2. Another drawback, which might tempt the Commission to give up the present topic, was the existence of terminological difficulties. They could hinder attempts at progressive development and codification for fear of the unknown. A heavy reliance on terms used in one particular legal system—for example, the common law—could give the impression that the concepts underlying those terms existed only in that system and had no place in a universal instrument. Those fears were none the less exaggerated. If one looked beyond the actual words, one was struck by the similarity of concepts in the various legal systems. For instance, it could safely be asserted that most of the terms employed in the reports now under consideration connoted concepts in Islamic law, although of course under different headings and applications. He accordingly urged members to keep terminological difficulties in mind but not to be discouraged by them.

3. The second choice before the Commission, one which he was inclined in principle to favour, was to continue work on the topic and see how far it was possible to go. The Commission, out of its sense of professional commitment, should make that effort. Even if the end-product ultimately proved unacceptable, it was possible to take comfort in the thought that a complete draft would have been provided for States and publicists to criticize. If, on the other hand, the end-product commanded general acceptance and proved timely, the Commission's efforts would have been adequately rewarded.

4. The Commission's immediate task, however, was to see how far it could go, and that raised a number of interrelated questions about the content and scope of the topic and about the degree of progressive development that was politically feasible.

5. First, the draft articles under consideration were notable for the almost total absence of rules of substance. The articles on scope and definitions were followed by some saving clauses and then by what had been described as a "genuine conciliation procedure". The heart of the draft thus consisted of a number of procedural provisions. That was not all the international community expected of the Commission and he strongly urged that more room should be made for substantive provisions. The formulation of such provisions would of course call for ingenuity if the draft was not to encroach upon the domain of general secondary rules governing State responsibility.

6. In that connection, the "original sin" referred to by the Special Rapporteur might well have been committed by the Commission itself when it had decided to study State responsibility in terms of primary and secondary rules, the logical result being to put a strait-jacket on topics which, like the present one, existed in a twilight zone.

7. The present topic had been described as *terra incognita*; but the territory had already been mapped, albeit approximately. Furthermore, it had already been cut down to half its size by the decision to exclude economic activities. The previous Special Rapporteur, R. Q. Quentin-Baxter, had been fully aware of the fact that the decision not to deal with economic activities meant a collapse of the unity of purpose of the topic. One of the arguments he had advanced in support of that decision was that State practice in the area was non-existent at present. Mr. Quentin-Baxter's suggestion, however, had not been that economic activities should be left out altogether but that that aspect of liability should be dealt with in a manner similar to the Commission's treatment of the law of the succession of States. Accordingly, the Commission should avoid giving the impression that it was oblivious to the logical and moral issues involved in restricting the topic to physical activities. It should be understood that, once State practice developed, the Commission would take up the question, although a greater element of progressive development would be called for.

8. The question also arose as to how to introduce greater precision into the draft. The matter of the list of legitimate activities giving rise to transboundary harm had been raised by Mr. Koroma (2018th meeting) and satisfactorily answered by the Special Rapporteur. Such a list was obviously desirable, but it ran the risk of very early obsolescence.

9. He had doubts about the viability of the approach of drawing distinctions between land uses, water uses and air uses, although it had been recommended in a study by the Asian-African Legal Consultative Committee with regard to nuclear activity. Any such division was bound to be arbitrary. The best frame of mind in which to approach the present topic was an increased awareness of the unity of the physical universe.

10. He had the same doubts with regard to what had been called "ultra-hazardous" activities, but was prepared to admit that, if the topic was confined to such activities, it might be easier to arrive at an agreement on the question of strict liability. The topic had already

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

been further delineated by the introduction of the concept of the “threshold” of appreciable physical harm, a concept which also had an impact on the question of strict liability. Personally, he did not favour any further attempts at delineating or narrowing down the scope of the topic; the Commission should be able to live with the degree of generality so far achieved in its work.

11. The unity of purpose of the topic reappeared in a different context when it was borne in mind that one of the goals was to encourage agreements between the States concerned and to provide residual rules in the absence of such agreements.

12. Suggestions had been made for a “framework agreement” and he wished to reiterate his criticism of such an approach, made earlier in connection with the topic of the law of the non-navigational uses of international watercourses. As he saw it, that approach was the very negation of the idea of progressive development and codification, the aim of which was to furnish a set of rules in a clear and uniform instrument. An argument in support of the framework approach was that it would increase the specificity of applicable rules. But the result might well be rules so specific and so dependent on unpredictable factors as to become what Mr. Quentin-Baxter had termed “non-principled solutions”, and that process might lead in the end to a mosaic of rules representing the antithesis of codification.

13. The negotiations for an agreement on such specific rules would in all probability depend on variables such as the relative strength of the negotiating parties, not to mention the skill of the negotiators. Yet surely the prime task of the legislator was to provide not a tailor-made solution to fit every case, but a general yardstick with built-in flexibility.

14. There was also the related problem of the political will of States and their general disposition to co-operate. When those elements were present in abundance, the topic became redundant. More often than not, however, that will and that disposition could not be assumed. The present topic, like that of the law of the non-navigational uses of international watercourses, was essentially a compromise between the reality of interdependence and the principle of territorial sovereignty. The problem became clearer when one considered that the end-product was intended for world-wide use. The *raison d'être* of the present topic was the realization that neither national legislation nor regional agreements were sufficient to deal with the problems involved, and a telling example was the fact that half of the pollution in Norway was generated in the United Kingdom,

15. Since the end-product was meant for use by a heterogeneous world, it was obvious that some of the procedural duties mentioned in the schematic outline might prove unrealistic. It was not realistic to expect States at war with each other or which did not recognize each other to apply the duty to inform and to negotiate. Those examples were not exceptional, but simply extreme manifestations of a common phenomenon, namely the lack of political will and of a general disposition to co-operate. Hence the Commission would be well advised to take such situations into consideration.

16. He had a few tentative suggestions to make as to how far, and in what ways, the draft could reflect those political realities. First, a greater role should be assigned to international organizations both in providing technical assistance in fact-finding and in aiding the process of negotiations.

17. Secondly, the normative aspect of the draft should be strengthened, a point that concerned the draft's acceptability to States. It had been said that the prospect of that acceptability came at the cost of a significant dilution of the normative content of liability. He himself, however, had always considered that acceptability to States was not necessarily related to the inferences that could be drawn from the debates in the Sixth Committee of the General Assembly. In that connection, it should be stressed that the small and weak States that formed the majority of the world community would probably be attracted more by a clear normative instrument that defined their rights and duties than by a system of conciliation with variables that usually worked against them.

18. Thirdly, the duty of prevention should be strengthened and amplified in the draft. Admittedly, initiative should not be discouraged and he was fully aware of the right of States to deal with nature within their territories. That was an extension of perhaps the most fundamental of rights, namely the right of survival. It must be remembered, however, that the draft was governed by the concept of “appreciable physical harm” and hence by the weakest interpretation of the maxim *sic utere tuo ut alienum non laedas*. Harm beyond that threshold was likely to be irreparable and it would be almost impossible to compensate for it. Everything would ultimately depend on how highly one regarded the idea of progress.

19. On the vexed question of strict liability, the previous Special Rapporteur had said in his fourth report that:

... wrongfulness and strict liability are often regarded as the active principles of two quite distinct systems of obligation—the only possible systems of obligation that legal reasoning admits. . . .<sup>6</sup>

Starting from the premise that the present topic fell outside wrongfulness, a simple exercise in logical elimination led to the conclusion that the draft had to be governed by a standard of strict liability. Besides, that standard had a good claim to being a general principle of law within the meaning of Article 38 of the Statute of the ICJ. The standard of strict liability, which conformed with fairness and morality, also had a claim to be regarded as a general principle of common sense and efficiency. In his second report, the present Special Rapporteur had cited an interesting passage from a study by Ms. M. H. Arsanjani, who had emphasized that strict liability was now accepted by most legal systems, “especially those of technologically developed countries with more complex tort laws”, adding that “while States may differ as to the particular application of this principle, their understanding and formulation is substantially alike” (A/CN.4/402, footnote 61).

<sup>6</sup> *Yearbook . . . 1983*, vol. II (Part One), p. 216, document A/CN.4/373, para. 51.

20. It had been claimed during the discussion that State practice did not support the principle of strict liability. True, State practice in the matter was not abundant, but it was nevertheless possible to speak of a nascent practice, which should be helped by the Commission's efforts. In that connection, two considerations had to be kept in mind. The first was that the scope of the draft had already been narrowed significantly by the limitation of the activities covered and by the requirement that the threshold of appreciable harm had to be reached. Secondly, a strict-liability standard was desirable in as much as the interests of developing countries should be protected, and it should not be moderated unduly by negotiations and shared expectations. He mentioned that consideration with hesitation, not because it lacked merit but because a North-South element was best introduced in the Sixth Committee.

21. In any event, the scarcity of State practice could not be an overriding consideration and should be viewed in the wider context of the Commission's role, the need for inventiveness in the light of the reality of interdependence and the need to give substance to the concept of progressive development.

22. On the basis of those considerations, his tentative conclusion was that the draft should incorporate a degree of strict liability that was strong enough to be meaningful. At the same time, it should be noted that, even in the case of an activity with the risk of causing injury beyond the threshold of appreciable harm—such as nuclear activity—exceptions had been introduced to moderate the operation of the principle, as in the case of the provisions of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, as modified by the 1964 Protocol. On the other hand, it would be going too far in the other direction to state, as did the Special Rapporteur, that, in cases where there was no existing régime, liability should be “of the least strict form”. His own view was that the existence of a strong degree of strict liability should be presumed and exceptions thereto should be introduced, for example *force majeure*, fortuitous event, negligence by the victim and the intention of third parties to cause harm.

23. He was not at all certain that it would be of any assistance to the Commission's work to introduce the concept of shared expectations into the draft, and he noted that the Special Rapporteur shared his doubts (*ibid.*, para. 55).

24. Subject to drafting improvements, the draft articles themselves were largely acceptable. Nevertheless, he would urge that the distinction between natural situations and man-made situations drawn by the Special Rapporteur in his third report be studied further. It was important to bear in mind that the draft spoke of “activities”, and not “acts”. The distinction, which was already an arbitrary one, was also likely to become blurred.

25. The Commission was obviously working on a “simple model” which should be developed in order to take account of situations where one or more States of origin and one or more affected States were involved. A particularly complicated case, but one that had actually

occurred, was where nationals of one State held shares in a company in another State and the legitimate activities of the company caused harm in their own State. In that case, it was necessary to examine questions concerning the joint liability of States and of corporate liability. That was not likely to prove an easy exercise, bearing in mind that questions concerning the liability of the territorial State and sometimes of the State that had physical control would also have to be taken into consideration in the model.

26. Lastly, the title of the topic would have to be reworded and brought into line with its scope, which was now confined to physical activities. Unfortunately, that rewording would have the effect of making even more unwieldy the present serpentine title.

*Mr. Díaz González, First Vice-Chairman, took the Chair.*

27. Mr. SHI said that the debate on the topic showed that the deeper the Commission went into fundamentals, the harder it was to make any headway. Indeed, that had been the situation since the topic had been placed on the Commission's agenda in 1978. He would thus refrain from discussing the major theoretical issues, so as not to add to an already complicated situation, and would confine himself to a few general remarks on the Commission's course of action. Before doing so, however, he wished to pay tribute to the Special Rapporteur, whose six draft articles constituted a valuable contribution to the progress of work on the topic.

28. He had no doubt as to the need for the progressive development and codification of the law on the present topic. The General Assembly's decision to assign the Commission a mandate to work on the subject in itself testified to the need of the community of nations for that progressive development and codification. In recent years, the need for a legal régime defining the rights and obligations of States with regard to activities not prohibited by international law had been corroborated by the concerns of States about the injurious effects of modern industry, science and technology on the ecological environment and the direct injury they caused to many innocent people in the States of origin and in other States. Nevertheless, he concurred with the view that, apart from a few international conventions which provided for the liability of States parties to make reparation to other States parties for damage caused as a result of activities specifically defined in the conventions, the concept of international liability for harm caused by lawful activities of States did not exist in general international law.

29. Accordingly, the topic could be said to be novel and unprecedented. For that reason, the Commission had encountered a number of fundamental and difficult theoretical and doctrinal issues. The first was the determination of the legal bases for the topic. Another was the question whether strict liability existed in customary international law. Yet another was whether the concept of prevention could be made an element of liability. Since 1978, there had been much divergence of views on all those and other basic issues.

30. For want of theoretical guidance, the Commission's work on the topic had been very slow. As he saw it, there were two ways in which the Commission could try to get out of that predicament. The first was to request the General Assembly to defer the Commission's consideration of the topic. Such a deferral would not in any way hinder States from continuing as usual to enter into specific agreements regarding liability for injury caused as a result of specifically defined hazardous activities not yet governed by specific régimes. Another argument for deferral was the Commission's heavy work-load. Suspending work on the present topic would afford the Commission an opportunity to make progress on the topic of State responsibility, which had been before it for such a long time. There were precedents for such a course: the draft Code of Offences against the Peace and Security of Mankind had been deferred for a number of years for perfectly valid reasons.

31. Another solution would be for the Commission to leave aside all difficult theoretical issues for the time being and to adopt a working hypothesis for the topic, which could be drafted by the Special Rapporteur on the basis of the first three principles of section 5 of the schematic outline. Those principles were that States of origin should be assured as much freedom of choice in regard to activities within their territory or jurisdiction as was compatible with the interests of other States; the principle of prevention; and the principle that an innocent victim should not be left to bear his loss or injury. Adoption of those three principles should not, however, be construed as acceptance by the Commission of the concept of strict liability or an admission that prevention formed part of liability. The Commission could draft articles on the basis of that working hypothesis, with due regard for the needs of States and for the practicability and acceptability of the rules to be formulated. It should also give careful consideration to the scope of the activities to be covered by the draft articles and the balance of the rights and interests of the State of origin and the affected State.

32. There was no lack of precedent to show that it was perfectly feasible to formulate draft articles without first resolving basic theoretical issues. For example, the Charter of the Nürnberg Tribunal for the trial of the major war criminals had been formulated to meet the practical needs of the times, with little guidance from legal theory or State practice, but the result had been endorsed by the United Nations in its fight against nazism and fascism and had been hailed by peoples all over the world. Despite the fact that some of the basic theoretical issues had subsequently been a source of legal controversy, the Nürnberg principles were now well established. Another concept now accepted by States which had also been the subject of much heated debate was that of the common heritage of mankind. In his view, therefore, the Commission could, with the approval of the General Assembly, create new concepts that were acceptable to States, as had happened in the case of the law of the sea.

33. Accordingly, the Commission should either request the General Assembly to defer consideration of the topic, on the ground that it was still not ripe for

codification and also because other topics of long standing on the Commission's agenda had to be completed, or alternatively adopt a working hypothesis along the lines he had suggested.

34. The six draft articles submitted by the Special Rapporteur in his third report (A/CN.4/405) were, on the whole, acceptable, although they did raise certain problems. For instance, a list of the activities to be covered by the draft should be included in the article on scope, otherwise the draft was unlikely to meet with general acceptance.

35. Mr. OGISO congratulated the Special Rapporteur on yet another masterly report on a highly complex topic. It had been recognized both by the previous Special Rapporteur, R. Q. Quentin-Baxter, in his fourth report<sup>7</sup> and by the present Special Rapporteur in his third report (A/CN.4/405) that there was a consensus that the scope of the draft articles should be confined to physical transboundary harm. Matters such as product liability or transboundary harm of an economic nature therefore fell outside the scope of the draft. It was gratifying to note in that connection that the Special Rapporteur had retained the word "physical" in draft article 1, but the same word should be inserted before the words "transboundary injury" at the end of draft article 4.

36. The Special Rapporteur's approach to strict liability differed somewhat from that of his predecessor. For example, the expression "strict liability" did not appear in the schematic outline, nor was it to be found in the draft articles under consideration. The Special Rapporteur had none the less referred to that concept in his second report (A/CN.4/402, para. 11), in a passage cited from the previous Special Rapporteur's fourth report. Owing to certain omissions, however, the passage gave the impression that the previous Special Rapporteur had envisaged the possibility of adopting strict liability rules: in his own view, that had not been so. The previous Special Rapporteur had not suggested, in the passage in question, that strict liability was an established international legal rule, but rather that the principles set out in section 5 of the schematic outline might be justified only through a review of State practice. The present Special Rapporteur had yet to complete that review and it would therefore be going too far to infer a rule of strict liability from general deductions without a more detailed examination of State practice. Furthermore, the argument adduced by the present Special Rapporteur regarding possible mitigation of the automatic operation of the strict liability rule<sup>8</sup> would not be valid unless an examination of State practice revealed that the principle of strict liability was to be found in international law.

37. He was not sure whether the Special Rapporteur intended to introduce into the draft the concept of shared expectations, but if he did, it should be spelt out in the article on the use of terms, since it was an important new concept which triggered the duty of reparation.

<sup>7</sup> *Yearbook . . . 1983*, vol. II (Part One), p. 201, document A/CN.4/373.

<sup>8</sup> See *Yearbook . . . 1986*, vol. II (Part Two), p. 56, para. 198.

38. Work on the topic was complicated by the lack of State practice, particularly in the areas of notification, negotiation and reparation, and it was not clear whether the duty to inform and to negotiate had been established as a generally applicable international legal rule. Consequently, it would be desirable for the draft to contain a recommendation that the States concerned should make arrangements for those purposes. In that connection, he had noted with interest that, in the schematic outline, the previous Special Rapporteur had used the word "duty" rather than "obligation", and "should" instead of "shall".

39. As far as the duty of reparation was concerned, State practice showed that there were several forms of allocation of damages for lawful activities, which did not always entail the liability of the State alone. Indeed, under most treaties, an operator engaging in certain dangerous activities was primarily liable for damage caused by such activities, the State being the warrantor for the operator's liability. For example, under the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the liability of the operator for any nuclear damage was absolute and the State of origin was required to guarantee payment of claims for compensation for nuclear damage which had been established against the operator by providing the necessary funds to the extent that insurance or other financial security covering the operator's liability was inadequate to satisfy such claims (art. VII, para. 1). Similar "mixed liability" rules were to be found in other treaties governing the operations of nuclear vessels and the carriage by sea of nuclear material. The extent of such liability, however, and especially the relationship between the civil and international elements, might still be open to debate. On the other hand, the direct liability of the State for damage caused by lawful activities had been recognized in only one case, namely in the 1972 Convention on International Liability for Damage Caused by Space Objects, specifically in article II thereof. As indicated in the preamble, article II had been drafted on the basis of the need to ensure the prompt payment of a full and equitable measure of compensation to victims of damage which might on occasion be caused by space objects. In his view, that formula had not been established as a general rule of international law and the strict liability rule would therefore not be generally applicable to all cases of international liability arising out of various kinds of lawful activities.

40. With regard to the draft articles themselves, he was a little doubtful about the expression "appreciable risk" in article 4, particularly since it did not appear in article 1. If that expression was to be retained, however, it should be defined in article 2, since it involved a very vague concept.

*Mr. McCaffrey resumed the Chair.*

41. Mr. BARSEGOV said that he first wished to congratulate the Special Rapporteur on the considerable amount of work he had done on an extremely complex and controversial yet highly topical subject. Regardless of one's views on the possible solutions to the questions involved, it had to be recognized that the Special Rapporteur had truly sought to find bases for his own approach to the topic. The advances in science and

technology and the growing interdependence between States meant that it had become indispensable to deal with questions concerning the injurious transboundary effects of lawful activities conducted by States on their own territory. Quite clearly, a solution to the problem of liability incurred in that connection would make for greater confidence between States, foster inter-State cooperation, and avoid the adverse impact of scientific and technological developments and the deterioration of the environment.

42. Two trends had emerged in international regulation of the matter. The first consisted in dealing with the question in the context of specific problems arising out of certain activities: the peaceful use of outer space, industrial activities—particularly the chemical industry—the use of nuclear energy, the use of water resources, and so on. The second lay within the framework of the topic under consideration and was apparent in the effort being made to formulate general principles. To set its work on the right track, the Commission should engage in an objective evaluation of the current legal situation.

43. Like it or not, the fact remained that, at the present time, it could not yet be said that the liability of States for transboundary injury caused to a third State as a result of lawful activities was institutionalized. As a set of rules based on fundamental and universal general principles, State liability for transboundary injury caused in the territory of another State as a result of lawful activity still did not exist. In terms of law, there was no general obligation requiring States to adopt preventive measures and to supply information on, for example, the construction work they were planning. Such an obligation stemmed solely from specific intergovernmental agreements regulating all the questions connected with the possible emergence of harmful consequences on a foreign territory or with the elimination of such consequences.

44. It was for that reason that the problem under consideration was new, even if it had already arisen in some particular cases. For example, in the case of environmental pollution, the principle of the liability of States had been formulated in very general terms in international declarations that were in the nature of recommendations, particularly in the Stockholm Declaration,<sup>9</sup> Principle 21 of which set out in general terms the idea of liability for the effects of pollution on territories situated beyond the State's jurisdiction. However, not all aspects of the problem were considered exhaustively in that principle of general liability, which, in the way it was formulated, was not adequate, and that was revealed by Principle 22, which stated:

*Principle 22*

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

The direction provided by Principle 22 in regard to the development of rules of international law was entirely justified. At the present stage, international practice was moving towards the elaboration and adoption of

<sup>9</sup> See 2017th meeting, footnote 6.



agreed rules concerning that kind of liability in specific fields of activity. The material liability of a State for damage caused by carrying out a lawful activity on its territory or in areas of common use stemmed from agreements in force.

45. Broader and more thorough legal bases for settling questions of liability incurred for the injurious consequences of lawful acts in specific fields would afford genuine opportunities for subsequent codification of the current norms and for the formulation of general legal principles. In the absence of provisional regulation of the specific issues connected with concrete aspects of activities giving rise to injurious consequences, it would be extremely difficult to elaborate general legal principles concerning liability incurred for transboundary injury arising out of lawful activities conducted by States on their territory.

46. Soviet legal science and the practice of the Soviet Union sought to find a solution to those questions and to other international issues of common interest for the good of each State and of mankind as a whole. The Soviet Union took an active part in resolving those questions in concrete fields of activity. For example, it had been at the origin of the elaboration and adoption of the 1979 Convention on Long-range Transboundary Air Pollution,<sup>10</sup> which it had been the first to ratify, along with its two protocols.<sup>11</sup> On the basis of those principles, at the First Special Session of the IAEA General Conference, held from 24 to 26 September 1986, the Soviet Union had proposed a programme for establishing an international régime for the safe development of nuclear energy for peaceful purposes.<sup>12</sup> The Soviet programme was designed to create a system to prevent nuclear accidents and minimize the effects of such accidents for other countries, and one of the major elements related to liability for transboundary damage.

47. The Soviet Union advocated the establishment of common international standards concerning accidental concentrations of radio-nuclides and levels of radioactive contamination in affected areas. The elaboration and adoption of such international standards were indispensable not only for all countries to be able to take adequate measures of protection, but also to provide a legal basis for claims concerning transboundary damage caused by radioactive emissions. The Soviet approach was that it was essential to settle the question of liability for nuclear harm for the purposes of regulating various aspects of safety in the production of nuclear power. The Soviet Government drew the attention of the international community to the fact that the absence of a carefully devised international régime, acceptable to the majority of States, for liability for damage resulting from nuclear accidents constituted a grave lacuna in the legal bases for international co-operation to develop nuclear energy for peaceful purposes. Although attempts at international regulation had already been made in various fields relating to the safety of nuclear energy, the question of political, moral and material harm in the event of an accident at a nuclear plant had

not been examined sufficiently, hence the attempts to use nuclear accidents to increase tension and distrust in inter-State relations.

48. In solving the problem, account obviously had to be taken both of the global interests of mankind and of the interests of the various countries—those of the people who had to suffer the harmful transboundary effects and those of the people on whose territory the accident had occurred. As a national of the country in which the Chernobyl accident had occurred, he had been particularly appreciative of the international solidarity which had been displayed in helping his country to eliminate the consequences of the accident. The Soviet people had been deeply grateful for the efforts of the American physician, Dr. Robert Gale, and many other persons, who had been prompted by purely humanitarian concern. But it had reacted sharply to the deplorable attempts made to exploit the accident for political reasons and to speculate on the misfortune of other people. It had not been the misfortune of a few people; it had been the misfortune of one and all. The Soviet Union had none the less done everything possible to minimize the consequences of the accident, not only on its own territory but also on the territory of all other countries. For that reason, the above-mentioned Soviet programme envisaged the establishment of an international instrument that could provide for the liability of States for damage caused at the international level by a nuclear accident and for the material, moral and political consequences of acts carried out on the pretext of defence against the consequences of nuclear accidents—for example, the spreading of unscrupulous information, the adoption of unwarranted restrictive measures, etc.

49. That had a direct bearing on the Commission's work in the field of liability for transboundary injury: such abnormal reactions towards the country that had been the first victim of a nuclear accident might well emerge in other fields. A unilateral approach could lead to injurious consequences for many other countries, particularly the developing countries, if a similar accident, whether or not nuclear, occurred in those countries and their foreign policy, for instance, was not acceptable to one State or another. The point of departure should be that no one was safe from such tragedies at a time of rapid advances in science and technology. Everything should be done at the legal level to prevent the adoption of an approach that was lacking in objectivity. In the case of the transboundary consequences of lawful activities—and not of wrongful activities, which entailed different consequences—the Commission should recognize that the first victim of accidents and other events involving environmental pollution and other harmful consequences was precisely the country in which the accident took place. For that reason, the Commission should guard against a unilateral and egocentric approach. An example of such a narrow viewpoint was to be found in the third report (A/CN.4/405, para. 15), which stated that "it is fair and logical that whoever derives the principal benefit from the dangerous undertaking or activity must assume the costs thereof, and not pass them on to third parties". Taken to its logical conclusion, such an approach would be not only unjust, but also blinkered, for

<sup>10</sup> E/ECE/1010.

<sup>11</sup> ECE/EB.AIR/11 and ECE/EB.AIR/12.

<sup>12</sup> IAEA, document GC(SPL.1)/8.

it would overlook the possibility that those who now viewed things solely from the standpoint of an impartial observer or a victim of transboundary injury might soon find themselves in the same predicament. Such an approach was a disservice to the progress of science and technology and hampered the advancement of civilization, since, in a way, it imposed a penalty on pioneering scientific and technological developments from which mankind as a whole stood to benefit.

50. The establishment of general principles should not stand as an obstacle to science and technology. Yet such a danger did exist and could well become a reality if the social function of law was ignored, a function which, in the present instance, consisted not only in rendering justice to the victims of injury and preventing the recurrence of such injury, but also in not placing shackles on the progress of science and technology or the advancement of civilization by declaring that any ultra-modern work was dangerous and in some way liable to punishment. Accordingly, the draft articles under consideration should at least incorporate some element of balance, in other words provisions under which it would be inadmissible to cause moral and political harm to the country in which the injury had occurred and under which liability would be established for such harm, caused unjustifiably under the pretext of protection against the harmful consequences of activities that were lawful under international law.

51. It was the wish to formulate rules which took account of the interests of all countries, which were just, which were based on scientific principles, which would hold firm against subjective distortions and which were realistic and practical that shaped the Soviet position on the present topic, not only in specialized international agencies and in diplomatic meetings but also in the formulation of rules which, generally speaking, would establish liability for all injurious transboundary consequences. Rules relating to international liability were now under discussion, particularly in IAEA, an agency in which the Soviet Union had proposed the conclusion of a new multilateral convention that would do away with the limitations of the Paris and Vienna Conventions, instruments of a regional character that viewed liability in terms of civil law and dealt solely with injury caused to private persons or to organizations. They left aside questions pertaining to inter-State relations, including liability for harm caused to the environment. The Soviet Union had therefore advocated a broader approach that took particular account of the needs of the modern world. It had also envisaged the possibility of elaborating provisions on liability for transboundary injury, but unfortunately had encountered opposition in that regard. Some States had taken the view that the question of State liability for nuclear accidents was very complicated and could give rise to controversy. According to them, "the temptation to make haste on the pretext that domestic public opinion needed a palliative would have to be resisted. The establishment of a new international régime of State liability in the nuclear field would have far-reaching implications and accordingly needed the most careful study."<sup>13</sup> At the same time,

<sup>13</sup> Statement by the delegation of the United States of America at the 667th meeting of the Board of Governors of IAEA, held at Vienna on 19 February 1987.

IAEA had been invited to take into consideration the results of the Commission's work, although the Commission had not achieved any results in that field.

52. He had drawn attention to those facts simply to show that the formulation of legal rules, even in an area for limited regulation of specific activities, was not without great difficulties, in terms of international law and in technical terms. The difficulties could well prove even greater in the formulation of general rules applicable to all types of lawful activities. Moreover, most members of the Commission had pointed to the difficulty of the task and many had said that the question was not ripe for codification. Suggestions had been made to deal only with certain aspects of the question or merely to enunciate general principles. Analysis of the documents submitted to the Commission and the debate on the topic had clearly shown that members still did not have at their disposal the requisite legal materials to formulate precise provisions establishing the cases and the circumstances in which liability was incurred for the consequences of lawful activities, as well as the legal bases and the extent of such liability. Until such time as the legal nature of liability under international law was examined with the necessary clarity and precision, until such time as the numerous technical problems outstanding were settled and the relevant international rules and other criteria were worked out, not only would it be impossible to assess risk or injury properly, but there would be no objective basis for determining the extent of liability and the amount of compensation for injury.

53. The artificial or hasty formulation of binding general rules in matters pertaining to international liability for all lawful activities, in the absence of concrete legal elements establishing the types, thresholds and other criteria and conditions of such liability, would do no more than foment endless discussions and conflicts, without the necessary legal basis to resolve them. In view of the present climate in international relations, such an approach could well turn such a delicate question into a political game, played in bad faith. By endeavouring to hasten things, the Commission not only would not facilitate but would prevent just and speedy settlement of the question of liability and reparation in the light of the interests of all parties.

54. Consequently, the sole genuinely realistic way for the Commission to proceed was to resolve first a number of absolutely essential questions which had not yet been sufficiently developed in the theory of international law, in international treaties or in international relations. It was not that the Commission should slow down its efforts: rather it should focus them appropriately so as to find the link that would enable it to unwind the entire chain. Just as a building was started with the foundations, so the Commission should lay the foundations for its work on the international rules concerning the concrete fields of lawful activities.

55. Unfortunately, the materials available to the Commission, although they bore witness to the Special Rapporteur's wish to justify the necessity and even the possibility of formulating rules on liability, raised more questions than they answered. The lack of precision started with the very title of the topic, which was "International liability for injurious consequences arising out

of acts not prohibited by international law”, not “International liability for injurious consequences arising out of lawful acts” as the rules of formal logic required in view of the title of the set of draft articles on responsibility for wrongful acts. Yet the present topic concerned activities that people conducted every day—agriculture, industry, construction, the use of water resources and nuclear energy, etc. The choice of the title of the topic therefore raised a number of questions, and further explanations were needed. It should be clearly and directly specified that the injury in question was injury arising out of a lawful activity.

56. Even the conceptual basis for the study of the topic was uncertain. He had already mentioned the difficulties involved in the attempt to assimilate the legal concepts of certain countries—in the present instance, the concepts of the common-law countries—to those of international law. It should be emphasized that “international” law, if it was to be described as such, should employ concepts common to all countries. But in fact different and sometimes contradictory interpretations were being offered for concepts drawn from the legal system of one or a few countries. One could, if the worst came to the worst, choose concepts that were close to one another. Yet to do so it would be essential to hold firm to clear and definite notions that were lacking in the system from which those concepts were drawn. The situation was further complicated by the fact that notions from internal civil law were being applied to international law. He had tried to discover how those who upheld the English doctrine had applied the common-law notion of liability to international law and had found that the Commission in fact went much further.

57. For example, Brownlie<sup>14</sup> simply noted that “it may happen” that a concrete legal rule provided for compensation for the consequences of acts qualified as lawful or “not unlawful”, and he illustrated that possibility by referring to a legal situation that was completely different from the one covered by the topic under consideration by the Commission. Brownlie spoke of reparation for loss or damage caused by the boarding and searching on the high seas of a foreign vessel mistakenly suspected of piracy and other wrongful acts. With reference to cases of lawful activity conducted by a State on its own territory that engendered the obligation to pay reparation, Brownlie considered the issue from the angle of abuse of rights, which presupposed that the person invoking that obligation should produce evidence that a right had been exercised only in order to cause damage, without any advantage to the person entitled to the right. Brownlie found an application of that thesis in the practice of international tribunals, and particularly in the PCIJ’s judgment in the case concerning *Certain German Interests in Polish Upper Silesia* (Merits).<sup>15</sup> It was Brownlie’s conclusion that the principle of abuse of rights came under the heading of the progressive development of the law and did not exist as a general principle of positive law. The members of the Commission who sought to apply the notion of liability

to international law thus proved to be bolder than the representatives of the common-law countries.

58. Even if the Special Rapporteur’s explanations regarding the conceptual differences between responsibility and liability were accepted, the first course should be to formulate articles containing definitions of the basic terms and then find equivalents in all the working languages. It seemed from the Special Rapporteur’s explanations that “liability” meant no-fault liability, but even English legal dictionaries gave different definitions of that concept. It was therefore essential for the Commission to agree on the meaning of all those terms.

59. Again, the key element in the proposed régime, around which the ideas of reparation and prevention were constructed, seemed to be physical injury—not only actual injury, but also potential injury. But it was difficult to see how injury which had not occurred could lie at the origin of an international obligation concerning not only reparation for injury, but also its prevention. The explanations given by the Special Rapporteur, in which potential injury was assimilated to risk, viewed as the basis for the régime, were not clear, particularly those contained in his second report (A/CN.4/402, para. 5).

60. The defect of some of the notions used by the Special Rapporteur was that they introduced subjective factors such as evaluation of risk. Yet, given the dynamic change in scientific and technological possibilities, the consequences of subjectivism could be serious. History afforded many examples of the ill effects of such a subjective approach, for instance the conservative reactions to the first appearance of the railways, the discovery of electricity, etc. Other notions, on the other hand, were imprecise as a result of objective factors, for example the geographical location of the activity (A/CN.4/405, para. 10), which might produce different effects depending on the type of activity in question and the size of the country’s territory.

61. According to the Special Rapporteur, an activity could be considered as entailing risks only if it was capable of being evaluated. Unquestionably, only specialists could make a reliable evaluation for each kind of activity. Hence he could not agree either that “on first examination it is generally not difficult to appreciate the risks created by certain new activities or certain variations on existing activities” (*ibid.*, para. 11), or that “predictability may be general in that cases may be predictable in a general rather than in a specific sense” (*ibid.*, para. 13).

62. When it came to determining injury and consequently establishing liability, another difficulty arose because the injury occurred in a number of stages: emission of the pollutant, transboundary displacement and interaction with the elements of the environment. For example, the pollution might be cumulative from various sources in the territory of various States. It was extremely difficult, in both technical and legal terms, to determine which part of the injury was attributable to a particular source and to a particular aspect of the activities, and it could not be done without special means. Furthermore, account should be taken of natural factors—for instance, wind direction—which had very diffi-

<sup>14</sup> I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), pp. 443 *et seq.*

<sup>15</sup> *Judgment No. 7, 1926, P.C.I.J., Series A, No. 7.*

ferent characteristics. It was a highly specialized task that called for suitable methods and means to be worked out to identify and differentiate between the sources of pollution and evaluate the scope of the harmful effect from each source. Thus arose the technical problem, and consequently the legal problem, of identifying the source of the transboundary pollution that had caused the injury. In addition to the differences regarding the sources of pollution as between the countries of origin, the differences connected with the types of activities had to be borne in mind. In that regard, the Special Rapporteur apparently believed that a State should take action against epidemics or disasters so as to ensure, above all, that they did not extend into neighbouring countries (*ibid.*, para. 26 (b)). The need for international co-operation to combat an epidemic or a natural disaster was undeniable, but it was difficult to see how they could entail liability. Should it not be presumed, in such a case, that the State on whose territory the disaster had occurred was taking, in its own interest and in that of its population, all the measures that were required?

63. The Special Rapporteur, endeavouring to solve the problem of liability without taking full account of existing practice, and doing so before international rules had been worked out, took the view that discretionary assessment by a third party was the only way out of the impasse and that, if third-party involvement in determining the factors for the appraisal was not accepted, no régime would be able to function (*ibid.*, paras. 18-19). It would be remembered that, for a topic analogous to the one under consideration, namely the law of the non-navigational uses of international water-courses, the Commission had decided not to adopt procedures involving third parties. Serious thought should therefore be given to the usefulness of such procedures for the present topic, since it seemed impossible to conceive of any machinery for establishing the facts if there were no scientific rules applicable to each type of activity: regardless of the procedure chosen to settle disputes, liability should be determined on the basis of an objective approach and not empirically.

64. Lastly, it was essential to begin by demarcating the topic in the light of the activities of other competent international organizations. It had already been said that consideration of the question of preventing transboundary injury should, in view of its technical aspects, be left to the specialized agencies. The Commission's aim should be to formulate not general theoretical provisions, but concrete and precise rules to facilitate the settlement of disputes in the light of the interests of all parties, thereby contributing to greater harmony and better understanding between States. Since concepts drawn from the legal systems of the common-law countries had to be used instead of concepts common to international law, it was necessary to work out, first of all, a "scheme of understanding", to agree on a set of notions based on international law and not on municipal law, so as to have equivalent terms in all the languages, and to include definitions of all the basic terms in the articles.

65. Pending the Commission's decision on the way in which it was to continue its work on the topic, he reserved his position on the draft articles.

*The meeting rose at 1 p.m.*

## 2021st MEETING

*Thursday, 25 June 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2<sup>4</sup>)

[Agenda item 7]

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

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (*continued*)

1. Mr. BENNOUNA said he was glad that the Commission, in response to the wishes of the Special Rapporteur, had held a fruitful discussion which had thrown some light on a subject that was fascinating in its topical interest, but difficult because of its novelty. The Commission should now fulfil its mandate from the General Assembly by completing the study requested of it.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

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

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

2. The first question the Commission had to answer was that of the scope of the topic and the field of application of the draft articles, for progress in the preparation of specific texts would depend on the answer to that question. Since the subject-matter was new—and complex, as shown by the very title of the topic—its delimitation raised great difficulties. As both Special Rapporteurs had pointed out, the origin of the topic partly explained those difficulties. The topic had grown out of the discussions on the foundations of international responsibility, during which two facets had been recognized, according to whether the activities were lawful or unlawful. Thus the Commission had started not from precise international realities, but from a theoretical inquiry into the origin of responsibility and the subsistence of State liability without any wrongful act or omission, that was to say without fault. It remained to be decided whether that theoretical distinction existed in the practice of inter-State relations, especially as the aim was to draw up rules of general international law, and no-fault liability had so far appeared only in special conventions relating to particular activities. In that connection, the Special Rapporteur had referred in his second report (A/CN.4/402, para. 52) to the opposition aroused by the concept of strict liability in the Commission and in the Sixth Committee of the General Assembly. While concluding that it had been said, perhaps rightly, that that kind of liability was not based on any rule of general international law, he had continued his research by trying to derive such liability from concepts such as sovereignty, the legal equality of States and justice. Whatever the force of that reasoning, it could be asked, as Mr. Graefrath (2016th meeting) had done, to what extent legal reasoning could replace the will of States, implicit or explicit, to commit themselves to a system of strict liability.

3. Furthermore, the analysis had been clouded by certain terminological difficulties connected, in particular, with the term “liability”. The Special Rapporteur had explained that “liability” took no account of the lawful or unlawful character of the act and related only to injury, deriving from it the primary obligations of prevention and reparation: that was the prevention-reparation continuum which was presented as the very heart of the topic. The Special Rapporteur had also emphasized (A/CN.4/402, para. 8) that the criterion for unity of the topic was injury, whether it was injury already done and calling for reparation, or the prevention of injury, that was to say potential injury, which was simply risk. On that basis he had drawn a distinction between the type of liability now being studied by the Commission, in which the condition for liability was injury, and the general régime of responsibility in which the condition for responsibility was the breach of an obligation, in other words a wrongful act. It might be thought that the two subjects were quite separate and that the one now under study completely excluded wrongful acts.

4. But it was there that the difficulty arose, for the Special Rapporteur had not reached that conclusion, since he had not excluded wrongful acts *a priori* from the scope of the topic. Indeed, he had taken the view that the obligations to inform and to negotiate were sufficiently well established in international law for their breach to give rise to wrongfulness (*ibid.*, paras. 67-68).

Then, distinguishing between acts and activities, he had said that, since the wrongfulness of certain acts did not make the activity itself wrongful, there was nothing to prevent the Commission, when it considered establishing a régime of liability for injurious consequences arising out of activities not prohibited by international law, from also considering acts which were inseparable from those activities and were wrongful because they were incompatible with certain established obligations—the obligations to inform and to negotiate—and that the Commission would not be going beyond its terms of reference if it included in a treaty régime obligations concerning the establishment of a régime the breach of which gave rise to wrongfulness. It could be seen that, as the Special Rapporteur’s reasoning developed, the specificity of the topic faded away, since injury as a unifying factor was no longer required as a condition for liability. It could then be understood why certain members of the Commission were reluctant to accept the prevention-reparation continuum, the logic of which was not that stated at the outset.

5. In those circumstances, the Commission had two options for delimiting the topic and trying to restore its uniformity: either it could confine itself to prevention, as Mr. Yankov (2019th meeting) had proposed, leaving reparation to the general régime of responsibility; or, as Mr. Mahiou (2018th meeting) had proposed, it could deal only with injury, but real injury, leaving potential injury out of account. Neither of those proposals removed the difficulties, however. For if the Commission dealt only with injury, it would be necessary to agree either on the activities to be covered or on the seriousness of the injury, since there could be no question of “strict” reparation of any injury whatsoever. But the Special Rapporteur had emphasized the difficulty and the disadvantages of drawing up a list of activities. As to appraisal of the seriousness of the injury, that also raised technical problems, concerning for example the threshold above which pollution was no longer acceptable, and also legal problems, when it was necessary to determine liability where there were several sources of pollution. The Special Rapporteur had mentioned a third possibility, which would be to entrust the assessment of the seriousness of the injury to a third party; but that solution also raised difficulties, since it would be necessary to define the powers of the third party. The last possibility considered—recourse to existing international organizations—was also liable to meet with some obstacles, since the operation of those organizations was governed by a charter, on to which it would be difficult to graft a multilateral convention.

6. With the topic defined as it was, the Commission had thus reached a theoretical deadlock: either it could include liability for wrongful acts within the framework of prevention, which would be going beyond its terms of reference; or it could work within the general régime of responsibility, which would make it necessary to reformulate the topic. But it must be admitted that, when removed from the general régime of responsibility, the topic was rather a slim one in the present state of international relations. It might even be asked whether the Commission’s work would not be too early or too late: too early because the study of the general régime of responsibility had not yet been completed; too late

because there were already a number of technically elaborate special régimes that must be taken into account. He therefore considered that, either at the current session or at the next session, the Commission should propose to the General Assembly that it amend the title of the topic in accordance with one of the approaches mentioned—injury or prevention—so as to give it the unity and coherence it lacked at present.

7. Although it was difficult to comment on the draft articles submitted so long as the Commission had not taken a decision on the approach to be followed, he would say that article 1, in particular, raised many difficulties. First, as had already been said, it was necessary to define the “activities or situations” falling within the scope of the draft. The Special Rapporteur had made a considerable effort to define them in his comments, although he recognized that many problems remained, concerning the relativity of risk, the notion of a threshold, etc. But he also admitted the uncertain character of a general definition and said that an agreement between States would be needed to determine the activities in question. Hence there was a vicious circle. Moreover, the parallel with internal law drawn by the Special Rapporteur in his third report (A/CN.4/405, para. 20) did not seem pertinent, for it was well known that the roles of jurisprudence in internal law and in international law were not comparable.

8. The term “control” was not without difficulties either. For it had to mean that a State exercised not exclusive jurisdiction, but concurrent jurisdiction—for example, in the exclusive economic zone or when a ship was passing through the territorial waters of a foreign State. It was therefore necessary to regulate the operation of those concurrent jurisdictions and the responsibilities deriving from them, which might introduce endless complications, especially if the scope of control was to include the question of multinational companies raised by Mr. Graefrath. He wondered whether it would not be wiser for the Commission to avoid entering into that area and confine itself to activities in the territory of the State, which would involve only the well-defined notion of territorial sovereignty.

9. Article 4, which referred to areas within the control of the State of origin, should be harmonized with article 1, which referred to activities or situations occurring within the control of a State, which was not the same thing. Article 5, on the relationship between the present articles and other international agreements, seemed insufficient to protect the special régimes established by particular conventions, the balance of which might be upset by the general convention. The commentary should give some explanation of the expression “do not specify circumstances in which . . .” in article 6. Did it mean that wrongful acts might be covered implicitly or that any reference to a wrongful act was excluded? The latter was not the case according to the Special Rapporteur’s comments, which referred to obligations of prevention whose non-fulfilment might be punished.

10. In conclusion, he thought that the Commission should fix a modest objective and that, if it succeeded in drafting only a small number of articles, provided they were coherent it would have done much for the progress of international law.

11. Mr. BEESLEY commended the Special Rapporteur for his approach to the topic and the way he had built on the work of his predecessor. Questions fundamental to the work of the Commission and its future had been raised. One principle on which there seemed to be no disagreement was that the Commission should ensure that its work was relevant to contemporary events and the future development of international law. There seemed to have been some suggestion that the body of customary or treaty law did not provide a sufficient basis for codification of the present topic. That point should not be determinative, however, for the progressive development of the law in the area was long overdue and any decision to postpone consideration of the topic or to delete it from the agenda would be regrettable.

12. He was also troubled by the continuing references to the novelty of the subject and the paucity of precedent. One of the relatively few cases which had gone to arbitration was, of course, the *Trail Smelter* case, the facts of which had arisen in 1938, although the case itself had not been decided until 1941 (see A/CN.4/384, annex III). In that case, which concerned the emission of noxious fumes from a privately owned smelter in Canada allegedly causing damage in the United States of America, the arbitral tribunal had held that Canada was responsible in international law for the conduct of the smelter. It had further held that, to avoid any damage, the operation of the smelter should be made subject to measures of control and that, if damage did occur, an indemnity would be payable to the United States. The interesting point was that one of the parties in that case had been a major power and thus capable of influencing customary international law by practice. Another precedent was the *Gut Dam Claims* case (*ibid.*), which had also been settled by arbitration between the United States and Canada. The dispute concerned a dam built by the Canadian Government which had allegedly caused the water level of Lake Ontario to rise, with resultant damage to property of United States citizens. Once again it had been held that Canada was liable to compensate for the damage caused.

13. Although the findings of those two cases did not constitute binding customary international law, he was prepared to consider them as reflecting a limited amount of State practice, since no substantial precedents had been cited to show that there was no liability in such cases.

14. So far as the duty not to cause harm was concerned—as distinct from the duty to accept liability—some further indications of State practice could be found, first of all, in the 1909 Treaty between Great Britain and the United States relating to boundary waters (*ibid.*, annex II), which he regarded as a landmark treaty since it recognized the obligation of both parties not to pollute the waters between Canada and the United States. The Stockholm Declaration,<sup>6</sup> adopted by the United Nations Conference on the Human Environment, had also developed certain legal principles, and at least one Government had stated that it would consider itself bound if Principles 21 and 22 of

<sup>6</sup> See 2017th meeting, footnote 6.

the Declaration were invoked. Principle 21 asserted the sovereign right of States to exploit their own resources pursuant to their own environmental policies and laid down that it was the responsibility of States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; Principle 22 proclaimed that States should co-operate in the further development of international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of those States to areas beyond their jurisdiction.

15. There was, however, another principle, which had been rejected by the Conference on the Human Environment because of a bilateral dispute. That principle read:

Relevant information must be supplied by States on activities or developments within their jurisdiction or under their control whenever they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction.<sup>7</sup>

That principle had subsequently been reflected in a somewhat watered-down version in resolution 2995 (XXVII) of the General Assembly, which had itself given rise to a second resolution reaffirming that Principles 21 and 22 had not been undermined by the first resolution. Not all United Nations resolutions constituted binding international law, of course; but some did, and being evidence of State practice they could have a significant influence on the development of customary and treaty law. Towards the end of the Conference on the Human Environment, an oil spill from a pipeline had occurred in United States territory and the Canadian Government had invoked Principles 21 and 22, as well as the decision in the *Trail Smelter* case. The United States, in its reply, had said that, in so far as Principle 21 was consistent with customary international law and represented a widely accepted treaty obligation, the United States regarded it as a declaration of international law.

16. Very serious steps were being taken on the assumption that there was an obligation on States not to damage the territory, environment or interests of other States. The 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft,<sup>8</sup> for instance, was based on the fundamental thesis that States had a duty not to damage each other's environment or the environment beyond the jurisdiction of any State party. Under that Convention, certain extremely important functions had been assigned to IAEA, which had subsequently developed rules and guidelines for the administration of the Convention. Not all States were bound by such conventions, but it was rather an exaggeration to say that there was no basis on which to begin to build rules of law on the topic under study.

17. There was also a vast network of bilateral and multilateral treaties whose stated purpose was to prevent damage being caused by one State to the environ-

ment of another State or States. Some of the most recent of them, such as the 1979 Convention on Long-range Transboundary Air Pollution and the 1985 Vienna Convention for the Protection of the Ozone Layer, had emanated from the Economic Commission for Europe. Such treaties should serve to propel the Commission to the forefront of law-making on the subject, for its role was to shape the law on the topic, not to leave the work to be done by other United Nations agencies until such time as the requisite principles had emerged.

18. A whole range of precedents was also to be found in the 1982 United Nations Convention on the Law of the Sea, which, though not yet in force, had been signed by 159 States. It was a common myth that that Convention had ended up on the scrap-heap because two or three of the major Powers had not signed or ratified it. Those States, however, were the first to insist that the Convention reflected customary international law, except the provisions they did not accept, such as those relating to the deep sea-bed. Article 192, in Part XII of the Convention, for example, provided that "States have the obligation to protect and preserve the marine environment"; and article 193 provided that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". There was also a series of provisions on measures to prevent, reduce and control pollution of the marine environment. So far as terminology and harmonization of language were concerned, no better example could be furnished for the purposes of preparing draft articles on the three interrelated subjects of the law of international watercourses, State responsibility and the present topic. In the light of such precedents, he could not agree that there was nothing on which to build the norms of the topic.

19. A tribute was due to the Soviet Union for the action it had taken following the Chernobyl disaster. But such a disaster might well occur elsewhere, and the proximity of certain peaceful nuclear facilities to the frontiers of other countries had already given rise to disputes. Did the Commission intend to wait until another catastrophe occurred to ascertain the necessary State practice? The interrelationship between the law on international watercourses, State responsibility and the present topic was not a reason for deleting any of those topics from the agenda, but rather for ensuring the necessary consistency in the Commission's approach to them.

20. There were very real issues on which the Commission should concentrate. One was the distinction between the harm caused by acts that were inherently lawful, and the damage done—with consequential liability—by acts that were inherently unlawful. He had an open mind about the words "acts" and "activities", although ideally both should be used according to the context. He had already stressed the importance he attached to recognizing the duty to negotiate where an act or a series of activities was contemplated which could cause harm to neighbouring or indeed any other States—for instance, activities of the kind that might damage the ozone layer. He also attached importance to

<sup>7</sup> See *Report of the United Nations Conference on the Human Environment* . . . (see 2017th meeting, footnote 6), chap. X, para. 331.

<sup>8</sup> United Nations, *Treaty Series*, vol. 932, p. 3.

recognition of the duty to take remedial measures, for instance by mitigating the damage, when something unexpected happened that did cause damage.

21. He would welcome further discussion on strict liability versus equitable principles. He was inclined to believe that a fairly strict liability rule should be imposed, since he was uncertain about the desirability of applying equitable principles unless there was a shared interest or resource.

22. As to whether there should be liability for private acts, in some countries many of the most dangerous activities were conducted quite privately. Hence he was not convinced of the need for a distinction to be made specifically for the benefit of the developing countries, which in his view were well informed of their interests in that area and knew how to protect them.

23. He would favour an even bolder approach by the Special Rapporteur, for if the Commission had substantive articles before it, it would have to focus on concrete matters, rather than theoretical questions as to whether positive law accepted a particular concept. In any event, lack of positive law was not an argument for postponing consideration of the topic or for removing it from the agenda. If the Commission did that other organs would develop the law; and what would the Commission's role be then?

24. Finally, there were a number of theoretical questions he himself wished to raise:

(a) Could the Commission agree that liability for injurious consequences related to liability for serious transboundary events resulting from otherwise lawful conduct, and that State responsibility related to responsibility for acts that were in themselves contrary to international law?

(b) Could members agree that the draft need not be confined to *lex lata* if there was disagreement on what constituted contemporary customary law on the topic, which the Commission was permitted and perhaps even required to develop progressively as well as to codify?

(c) If the Commission could agree on the foregoing, what would be the rationale for leaving questions of reparation to the draft articles on State responsibility?

(d) If there was no objection to the present draft articles being preventative in purpose, how could the Commission justify omitting remedial provisions, leaving aside the question whether or not it should propose strict liability?

(e) Did the Commission agree that its work need not be frozen in time in the period before Chernobyl and Bhopal, and that it was permitted and perhaps obliged to take such disasters into account?

(f) Did the Commission agree that what it was seeking to prepare was not a detailed convention regulating all aspects of the topic, but a general framework convention, or umbrella régime, which would leave some specific issues to be regulated by existing and future State practice, and by bilateral and multilateral agreements?

(g) If the Commission could agree on the need for such a framework agreement, could it accept the conclusion that the draft articles must be substantive and normative?

(h) Whatever the answer to the foregoing question, did the Commission agree that it need not confine itself to acts affecting the territory of other States, but could include acts affecting the international community as a whole beyond national jurisdiction, such as acts affecting outer space or the sea-bed beyond national jurisdiction? Or was it suggested that States had no obligation concerning such areas?

(i) Did the Commission agree that, if there was a need to develop the law on the topic, the task should fall to the Commission? Or should it rather be left to one of the many other institutions and conferences working on the subject?

(j) If the Commission was not able to agree that there was an existing legal duty to make reparation, could it not at least agree that there ought to be such a duty? Alternatively, what would be the rationale for rejecting the need to recognize such a duty?

(k) If the Commission denied the need to develop the law in the present field, how could it explain the vast and rapidly expanding network of bilateral and multilateral treaties directed to the preservation of the environment?

(l) Could the Commission agree that strict liability was not absolute liability and that the distinction must be borne in mind and, if necessary, clarified?

25. Mr. SEPÚLVEDA GUTIÉRREZ expressed his gratitude to the Special Rapporteur, who, in his second and third reports (A/CN.4/402 and A/CN.4/405), had provided the Commission with the information it needed for a fruitful discussion on a difficult topic. The Secretariat's survey of State practice (A/CN.4/384) was also very useful.

26. At the present stage in the debate, the Commission was sailing between Scylla and Charybdis: either it could prepare draft articles generally acceptable to States, which were the potential authors of injury and would have to answer for its consequences, in which case the notions of attribution and the extent of liability might vanish; or it could prepare a text that was legally justified and viable, but which might not be accepted by States because of the obligations it imposed on them. In either case the Commission would be failing in its task.

27. It must therefore try to avoid both those dangers, and to do so it should ask itself a few questions. First, in the present state of international law could States be held liable for their lawful acts which caused damage to other subjects of international law? Personally, he believed that they could and was even convinced that the Commission should not postpone the study of the topic, because international society was prepared to receive proposals for its international regulation and needed such regulation for a peaceful and orderly life. Moreover, if the Commission did not take up the task at once, it might meet with insuperable difficulties later, if only because of technical advances.

28. Next, which States would be interested in the draft articles? Obviously, it would be the weakest members of the international community that would have the greatest interest: first, because transboundary injury, which might have permanent and irreversible effects, could endanger the existence of those States perhaps



more seriously than an invasion or a war; and secondly, because those States needed to know the reasonable limit of their liability in order to avoid being ruined by having to pay reparations beyond their means. But other States also needed rules to define the extent of their liability, so that they could negotiate in order to avoid unproductive confrontations, and so that a State responsible for injury could keep its place in the international community rather than lose the trust of other States.

29. Another important question was whether the type of liability under consideration should be the subject of draft articles separate from those on State responsibility for wrongful acts, or whether it should be covered by those articles? In his view, the two types of responsibility should be studied separately, even though some connections must be made. It had, of course, been argued that the concept of strict or absolute liability would be difficult for States, or at least for a number of them, to accept. Such reluctance was understandable, and difficulties were always to be expected when breaking new ground. Nevertheless, he was still optimistic, for if the Commission prepared a set of draft articles they would, at the worst, have doctrinal value, which should not be underestimated. In that connection, Mr. Roucouas (2019th meeting) had mentioned the value of theory in the formation of modern international law, and it was true that political realities, constantly changing, were not the only influences: theoretical speculations, the inherent principles of any legal order, discoveries by inference and *opinio juris* also contributed to the formation of international law.

30. It had also been said that it was necessary to have an adequate conceptual basis as a foundation for liability. But even if that were so, there was no reason why the foundation should not be derived from the debate, which had resulted in definite progress; it would simply be a matter of systematizing the opinions expressed. The draft had clearly not been rejected as to substance. The different points of view could be reconciled, and it seemed possible to reach agreement on the conceptual basis of the draft, and then on the formulation of various provisions.

31. He was convinced that the Special Rapporteur, who had already taken account of many comments made during previous debates, would be able to find a middle course enabling the Commission to go forward. He hoped that, at the end of the discussion, the Special Rapporteur would harmonize the different trends of thought which had appeared and would reconcile them in a manner acceptable, if not to all members of the Commission, at least to a majority. In any case he still thought it possible to develop a régime of injury and reparation for injury, especially as the report contained the necessary bases for doing so. As to the prevention of risk, it seemed that agreement might soon be reached in the Commission. It was true that the duty to inform States of activities involving risk, like the obligation to negotiate, raised difficulties for some members, but wording could be found to attenuate those difficulties. It must not be forgotten that the rules the Commission was considering were residual rules and that the Commission consequently had some room for manoeuvre in

enunciating them. Moreover, it had been pointed out that the régime contemplated might be provisional, in view of the rapid advance of science and technology, and that might provide some additional flexibility.

32. He wondered whether some of the problems raised by the draft articles were not purely terminological. If that was so, it would probably be possible to define the terms in question and certain important concepts, in order to make their real scope better understood. No doubt the Special Rapporteur would make an effort in that direction. For example, the French expression *responsabilité objective*, which was well known in Latin America, would be more satisfactory than *responsabilité absolue* and might provoke fewer negative reactions. There was no doubt that other formulations could also be improved.

33. On the whole, he could accept the six draft articles submitted by the Special Rapporteur, subject to slight modification of such expressions as “within the control”, which needed to be defined. He would refer to those points when the Commission examined them in detail. In the mean time, he would stress that the Commission could not abandon its study of the topic and should not give an impression of impotence.

34. Mr. REUTER said that, as a teacher, the debate suggested to him three subjects for a thesis or dissertation, around which members of the Commission could group their reflections pending the next session: (a) unintentional violations of the status of State territory and non-territorial space; (b) prevention and reparation relating to damage caused by dangerous objects or activities; (c) corrective or compensatory measures relating to protection of the environment.

35. Mr. PAWLAK said that he would limit his statement to some comments on the scope of the topic and the courses open to the Commission. There was certainly a need for lawyers and States to deal with the consequences arising from the increasingly intensive use of the resources of the globe for economic, industrial and scientific purposes. Activities undertaken in individual States, even if not prohibited by international law, could have injurious effects on other States and their nationals. States were now not only exporting valuable goods and services to other States, but also transferring pollution produced by their steel, aluminium, asbestos and chemical industries. Those activities were not only a result of State policy, but were increasingly due to the action of private entities, including powerful transnational corporations.

36. The Secretariat's valuable study on the topic (A/CN.4/384) revealed that States were becoming increasingly aware of that situation and furnished many examples of treaties containing procedural and substantive provisions whereby the parties accommodated their conflicting interests. Those treaties embodied the principle of good-neighbourliness, the duty of care, and the principles of equity, prior negotiation and consultation, the balancing of interests and the prevention and limitation of injury to other States and their populations.

37. Despite the difficulties involved, he believed that the Commission should proceed with its work on the topic, as he had urged as the representative of his coun-

try in the Sixth Committee of the General Assembly. That work should be continued on the basis of the generally recognized principle *sic utere tuo ut alienum non laedas*, which meant that States had a duty to exercise their rights in ways which did not harm the interests of other States. That principle had found expression in Principle 21 of the Stockholm Declaration.

38. The topic under consideration thus brought into play two potentially conflicting principles of international law: the sovereign right of a State to engage in activities within its own territory, and the duty of a State to exercise its rights in a way that did not harm the interests of other States. Those who invoked the principle of sovereignty to oppose the study of the topic overlooked another aspect of State sovereignty, namely that every State was entitled to use its own territory without any outside interference.

39. He shared the Special Rapporteur's view that the topic was closely related to the duty of the State of origin to avoid, minimize or repair any appreciable or tangible physical transboundary loss or injury caused by an activity involving risk. In other words, it dealt with "liability", which could be incurred regardless of the lawfulness of the underlying cause, as opposed to "responsibility", which could arise only from wrongful acts.

40. In his opinion, the topic should cover all activities involving risk, not only "ultra-hazardous" activities. There was no valid reason for denying the protection of international law to the potential victims of activities that were not ultra-hazardous. Besides, it was difficult to draw the dividing line between activities that were ultra-hazardous and those that were not.

41. With regard to the obligation to make reparation, the Special Rapporteur had put forward the promising idea that strict liability should be the basis for that obligation, subject to certain mitigating factors.

42. The territorial scope of the topic should be extended to make the term "transboundary" cover not only injury caused in a neighbouring country, but also any injury caused in a country that was not contiguous or in areas beyond the limits of national jurisdiction. He was aware of the difficulties that approach would involve in the present state of international law, but the Commission should respond imaginatively and creatively to the needs of the modern world. Such acts as the massive pollution of the atmosphere or the sea were international crimes, and acts which, although not prohibited by international law, caused catastrophic damage in areas outside national jurisdiction could not remain without legal consequences.

43. In the same context, consideration should also be given to the role of international organizations in the co-operation necessary for the mechanism proposed in the schematic outline, and as subjects of rights and obligations deriving from the provisions of the draft.

44. As Mr. Beesley had pointed out, there would undoubtedly be a need, at some stage, to consult specialists in industry, science and other fields. Nevertheless, the Commission should press on with its work, bearing in mind that the world was becoming increasingly com-

plicated and dangerous. It would probably be well advised to be modest in its ambitions and to concentrate on practical questions.

45. He was in favour of drafting a framework convention, which would certainly be more acceptable to States. Besides, the results of the Commission's work could provide some guidance for bilateral and multilateral treaties, as well as for individual States.

46. The crucial question that would arise was clearly whether, when harm was caused, compensation should be provided for regardless of whether the act was lawful or not under international law. In its consideration of that question, the Commission could be guided by the three criteria it had adopted at its thirty-sixth session, which were discussed by the Special Rapporteur in his third report (A/CN.4/405, paras. 37-41), namely: (a) the transboundary element; (b) the element of a physical consequence; (c) the adverse effects. It was also necessary to harmonize the Commission's work on the present topic with its work on the law of the non-navigational uses of international watercourses and on State responsibility. He reserved the right to discuss the legal and other aspects of the topic in greater detail later.

47. Mr. SOLARI TUDELA expressed his appreciation of the Special Rapporteur's third report (A/CN.4/405) and the survey of State practice prepared by the Secretariat (A/CN.4/384). Not only was the topic a difficult one, but the Commission's study of it was impatiently awaited by the international community, whose requirements were increasing with technological progress. Moreover, the topic was linked with the emergence of a new branch of law: the law of the environment. An initial examination was sufficient to show the mutual benefits and the possibilities of overlapping between the topic under study and that of State responsibility for wrongful acts. Nevertheless, the Commission had received a mandate from the General Assembly which it must fulfil, for otherwise other bodies would step in to fill the gap.

48. However much overlapping with State responsibility there might be, there remained cases of strict liability which belonged exclusively to the present topic and which the Commission should regulate. In that connection, the Special Rapporteur had said in his second report (A/CN.4/402, para. 67):

... In the opinion of the Special Rapporteur, the obligations to inform and to negotiate are sufficiently well established in international law, and any breach of these obligations thus gives rise to wrongfulness. However, all things considered, that does not mean that they cannot be included in the draft.

The affirmation of those obligations in the draft, side by side with rules on prevention, would indeed serve to determine the lawfulness of the activities, but their breach could not be covered by the present draft, for as soon as there was a breach of international obligations, State responsibility was involved.

49. He would find it difficult to accept rules on prevention without reparation: the obligation would then be too incomplete. He unreservedly accepted the idea that the draft was based, as the Special Rapporteur indicated, on Principle 21 of the Stockholm Declaration

(freedom of States to carry out in their territory all activities compatible with the interests of other States), on the principles of prevention and reparation, on the principle that an innocent victim of loss or injury must not be left to bear the consequences, and on the procedural principle authorizing an affected State, if it had not received information from the State of origin on the effects and nature of an activity, to invoke presumptions of fact, indications or indirect evidence.

50. He had no objection to the substance of the six draft articles submitted, but it would have been useful to develop the Special Rapporteur's comments into draft articles. The Special Rapporteur had proposed criteria for determining the amount of reparation, for example, and it seemed that the time had come to have the whole set of draft articles available, since the theoretical discussion on the general part of the draft had created the necessary conditions for examining them. Mr. Shi's idea (2020th meeting) of adopting a working hypothesis was a positive suggestion that would facilitate the Special Rapporteur's task. It would also be useful if the Special Rapporteur could propose a list of dangerous activities in his next report—whether in the form of commentaries or draft articles. The Commission would then consider whether that list should be exhaustive, in which case it would be necessary to provide means of supplementing it, as Mr. Tomuschat (2018th meeting) had proposed. Examples to enlighten the Commission could be sought with the help of UNEP or independent experts.

51. Mr. DÍAZ GONZÁLEZ said that the topic under study could be compared to a play by Pirandello entitled *Six Characters in Search of an Author*, the roles being simply reversed: in the present case it was the authors—the Commission—who were in search of a character, their subject. It was indeed difficult to determine the foundations and parameters of the topic. That being so, a tribute was due to the Special Rapporteur, who, recapitulating the work of his predecessor and taking the schematic outline approved by the Commission as a starting-point, had submitted two extremely important reports (A/CN.4/402 and A/CN.4/405) which could help the Commission to fulfil the mandate entrusted to it by the General Assembly. The Commission had been asked to prepare a set of rules applicable to areas which did not pertain to responsibility for wrongful acts, and the title of the topic itself contained two elements which should be taken into account: first, injurious consequences; and secondly, consequences arising out of acts not prohibited by international law.

52. An initial difficulty related to terminology, and, as everyone knew, it was always difficult to introduce the vocabulary of any particular legal system into international law: the terms used in an international instrument had to be understandable to all those called upon to apply it.

53. Moreover, the foundations of the topic raised certain queries. In his third report (A/CN.4/405, para. 59), for example, the Special Rapporteur based liability on injury, more precisely on appreciable injury, and spoke of the threshold above which a State would be liable. But at what point did injury, or harm, become appreciable? And who could determine whether it was ap-

preciable or not? It was obvious that a State in whose territory injury had occurred as a result of lawful activities could not claim reparation in the absence of fault. Was the basis of liability therefore to be sought in what the Latin-American countries called *responsabilidad objetiva* (strict liability), or in no-fault liability? How could one forget that the developing countries had the greatest interest in not being placed either in the situation of a State to which injury was attributed, when they lacked the means to compensate the affected State, or in the situation of the affected State, which would have difficulty in obtaining compensation? Many members of the Commission had such doubts about the topic, since they were not convinced by the arguments advanced in favour of studying it in its present form.

54. The Commission should not devote itself exclusively to the codification of international law, but should also think of its progressive development. For that purpose it was important that it should seek means of defending the legitimate interests of States, that was to say their rights, and that it should establish the rights that could be exercised by States which acceded to the instrument resulting from the draft articles. The Commission, as a legislative body, had the faculty to draft legal rules, which meant creating law. It should accept that responsibility and not defer its task or leave it to another body. Neither doctrine, nor State practice, nor jurisprudence alone would provide the necessary foundations for preparing a set of draft articles, whether they were to be of a mandatory or of an optional character. The Special Rapporteur was not solely responsible for his topic: all the members of the Commission should assist him in his study. Mr. Beesley had even mentioned the possible assistance of experts, in accordance with article 16 of the Commission's statute.

55. Finally, he considered that the Commission should continue its work without haste and in full knowledge of the subject, perhaps beginning by defining the terms it intended to use and agreeing on the minimum basis for international liability for injurious consequences arising out of acts not prohibited by international law.

56. Mr. KOROMA observed that the Special Rapporteur had asked for guidance from the Commission. He suggested that the Commission should revive an earlier practice, according to which the Chairman had identified the main issues that had arisen during the discussion, in order to facilitate the summing-up by the Special Rapporteur.

57. The CHAIRMAN said that he would be reluctant to encroach on the prerogatives of the Special Rapporteur. Mr. Koroma's interesting suggestion could be considered by the Planning Group of the Enlarged Bureau when it examined the Commission's methods of work.

*The meeting rose at 1.05 p.m.*

## 2022nd MEETING

Friday, 26 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCaffrey

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Visit by a former member of the Commission

1. The CHAIRMAN extended a warm welcome to Mr. Sucharitkul, a former member of the Commission.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2<sup>4</sup>)

[Agenda item 7]

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

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Various cases of transboundary effects)
- ARTICLE 4 (Liability)
- ARTICLE 5 (Relationship between the present articles and other international agreements) *and*
- ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (continued)

2. Mr. Sreenivasa RAO said that the topic under consideration was an important aspect of international law and could and should be distinguished from the topic of State responsibility, although there were admittedly areas and elements common to both. The treatment of the topic should also differ from that which the Commission was giving to the question of the régime for non-navigational uses of international watercourses, although there, too, there were certain common aspects inasmuch as the question of liability also arose in the context of international watercourses.

3. The Special Rapporteur had recognized the importance of those basic points in delineating the course

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

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

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

of action to be followed, which was different from the methods adopted for the topic of State responsibility and for international watercourses. In that regard, the efforts of the previous Special Rapporteur, the late R. Q. Quentin-Baxter, had not been altogether successful and some members of the Commission, as well as some representatives in the Sixth Committee of the General Assembly, had been inevitably drawn into a very general theoretical debate on the subject of State responsibility. At the same time, the clash of concepts involved in the development of the subject of international watercourses, particularly the question of how the freedom of States to pursue the goals of progress and rational and optimum utilization of national resources was to be reconciled with the duty to exercise one's rights within an overall framework of accommodation and reasonableness, had had its impact on the approach and thinking not only of the Special Rapporteur, but also of several members of the Commission.

4. State responsibility was essentially a question of State-to-State relations and dealt mostly with obligations and standards involving conduct at the State level; it was not conditional upon specific results or injury. On the other hand, liability—in the specific sense of the need for reparation as distinct from the more literal sense of responsibility—arose in all cases of breach of conduct or obligations which involved injury or harm. The Commission had to concentrate on that basic distinction in common law.

5. The subject of liability had to be studied carefully in order to identify its various legal components, namely the conditions under which it arose, the defences or mitigating factors, the means by which it was established and the manner in which the type and extent of reparation could be determined. In that connection, various issues had been raised, such as the relationship between cause and harm, the burden of proof, the presumption that arose in the event of refusal to cooperate, the duty to notify and knowledge of the risks involved. It was also necessary to investigate the conditions under which liability did not exist and specify the factors that could snap the legal chain of causation: acts of God, *force majeure*, contributory negligence of the victim, intervention of a third party and "shared expectations", which was simply another term for the well-known defence of tacit or implied agreement or acquiescence. Personally, he did not favour using the term "shared expectations", for it had much broader scope and significance. The Commission should therefore focus on the relevance of those factors in various contexts, such as nuclear accidents, outer space activities and activities concerning resource exploration and exploitation in marine areas.

6. The existing body of precedent should also be carefully studied in order to draw generally acceptable conclusions that could guide decision makers in identifying the most relevant mitigating factors. In that respect, he shared the view expressed by the Special Rapporteur in his second report (A/CN.4/402, para. 51) that there was no clear-cut division between strict and absolute liability and that there were many shades of strictness, ranging from the "channelling" of liabi-

lity to the operator in the nuclear field, with an almost total lack of exceptions, to more benign forms, such as simple reversal of the burden of proof or recourse to inferences which would work in favour of the plaintiff.

7. Hence the debate on whether strict or absolute liability was recognized in customary international law was neither decisive nor even necessary. State practice was focusing on specific activities, within the framework of specific treaty régimes. What was more important and even crucial for the Commission's present purpose was to note that, in order to establish liability, there had to be an acceptable and generally agreed threshold of harm or injury, a threshold that would naturally differ from one activity to another.

8. In that regard, scientists and informed observers were not in agreement on, for example, the tolerable levels of radiation for different subjects (humans, animals, the environment, the rivers or the oceans) or on the conditions under which the levels of tolerance could vary. Similarly, the debate on the use of pesticides and chemical substances, on noxious gases, on waste disposal and on the dumping of nuclear substances had led to numerous disagreements on the question of what the threshold should be.

9. It had been suggested that experts should be invited to elucidate for the Commission the scope and type of standards needed and help in clarifying the technical and scientific content of the topic. A more thorough understanding of the subject in all its dimensions was no doubt required, but it should be remembered that there was no single expert opinion on the matter, just as there was no single group of experts for all the different aspects of science and technology involved in the present topic. It was therefore clear that it would not be appropriate to talk of liability in general terms. The important thing was to establish standards that were generally acceptable to technical experts, and later to States and the responsible authorities. It would then be significantly easier for the Commission to provide indications to determine the type and quantum of reparation or damages that were appropriate.

10. It was therefore essential to determine the basic principles applicable in the matter. The first principle was State sovereignty, namely each State's freedom of action in so far as was compatible with the rights of other States. Everyone was in agreement with that principle, which was valid for all the topics before the Commission. At the same time, it was in the interests of all States to have rules on liability, not so much to try to find a guilty party as to regulate the problem of reparation, with the emphasis on preventive measures. In the case of river pollution, for example, the State of origin was the first to be affected by the pollution; hence there was no real conflict of interest with other affected States.

11. The events at Bhopal had clearly shown that multinational corporations controlled almost all aspects of scientific and technological development. The role of multinational corporations in science and technology had been the subject of much criticism and called for separate analysis. Profit was the primary consideration for such companies, whereas States were compelled by

economic and social needs to involve them in their development process. The situation was of the type which called for application of the principle, formulated by the Special Rapporteur, that an innocent victim should not be left to bear his loss. The victim in the case cited had been the State itself, millions of whose inhabitants had been affected by the catastrophe. The question of liability in such instances would have to be examined and he believed that the Commission could not escape that problem.

12. Another policy question had been raised by Mr. Barsegov (2020th meeting), namely the need to encourage innovation and enterprise in moving into new areas of science and technology. In that regard, a balance had to be struck between experimentation and reasonableness. Undeniably, certain beneficial activities had to be encouraged. At the same time, however, there should be a reasonable time-lag from experiment to industrial application; the magnitude of the risk also had to be kept in mind.

13. In September 1986, IAEA had adopted two conventions, the first on early notification of a nuclear accident and the second on mutual assistance in such matters,<sup>6</sup> but it was significant that the conventions did not deal with the question of liability. At the meeting in March 1987 of IAEA's Standing Committee on Civil Liability for Nuclear Damage under the 1963 Vienna Convention, the important question of the liability of the operator had been mentioned, but it had been suggested that the Commission was the proper body to study it. The Commission should therefore deal with that question under the present topic.

14. Another policy issue was the prevention of adverse effects with respect to such matters as nuclear damage, pollution and damage caused by chemical substances. In those cases too, the activity in question first harmed the State of origin, before it could cause damage to other States. There was thus a common interest in dealing with the matter, and that common interest was precisely the *raison d'être* of the Commission's current work. Due regard should be paid to all the elements involved, such as the problem of multinational corporations, which were agents of profit. The main purpose of the State, however, was not profit. Therefore the State was not the only subject to be considered in connection with liability. It was worth noting that, even in the United States of America and Japan, the public authorities had little or nothing to do with scientific and technological advancement, and multinational corporations were therefore among the leading actors in the field of application of science and technology for development purposes. That being the case, the Commission must not fail, in its study of international liability, to give sufficient attention to the role, responsibility and liabilities of those important actors as well.

15. A number of other issues, in addition to the responsibility of multinational corporations, required careful examination, such as the nature of absolute or strict liability, exceptions to the obligation to make reparation in the case of certain scientific activities, and the transnational effects of certain activities.

<sup>6</sup> See 2019th meeting, footnotes 13 and 14.

16. Another question was the title of the present topic. He objected in particular to the words "not prohibited", which distorted the focus of the topic and could be taken to mean that any act not prohibited by international law was in fact permitted. Besides, that formula appeared to go beyond the scope of the present topic in its impact on various other activities and their lawfulness under international law.

17. There was no lacuna in the law as he saw it, only in the approach of those called upon to apply it. International law had a creative and innovative aspect which should not be overlooked, and the impression should not be given that it consisted of a body of negative principles. Indeed, if that were so, there would not have been a law of the sea nor would the principle of the common heritage of mankind, already mentioned by Mr. Shi (*ibid.*), now be established in international law for all time. The words "not prohibited" were therefore neither helpful nor desirable and should be deleted from the title of the topic. It might be possible to speak instead of lawful activities of States or activities authorized or permitted under international law. One member had mentioned inherently lawful and inherently unlawful activities; but the word "inherently" applied more specifically to dangerous activities than to the broader activities covered by the present topic.

18. With regard to the Special Rapporteur's third report (A/CN.4/405), he felt that it was proper to emphasize "knowledge" or "means of knowing" as a test for determining the liability of a State. He further noted that it would be more appropriate not to dissociate the notions of "territory" and "control", as the Special Rapporteur did (*ibid.*, paras. 44 *et seq.*), in any assessment of State liability.

19. He trusted that the ideas he had advanced would receive the Commission's careful consideration, particularly since other members had already warned against undue generality and conceptualization.

20. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.25 a.m.*

## 2023rd MEETING

*Tuesday, 30 June 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*) (A/CN.4/384,<sup>1</sup> A/CN.4/402,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2<sup>4</sup>)

[Agenda item 7]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)<sup>5</sup> (*concluded*)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate on the topic, said that the main conclusions to be drawn were, first, that the Commission should endeavour to fulfil the mandate it had received from the General Assembly; secondly, that the draft articles should not discourage the development of science and technology; and thirdly, that prevention should be linked to reparation in order to preserve the unity of the topic and enhance its usefulness.

2. A number of general principles were also applicable, including the principle that every State should have as much freedom of action within its territory as was compatible with respect for the sovereignty of other States; the principle of prevention and the related principle of reparation in the event that harm occurred; and the principle that an innocent victim of injurious transboundary effects should not be left to bear his loss. It was important to note that, while there had been a difference of opinion as to whether those principles were accepted principles of customary international law, it had not been suggested that they were inadequate in terms of the subject-matter they would govern.

3. Some members of the Commission had advised him to be cautious and more realistic, while others had urged him to be firm and even audacious. Perhaps his true course lay in being cautious as to the scope of the topic, firm in the case of principles and realistic about procedures and obligations. In any event, he was fully aware of the need for the political support of States, as well as of the practical problems to which any set of articles on the topic would give rise.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

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

<sup>5</sup> For the texts, see 2015th meeting, para. 1.

4. One of the many issues raised related to the nature of the proposed articles and the question whether a draft framework convention or a set of recommendations was being prepared. Mr. Mahiou (2018th meeting), for instance, had stated that the schematic outline could provide the basis for a régime of liability, while Mr. Shi (2020th meeting) had said that the Commission should avoid theoretical problems by proposing a working hypothesis and continuing to draft articles. His own view was that the Commission should seek to draft a set of coherent articles that would be compatible with the principles of law and justice and then take a decision in the matter or leave it to the General Assembly to decide.

5. Another issue concerned the foundation of the topic, which was, in his view, harm, whether actual or potential. It had been suggested that he intended to take the concepts of shared expectations and *abus de droit* as the foundations of the topic. However, he had never proposed that shared expectations should serve as a foundation, only that they should be a condition for mitigating strict liability. Nor had he ever mentioned *abus de droit*, which, in his view, was not firmly rooted in international law, was seldom, if ever, invoked by international courts as a basis for their decisions, and was virtually unknown in certain systems of law. Unjust enrichment and the expropriation of amenities had also been mentioned, but they were merely different ways of saying the same thing and none could be the basis for liability in the context of the present topic.

6. There was nothing exotic about the doctrine of strict liability, which had followed the same evolution in international law and in internal law. The only question was how to couch that concept in general terms. The Commission should not, however, continue to question the theoretical foundations of the topic.

7. He agreed that harm was at once the element which generated liability and the condition for reparation. In the case of State responsibility for wrongful acts, harm was something different, since it placed an obligation on the delinquent State to restore the situation to the conditions existing prior to the violation. In the case of the topic under consideration, reparation was determined on the basis of different factors and might not be equivalent to the actual damage suffered. Did it follow, in the context of State responsibility, that, without material damage, any right of action was merely symbolic? Or should reference be made to the concept of satisfaction in international law which sometimes followed a breach of an obligation not entailing material harm? In any event, he recalled having stated in his second report (A/CN.4/402, para. 9) that a distinction between the two topics had to be made on the basis of injury "in the sense accepted thus far" by the Commission, since injury as defined by the Commission in the context of State responsibility did not give rise to responsibility and hence to reparation. For the time being, therefore, harm was neither a condition for the existence of a wrongful act nor a condition for reparation in the case of State responsibility.

8. If the Commission agreed with his position, the debate on whether the underlying principles of the pres-

ent topic, as set out in section 5 of the schematic outline, did or did not amount to principles of customary international law could be avoided. He had started from the premise that sovereign equality was a confirmed principle of international law: if one State had unlimited freedom to carry out activities in its territory which caused harm to a neighbouring territory and no compensation was required, that equality was broken; in other words, one territorial sovereignty would prevail over another. One possible conclusion was that the principle laid down in section 5, paragraph 1, of the schematic outline could be deduced from sovereign equality and should therefore be recognized as a principle of international law. The same conclusion could, however, be reached by an inductive process, since the principles in question could very well be inferred from judicial decisions, bilateral and multilateral treaties, and declarations of international conferences and other bodies. In any case, it was not sufficient to say that the application of those principles should be left to agreement among States, for, if the principles were deemed to be non-existent, any such agreement would be tantamount to a concession on the part of the State that had the factual possibility of acting. Indeed, if the law were to remain silent on the matter, it would favour those States which had such a possibility, to the detriment of the States which suffered the harmful consequences of such action. Such a situation would not be conducive to international solidarity. If the Commission decided that the principles in question did not exist in international law and should therefore not be proposed for the purposes of the progressive development of the law, it should say so clearly and shoulder its responsibility before the General Assembly and world opinion in general.

9. Views in the Commission differed on the need to include a list of dangerous activities in the draft. As he had already pointed out, such a list would be obsolete in 10 years' time and would in any event take account only of certain activities, whereas the General Assembly had requested the Commission to deal with the consequences of all non-prohibited activities. He would nevertheless endeavour to meet the concerns of those who favoured such a list, perhaps by including one in the commentary and giving a more detailed description in the draft articles of what constituted a dangerous activity. As to the relationship between the articles and existing conventions, he agreed that the wording of draft article 5 was not felicitous and suggested that it be replaced by the wording of article 30, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties.

10. He thought that Mr. Calero Rodrigues (2019th meeting), who considered that a list of activities would merely underline the uselessness of a general convention, was being unduly pessimistic. Under the draft articles on the law of the non-navigational uses of international watercourses, for example, a State's responsibility was discharged if it could prove that everything reasonable had been done in the light of modern technology. Should harm arise as a result of an accident due to the dangerous nature of an activity on or near a river, however, the responsibility incurred would be in the nature of strict liability.

11. In that connection, he could not agree that the General Assembly had been unaware of the problems of strict liability when it had assigned the Commission the task at hand. The Commission had advised the General Assembly that, owing to the entirely different nature of liability for risk and the different rules governing it, a joint examination of the topic of State responsibility and the present topic would only make both more difficult to grasp. The General Assembly had therefore deliberately taken the decision that the Commission should consider the two topics separately.

12. The purpose of the whole exercise was illustrated by an observation contained in the report of the World Commission on Environment and Development entitled *Our Common Future*:

National and international law has traditionally lagged behind events. Today, legal régimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature. . . .<sup>6</sup>

He did not wish to sound like Cassandra, but, unless States gave up certain notions that were incompatible with the realities of the present century, which was characterized by interdependence, things might take an unexpected turn for the worse. Mr. Tomuschat (2018th meeting) had rightly pointed out that, in the modern day and age, transboundary effects were the equivalent of aggression in the nineteenth century and that State sovereignty had more to fear from that new threat than from the use of force. With that in mind, the international instrument being envisaged should have four main purposes: to provide international law with the necessary legal concepts to cope with the reality of new dangerous activities; to provide States with mechanisms to arrange régimes for new activities and with the principles to guide them in drafting such régimes; to help States resolve existing situations of conflict through the machinery of the schematic outline or other machinery; and to complement existing régimes of State responsibility for wrongful acts.

13. It had been suggested that the terminology of the three topics—international watercourses, State responsibility and the present topic—should be harmonized and that a list of the terms used, together with their meanings, might be included in an article, an annex or the commentary. He wrote his reports in Spanish, of course, and used Spanish legal terminology, which was very similar to the French. The only liberty he had taken was to use the term *responsabilidad estricta*, which was not a legal term in Spanish, since his predecessor, R. Q. Quentin-Baxter, had used the term “strict liability”. It had been suggested that he had borrowed concepts from common law, but that was hardly likely, since his legal training had been in civil law. Admittedly, he had made certain references in his second report (A/CN.4/402) to literature of Anglo-Saxon origin, but that was because international conventions recognized various degrees of strict liability and he had wished to underline the need for flexibility in the topic. There had also been translation problems, but he had no control over translations into other languages.

14. One very important aspect of the topic was prevention, which some members thought he had over-emphasized, but which others had said he had not emphasized enough. The majority of members of the Commission nevertheless considered that prevention was absolutely necessary, and the General Assembly had had the same reaction several years earlier. Some members also thought that obligations of prevention led into the realm of State responsibility, inasmuch as a violation of such obligations gave rise to the secondary obligation of reparation. Ultimately, the two régimes could coexist in the same instrument, but the most important thing was to separate them conceptually.

15. Responsibility encompassed two different elements: the consequences of the breach of an obligation, and the duties imposed by law on any person acting in society. On that basis, he believed that obligations of prevention came within the terms of the Commission’s mandate. Some members had also referred to section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline, both of which contained the statement that “failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action”. He wondered, however, whether the Commission might not be accused of actually dealing with the consequences of wrongful acts, since to say that an act had no consequence seemed to involve a secondary norm. If the sentence in question were deleted, the draft articles would remain in the realm of primary norms, since they would deal with obligations of prevention, not with their consequences, as well as with obligations of reparation, which were not the consequence of a wrongful act. Whatever view was taken regarding the real nature of such obligations in customary international law, it was clear that some consequences attached to their violation under the draft and that those consequences had an important feature in common, namely that they were linked with the harmful event and therefore had to do with the reparation process. Section 5, paragraph 4, of the schematic outline, for instance, provided for an unfavourable consequence of a procedural nature in the event of the breach of the obligation, and the obligation under both section 3, paragraph 4, and section 2, paragraph 8, would reappear at the moment of compensation. Section 4, paragraph 3, provided that, in determining the reparation due, “account shall be taken of the reasonableness of the conduct of the parties, having regard to . . . the remedial measures taken by the acting State to safeguard the interests of the affected State”. Account could also be taken of any relevant factors, including those set out in section 6, and specifically in paragraphs 4, 9 and 10 thereof.

16. A question central to the scope of the topic was whether the unintentional violation of territorial or non-territorial sovereignty entailed liability. The purpose in asking that question was to determine whether the topic was of manageable dimensions. Mr. Quentin-Baxter’s answer had been to apply the criterion of a physical consequence, which could be summed up as follows: causal responsibility required a causal chain in the physical world, at one end of which there was an area within the territory or control of one State and at the other end of

<sup>6</sup> Oxford University Press, 1987, p. 330.



which there was an area within the territory or control of another State which suffered the harmful effects of an activity. In the physical world, as exemplified by the decision in the *Lake Lanoux* arbitration, harmful effects had to have negative economic or social repercussions. In economic and social relations, however, it was impossible to establish such a relationship with certainty. He therefore understood the concerns of those members who considered that to go beyond the realm of a physical consequence could lead to so many variations and conceptions of action and injury that the topic would be rendered unmanageable.

17. Two other interesting criteria were dangerous activities and the human environment. The schematic outline had opted for dangerous activities with adverse physical consequences and, if that criterion were selected, only harm arising out of such activities would fall within the topic. In an effort to identify the activities to be covered by the topic, he had tentatively added two further criteria: (a) that the risk created must be predictable in general terms and must also be appreciable or visible, but, if hidden, must be known to the State of origin; (b) that that State must know or have means of knowing that the activity in question was carried on within its territory. Those conditions were designed to mitigate liability. Mr. Calero Rodrigues apparently believed that it was not only foreseeable damage, but all damage, that should give rise to compensation. That approach would, however, impose on States a very strict form of absolute liability—and that was not the purpose of the draft.

18. Attention had been drawn to certain ambiguities in the terms “territory”, “jurisdiction” and “control”. The Commission was endeavouring to identify the entity to which liability for the events covered by the topic would be attributed and many members, including himself, considered that at the international level it should be attributed to a State within whose territory or control an activity with injurious transboundary effects occurred. As Max Huber, the arbitrator in the *Island of Palmas* case (see A/CN.4/384, annex III), had stated, sovereignty in the relationship between States signified independence, with the right to exercise over a given area and to the exclusion of any other State the functions of a State—the corollary of that right being the duty to protect within the territory the rights of other States.

19. Territoriality was therefore a major basis for the exercise of jurisdiction and for the attribution of liability for its extraterritorial injurious consequences. In the context of the present topic, most of the activities of concern occurred within the limits of State territory, a portion of the globe where a sovereign State exercised exclusive jurisdiction and where, subject to international law, it was entitled to allow or prohibit certain activities, while remaining liable to the other members of the international community for some consequences of those activities. That was the meaning that the term “territory” was intended to have in the draft articles.

20. With regard to the term “control”, reference might be made to the advisory opinion of the ICJ in the

*Namibia* case,<sup>7</sup> as Mr. Roucouas had rightly pointed out. In its acceptance in that case, the word meant that a State which effectively exercised exclusive jurisdiction over a territory could be held liable for certain extraterritorial injurious consequences of activities conducted within that territory. That was a case where the international community refused, for policy reasons, to legitimize the presence of the State concerned in the territory in question by recognizing its jurisdiction, yet still wanted to hold that State liable, for to do otherwise would have been to reward it for its illegal presence.

21. There were two other situations to be covered. The first concerned activities conducted beyond areas under the exclusive jurisdiction of States, in other words in areas which belonged to the common heritage of mankind and which all States were entitled to use, subject to international law. Where such use caused injury to others, the party causing the injury was liable. In that connection, the draft articles referred to activities on the high seas and in outer space.

22. The second situation concerned activities conducted in regions of the world which were neither part of the common heritage of mankind nor part of the territory of a State. Those were areas in which international law gave one State some exclusive and permanent rights, while also granting other rights to other States. In such cases, the exercise of exclusive rights by the first State engaged its liability, but, where other States also enjoyed certain rights, they too would be liable for the consequences of their activities. A case in point was the exclusive economic zone, where the coastal State exercised permanent and exclusive rights, although other States also had certain rights, such as the right of navigation.

23. In areas belonging to the common heritage of mankind, such as the high seas and outer space, the attribution of liability was a more complicated matter; but there again, some analogies might be drawn from the writings of Max Huber and the provisions of general international law. In much the same manner as the exclusive exercise by a State of jurisdiction over its territory engaged its liability for injurious consequences arising therefrom, the exclusive jurisdiction of a State over a vessel, as symbolized by its flag, also engaged its liability for damage caused by that vessel. The exclusive economic zone provided an example of those two aspects of liability. A coastal State would bear liability for the injurious consequences to which the exercise of its exclusive rights might give rise, but other States would be liable for the injurious consequences of the exercise of the rights to which they were entitled under the flag principle.

24. It had to be stressed that the rules concerning the attribution of liability in international law in no way altered or limited the private-law remedies available either under the internal law of the State concerned or under private international law.

25. With regard to the suggestion made by Mr. Ogiso (2020th meeting), he said that several existing conventions attributed primary liability to the operator of the

<sup>7</sup> See 2019th meeting, footnote 12.

entity which had caused injury and held the State liable only as the guarantor of payment. That type of remedy was, however, only one of many available to the parties when negotiating a régime. They could also agree to limit or allocate liability as between themselves, or only to provide equal access to courts and other internal-law remedies. Such private-law or alternative régimes were, however, not sufficient to relieve a State of liability in the absence of any régime. Although private-law remedies were useful in giving various choices to the parties, they failed to guarantee prompt and effective compensation to innocent victims, who, after suffering serious injury, had to take proceedings against foreign entities in the courts of other States. Private-law remedies by themselves would, moreover, not encourage States to take more effective preventive measures in relation to activities conducted within their territory which gave rise to injurious transboundary consequences.

26. He did not intend at the present time to ask the Commission to refer to the Drafting Committee the six draft articles he had submitted. Some of those texts had been tentative and he would redraft them in his next report in the light of the comments made during the discussion.

27. Mr. BENNOUNA said that, even if the draft articles were not referred to the Drafting Committee, the discussion would have enabled the Commission to make headway in its analysis of the topic. The key question of the dividing line between the present topic and that of the general régime of responsibility had, however, still not been answered. If it was true, as the Special Rapporteur had said, that the breach of obligations of prevention could give rise to reparation, the Commission was, in the final analysis, dealing with activities that were to some extent prohibited. It would therefore be necessary to define the scope of the topic more clearly, for otherwise he feared that the Commission would face the same problems at its next session. The Commission must, of course, take risks and assume responsibility for them, but, in order to do so, it had to have a sound basis. The Special Rapporteur had stated that, in his opinion, there had to be a continuum between prevention, injury and reparation and that what gave the topic its originality was injury, regardless of the lawfulness or wrongfulness of the activity in question and of the problem of attribution. The Commission was therefore not entirely clear whether the framework of the topic was liability for risk or strict liability and whether provision should be made both for preventive measures and for liability for risk. If that was the case, the study of such a question might go beyond the mandate the Commission had received from the General Assembly.

28. The CHAIRMAN, speaking as a member of the Commission, said it would be well to remember that the topic under consideration was not a traditional subject of international law. Its contours were becoming increasingly clearer as the Commission proceeded with its work and the subject had been further refined at the present session. Perhaps members of the Commission should give themselves more time to assimilate the various aspects of the topic, even though they might all

wish to know immediately exactly what its scope was. They certainly had the benefit of excellent guidance from the Special Rapporteur in that regard.

29. Mr. REUTER said that the Special Rapporteur, whose summing-up and efforts to take account of the opinions of all members he had greatly appreciated, appeared to consider that the heart of the topic lay not in liability in the absence of a wrongful act, but rather in the concept of dangerous activities and the risks they involved. He himself had no problem agreeing that, in some cases, the result would be responsibility for a wrongful act and, in others, liability for a non-wrongful act. He also thought that the Commission should not take the General Assembly's instructions too literally, for it assigned the Commission a topic for practical reasons and indicated the cases it had in mind. If the Commission found that such cases should be dealt with in terms both of responsibility for wrongful acts and of liability for lawful activities, it should not hesitate to say so, if not in its report on its thirty-ninth session then at least in its report on its fortieth session.

30. He recalled having proposed (2021st meeting) that members of the Commission might think about liability for unintentional violations of the status of State territory and non-territorial space. The Special Rapporteur had taken note of that proposal and had situated the problem in terms of causality. It was possible that causality might not always be the same in the case of the present topic as in the case of responsibility for wrongful acts, where the problem was dealt with by means of the meaningless formula that the State was responsible for direct injury, but not for indirect injury, except in the case of an act committed with intent to harm. In referring to liability for an unintentional violation, however, he had been thinking not of intent to harm, but rather of the hypothesis in which a State conducted a dangerous activity but hoped that no harm would actually occur. In other words, the intention of the State was to engage in an activity, but it did not rule out the possibility that such activity might have dangerous consequences. Where harmful smoke emissions had occurred, as for example in the *Trail Smelter* case, no arbitrator would now hesitate to refer to a violation of territorial status.

31. Hans Thalmann was the only writer to have dealt with that question, in a thesis in German published in 1951 and entitled "Basic principles of the law of modern good-neighbourly relations between States",<sup>a</sup> in which he had referred to "immissions", in other words harmful effects originating in an adjacent property and endangering the unhampered use of land not located on that property. It was that concept of "physical emissions" that the Special Rapporteur had adopted as a criterion for his topic. It could also be said that, in the case of some typical physical emissions—but not in that of slight emissions or those which occurred gradually—there was an unintentional violation of territorial sovereignty. If the Commission could move away from too narrow a definition of lawful and wrongful acts in its approach to the topic—and he

<sup>a</sup> *Grundprinzipien des modernen zwischenstaatlichen Nachbarrechts* (Zurich, Juris-Verlag, 1951).

thought that it would probably be forced to do so—it would also be able to avoid the risks of differences of opinion among its members. If the Special Rapporteur reached the conclusion that the focus of the topic lay in dangerous activities and the risks they involved, he was convinced that the General Assembly would have no objection.

32. Mr. BARSEGOV noted that, in summing up the discussion on a complex and very topical subject, the Special Rapporteur had somewhat simplified his position. He recalled that, in his earlier statement (2020th meeting), he had expressed his concern about the lack of precision in the terms used and in the list of problems to be considered, a lack of precision that was, moreover, reflected in the title of the topic, which referred to non-prohibited acts, not to lawful acts. He had also said that, before formulating the rules that would govern that type of problem, the Commission had to lay sound legal foundations which would be free from any subjectivism and would not lead to any political games. However, the Special Rapporteur had not spoken of the work on liability that was being done in other organizations and had not explained how he intended to take account of that work, although several members had pointed out that the Commission could not overlook the work being done in other areas where the question of liability also arose. He therefore requested the Special Rapporteur to look into the question of the international rules which could serve as a basis for determining injury and without which it would be virtually impossible to solve problems relating to liability. He also regretted that the Special Rapporteur had had nothing to say about the extremely important question of the interests of a State in whose territory an accident occurred. If that question were not settled, it would be impossible to find an objective and balanced solution to the problem of liability as a whole.

33. Another important point on which the Special Rapporteur should focus attention was that, in the event of an accident in a State, it would be inconceivable to inflict physical or political injury on that State: that would only heighten tensions and mistrust among countries. He recalled that he had stressed the need to deal with liability for activities for which there was no basis in fact, such as spreading false information. There were also various other questions that the Special Rapporteur had unfortunately not taken into account in his summing-up, and he hoped that, when all the summary records were available, the Special Rapporteur would carefully consider all the views expressed during the debate.

34. Mr. BEESLEY said that, in his excellent summing-up of the discussion, the Special Rapporteur had focused on the basic question on which the Commission had to decide, namely whether it should engage in the codification of positive law or in the progressive development of the law on the topic under consideration. He himself had had the impression that, although no member of the Commission was opposed to the objective of the progressive development of the law, there might be some disagreement about the actual starting-point for the Commission's work. There had also been differences of opinion with regard to terminology and

the conceptual approach to the topic in the various legal systems. No one, however, had asserted that there was no legal basis for the concept of liability for harm resulting from lawful acts. He hoped that the Commission would not suspend its work on the topic because of those differences of opinion. It should be cautious, but resist the temptation to give up.

35. Mr. Sreenivasa RAO said that he shared the Special Rapporteur's views on the many questions he had raised in his excellent summing-up. Emphasis had been placed on the State as the entity which was liable in the cases covered by the topic and it was clear that every State had to assume responsibility for what happened in its territory; it was also obvious that an innocent victim must not be left to bear his loss. It should, however, be remembered that reparation was not always within the means of the developing countries, which made up 80 to 90 per cent of the international community. Thus, when dangerous activities were conducted in their territories by other agents, such as multinational corporations, those countries did not have the necessary resources to answer for liability. If realistic results were to be achieved, that aspect of the problem would have to be reflected in the draft.

36. The CHAIRMAN said that the consideration of agenda item 7 was concluded.

**Relations between States and international organizations (second part of the topic) (A/CN.4/391 and Add.1,<sup>9</sup> A/CN.4/401,<sup>10</sup> A/CN.4/L.383 and Add.1-3,<sup>11</sup> ST/LEG/17)**

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

37. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic and indicate how he thought the Commission should deal with it.

38. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that the Commission had before it two successive reports on the topic, namely the second report (A/CN.4/391 and Add.1), submitted in 1985, and the third report (A/CN.4/401), submitted in 1986. In accordance with the decision which the Commission had taken following its consideration of his preliminary report<sup>12</sup> at its thirty-fifth session and which had been approved by the General Assembly in resolution 38/138 of 19 December 1983 (para. 3), he had continued his work on the second part of the topic, namely the status, privileges and immunities of international organizations, their officials, and experts and other persons engaged in their activities not being representatives of States.

<sup>9</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One).

<sup>10</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>11</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

<sup>12</sup> *Yearbook* . . . 1983, vol. II (Part One), p. 227, document A/CN.4/370.

39. The Commission had considered the topic at its thirty-seventh session, in 1985.<sup>13</sup> Due to lack of time, however, the discussion had unfortunately been brief and the Commission had been unable to take any decision on the draft article which he had submitted.<sup>14</sup> It had deemed it advisable to resume its consideration of the draft article at its thirty-eighth session so that more members could express their views and the new members could become acquainted with the topic. It had merely requested him to consider the possibility of submitting concrete suggestions on the scope of the draft articles to be prepared, as well as a schematic outline of the subject-matter to be covered by the articles.

40. He had therefore prepared his third report (A/CN.4/401) for the thirty-eighth session of the Commission, which had been unable to consider it, again due to lack of time. He noted that the third report took account of the replies to the various questionnaires (1965, 1978 and 1984) sent by the Legal Counsel of the United Nations to the United Nations specialized agencies, to IAEA and to regional organizations. Those replies were contained in the studies prepared by the Secretariat in 1967<sup>15</sup> and 1985 (A/CN.4/L.383 and Add.1-3) and in the collection issued in 1987 (ST/LEG/17).

41. He suggested that the discussion at the present session should focus on the third report (A/CN.4/401) and, in particular, on the possible scope of the draft articles (*ibid.*, para. 31) and the schematic outline for the drafting of the articles (*ibid.*, para. 34). It would be easier for the Commission to consider the second report in conjunction with the fourth report, which he would prepare for the next session. It would then be able to take a decision after having heard the comments of those of its members who had been elected since the topic had been included on the agenda.

42. Obviously he attached particular importance to the comments and suggestions which members of the Commission would make on the two main points dealt with in his third report, namely the scope of the privileges and immunities of organizations and the various persons in their service, and the schematic outline for the drafting of the articles. The Commission would thus be able to decide how its work should proceed and he would have a much clearer idea of its views concerning the mandate entrusted to it by the General Assembly.

43. The CHAIRMAN noted that the Special Rapporteur had suggested that the Commission should focus its discussion on his third report and, in particular, on the scope of the draft articles and the schematic outline he had proposed (A/CN.4/401, paras. 31 and 34).

44. Mr. TOMUSCHAT said that it would be helpful if the Commission could have a list of the States which

had ratified the 1975 Vienna Convention on the Representation of States.

45. The CHAIRMAN said that the Secretariat would prepare that list. He suggested that the meeting should rise to enable the Drafting Committee to meet.

*The meeting rose at 12.25 p.m.*

## 2024th MEETING

*Wednesday, 1 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouinas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/391 and Add.1,<sup>1</sup> A/CN.4/401,<sup>2</sup> A/CN.4/L.383 and Add.1-3,<sup>3</sup> ST/LEG/17)**

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

1. Mr. REUTER observed that the statements by members of the Commission were generally marked by their experience, whether at the Third United Nations Conference on the Law of the Sea, for example, or, as in the present case and in his own case, at the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, held in Vienna in 1986, which had completed a series of international conferences on treaties, but had also been concerned with international organizations. At the present stage, the Commission could not take up a subject which touched closely, or even remotely, on international organizations without taking account of the reactions evoked by the problems of international organizations at the 1986 Vienna Conference.

2. He wished to make two comments on the question that was of the greatest interest to the Special Rapporteur, namely the scope of the draft. First, it should be decided whether the draft would apply to all international organizations or only to some of them. The view of the Special Rapporteur and apparently of the Com-

<sup>13</sup> See *Yearbook* . . . 1985, vol. I, pp. 282 *et seq.*, 1925th to 1927th and 1929th meetings.

<sup>14</sup> See *Yearbook* . . . 1985, vol. II (Part Two), p. 67, footnote 252.

<sup>15</sup> *Yearbook* . . . 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

mission was that the draft should be conceived and studied from the outset as applying to all international organizations. But it was possible that, on completion of its work, the Commission would be led to change its opinion, since the subject had political and technical aspects that would appear only when further progress had been made. He therefore considered that for the time being the Commission should not go back on the cautious position it had adopted.

3. Secondly, with regard to the matters to be dealt with which were shown in a tentative outline, he thought it would be reasonable, at the first stage, to opt for as broad an outline as possible. The outline proposed by the Special Rapporteur did not call for criticism or comments on his part, for the Commission was bound to encounter a fundamental problem of a political and technical nature, inasmuch as it was not breaking new ground, since there were already a certain number of special treaties on the subject. There was therefore every reason to expect that States in whose territory the headquarters of an international organization was located would argue that it had been difficult to solve the problems raised by its establishment and that the solutions adopted should not be called in question again. Furthermore, it was obvious that the rules proposed by the Commission would be compared with those already in force, and that they should be at least equally generous to international organizations and international officials. Lastly, it was a minority of States that had received international organizations in their territory; hence there would be many political problems to solve. However, he thought that the Commission need not concern itself with those delicate political questions as things stood at present.

4. It was in dealing with questions which were rarely settled in headquarters agreements or were even ignored by agreements and practice, or which required more detailed regulation, that the Commission would be doing useful work. For example, not all headquarters agreements settled the question of the archives of international organizations. That question, which seemed simple at first sight, appeared in a new light because of technical progress. Citing the case of an organization long regarded as a non-governmental organization by the Economic and Social Council before being recognized as an international organization—the International Criminal Police Organization (INTERPOL)—he noted that that organization had very incriminating files on wanted individuals all over the world. As all countries had enacted legislation for the protection of human rights, especially in view of the progress of information processing, which made it possible to store the most varied information on the public or private life of all mankind in a small space, it might be asked whether the privileges of international organizations covered the information they had stored in computerized form. Did it constitute archives or not? That question had arisen for INTERPOL the day it had acquired a computer. United States courts had decided, on first instance, that the status of an international organization could not be accorded to INTERPOL, so that it could not invoke privileges or immunities. Consequently, if it transmitted information about a person who was subsequently

found to be innocent, proceedings could be taken against it. He therefore welcomed the broad outline proposed by the Special Rapporteur, even though the Commission might subsequently decide not to pursue its work in some particular direction.

5. Referring to the definition of an international organization, on which his views derived from the conclusions he had drawn at the 1986 Vienna Conference, he pointed out that in all its work the Commission had kept to the definition given in the 1969 Vienna Convention on the Law of Treaties, article 2, paragraph 1 (*i*), of which stated that an “international organization” meant an intergovernmental organization. Although, during the preparatory work for the 1986 Vienna Conference, many Governments had asked the Commission to make that definition more precise, it had declined, taking the position that either an intergovernmental organization did not have the capacity to conclude treaties, in which case the convention would not apply to it, or that it did have such capacity and the convention would apply to it. The question of definition had not arisen directly in 1975 regarding the Vienna Convention on the Representation of States, because that Convention applied only to certain organizations. It had nevertheless arisen indirectly in so far as the possibility of applying the same rules to other intergovernmental organizations had been discussed. But in the present case there was a question which the Commission could not answer in the same way as it had done previously. That question was whether the Commission should provide for a minimum of privileges to be enjoyed by international organizations and determine the kind of international organizations that would enjoy them. For there were international organizations, designated by that name, which did not have the capacity to conclude treaties. In the same context, he wondered whether an international conference did not have some personality. Did the president of a conference, with the authorization of its officers, not perform certain international acts on behalf of the conference? Did an international conference, as such, not perform embryonic activities? The Commission might thus be led to pronounce rather more precisely on what an international organization was.

6. He had some reservations about the Special Rapporteur’s proposal that international organizations should be recognized as having international personality. What was the content of international personality? It implied at least the faculty to conclude international agreements and probably also a certain international responsibility. That being so, if the Commission intended to apply the term “international organization” to entities which were not entitled to conclude treaties, it could hardly speak of international personality. In his reports on State responsibility, Mr. Ago had referred to the question whether international responsibility of international organizations existed as a principle. But there had never been any question of proposing the responsibility of international organizations as a possible subject of study, because there was no general concept of an international organization valid for all of them. International organizations were proliferating, because they represented the future of mankind, but

States wished to define them independently of one another, giving each one its own particular status.

7. He had no reservations about the capacity of international organizations under internal law, provided that such capacity was determined by their functions. The capacity of international organizations should be adapted to each one and it was not possible to lay down general rules. In that respect, the 1986 Vienna Conference had adopted a rather more precise definition of the notion of "rules of the organization" than that drafted by the Commission, replacing the words "relevant decisions and resolutions" by "decisions and resolutions adopted in accordance with [the constituent instruments]".

8. He urged the Commission to be cautious, in order not to give certain Governments the impression that it was trying to complicate things. Moreover, many international organizations encountered practical problems in the exercise of certain internal activities, such as those relating to international officials' co-operative stores (the commissary in Vienna, and SAFI in Geneva). It was those questions, among others, that the Commission should study in order to do useful work.

9. Mr. PAWLAK said that he spoke with some reluctance on a topic that had been under consideration since 1976, as he did not wish to contradict opinions already accepted by the Commission. At the same time, he had some doubts and reservations regarding the scope of the draft articles as shown in the proposed outline.

10. His first remark would be of a general character. Like the majority who had spoken on it in the Sixth Committee of the General Assembly, he considered it desirable to codify the present topic, which was an important, complex and useful one. As the Special Rapporteur pointed out in his third report (A/CN.4/401, para. 37), the Commission, in undertaking the work of developing and codifying the topic as a branch of diplomatic law, intended to complete the *corpus juris* of diplomatic law elaborated on the basis of its work and embodied in the four codification conventions mentioned in the report (*ibid.*), as well as in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The new instrument in preparation would usefully supplement the 1946 Convention on the Privileges and Immunities of the United Nations.

11. In view of the clear mandate it had received from the General Assembly, the Commission should speed up its work on the topic. Since States had approved its various conclusions and recommendations, the Commission had their support in regard to both the scope of the draft articles to be prepared on the topic and the schematic outline of the subject-matter to be covered by the various draft articles.

12. The Special Rapporteur's new outline of the subject-matter to be covered by the draft articles (*ibid.*, para. 34) was exhaustive and covered the main aspects of the topic. It was so general, however, that it was difficult to comment on it or suggest improvements. Moreover, it gave undue prominence to the question of the privileges and immunities of international organiza-

tions and their officials, which was dealt with in one way or another in 6 of the 11 sections of the outline. Important though they were, privileges and immunities were subsidiary in relation to the functions and purposes of international organizations, which were created, operated and controlled by States.

13. However broad their privileges and immunities might be, the fact remained that international organizations were subjects of international law only to a limited extent. Their activities could not extend beyond the limits set by their constituent instruments. Even a powerful organization like the United Nations was not a full subject of international law. International organizations could not act like States, which had territory and a population.

14. That remark led to the question of the meaning of the term "international organization", which the Commission had to define. It would perhaps arrive at a broader definition than that contained in the 1969 Vienna Convention on the Law of Treaties. For his part, he was inclined to agree with the Special Rapporteur's statement in his second report (A/CN.4/391 and Add.1, para. 15) that the Commission should not "try to work out and propose a precise definition of what an international organization is". He himself could accept as a working hypothesis the definition of the term "international organization" as meaning an intergovernmental or inter-State organization.

15. The Commission should confine its study to intergovernmental organizations of a universal character. From his own experience he could say that most of the important regional organizations had already established their *modus vivendi* and *modus operandi* in their relations with States. In most cases, similar arrangements existed between States and international organizations of a universal character.

16. Referring to the scope of the topic as presented in the tentative outline in the third report (A/CN.4/401, para. 31), he stressed that international organizations set up by States to engage in co-operation in a particular field had not only rights, but also obligations *vis-à-vis* States. They had to conform to their constituent instruments in their relations with States and refrain from activities for which they had no mandate. The status and role of international officials should also be defined in accordance with the constituent instrument and mandate of the organization to which they belonged; but, as was well known, that was not always the case.

17. While he was strongly in favour of expanding the functions and duties of international organizations, he could not accept the view that, with the extension of its functions, an international organization could become independent of the States that had created it. He maintained that such organizations could act only within the framework agreed on by member States and could in no way set themselves above States.

18. All those factors should be taken into consideration when formulating concrete provisions on definitions and the scope of the draft articles, and provisions on the bases of the privileges and immunities of international organizations, which should be followed by pro-

visions setting out the specific privileges of international organizations and their officials.

19. In conclusion, he thanked the Special Rapporteur for his third report and the Secretariat for its useful study of the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities (A/CN.4/L.383 and Add.1-3), as well as for the equally useful document containing the replies of regional organizations to a questionnaire concerning their status, privileges and immunities (ST/LEG/17).

20. Mr. BENNOUNA said that a reading of the Special Rapporteur's second and third reports led him to raise a number of questions. Quoting a passage from the third report (A/CN.4/401, para. 36), according to which "this body of norms consists of an elaborate and varied network of treaty law, which requires harmonization, and a wealth of practice, which needs to be consolidated", he asked, first, whether the topic under study was one for codification alone. Was progressive development excluded? Secondly, why should the provisions of treaty law require harmonization? He would have liked the Special Rapporteur to have developed that statement and to have gone more deeply into it from the point of view of legal policy. In other words, he would like to know what were the advantages and disadvantages of such harmonization for the functioning of international organizations. Thirdly, what would be the place and the role of host countries in the process of harmonization? Should a special place not be reserved for their participation? Fourthly, did the process of codification contemplated not automatically imply the participation of international organizations and, if so, how did the Special Rapporteur envisage the role of international organizations in that process? That was a difficult question, connected with the question as to which organizations were involved.

21. The tentative outline called for another series of comments. First, the question of the relationship between the future general convention and existing special agreements was not made clear. Secondly, a distinction was made in the outline between the privileges and immunities of the organization and the privileges and immunities of its officials. Did they not affect each other? How could international organizations intervene to protect their officials and ensure that their privileges and immunities were respected? That was a classic question, because it was the central point of the advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>4</sup> But there were also more recent cases, of intense current interest, concerning international officials who, being detained in their countries, were prevented from submitting their resignation to the Secretary-General, and on whose behalf the United Nations was seeking to intervene to find a solution taking account of the interests of the Member State, of the official concerned and of the Organization itself. Those were cases of fundamental importance for the future operation of international organizations, that was to say for the security of international officials in their work. If, when on mission,

such officials could be detained and prevented from performing their duties, they would certainly not be in a position to fulfil their functions to the best of their ability.

22. Thirdly, did what had been called the right of functional protection—protection exercised by international organizations—come within the scope of the topic or not? Fourthly, in his second report (A/CN.4/391 and Add.1), the Special Rapporteur had made concrete proposals concerning the legal personality and capacity of international organizations. A place should also have been found for the principle of specialization of international organizations, which should be the subject of an article. With regard to personality, he pointed out that, in the above-mentioned advisory opinion, the ICJ had held that the United Nations possessed objective legal personality, which meant that it could initiate legal proceedings not only against its own Members, but also against non-member States. Did the Special Rapporteur share that opinion? Besides "normal" or "relative" legal personality, effective only in regard to members and requiring recognition by non-members, should a place be found for "objective" legal personality, effective in regard not only to members, but also to non-members, being as it were absolute? In that connection he referred to paragraph 37 of the second report, in which the Special Rapporteur had confined himself, for the time being, to relative personality.

23. Mr. YANKOV thanked the Special Rapporteur for his clear and concise report, which raised a number of very important questions. He also thanked the Secretariat for its comprehensive study of the practice of international organizations (A/CN.4/L.383 and Add.1-3), which showed that each organization had its own rules. For the purposes of the present study, that was an important point to bear in mind, since it was impossible to conceive of a legal régime that would apply equally to all international organizations and embody uniform rules.

24. In his second report (A/CN.4/391 and Add.1, para. 15), the Special Rapporteur had said that the object should be to formulate "general rules governing the legal capacity, privileges and immunities of international organizations". Having made a thorough study of existing international instruments and practice, however, he himself was inclined to favour a more modest approach whereby gaps and unsolved problems would be identified and rules corresponding to the new requirements would be proposed. The Commission should not, of course, lose sight of the general framework, but it should adopt a pragmatic approach, concentrating less on doctrinal and general issues and more on the codification method of harmonization.

25. In his third report (A/CN.4/401, para. 21), the Special Rapporteur referred to certain very important questions which the Commission would have to answer. The first concerned the place of custom in the law of international immunities as applied to international organizations. In his view, it would be better not to concentrate on customary law, since enough legal instruments existed already. In dealing with the second

<sup>4</sup> *I.C.J. Reports 1949*, p. 174.

question—that of the differences between inter-State diplomatic relations and relations between States and international organizations—it was important to bear in mind the similarities as well as the differences. Common aspects of those two spheres of relations included, for example, the regulation of privileges and immunities, exemptions from national laws and regulations, and the special legal protection and favourable treatment given to international organizations and their staff. As to the differences, in traditional diplomacy the relationship between the sending State and the receiving State was based on sovereign equality and the important principle of reciprocity, which could also serve as a basic mechanism for legal protection. In that connection Mr. Bennouna had asked how an international organization could secure legal protection against a host State which had infringed the status of the organization. The principle of sovereign equality had no place in relations between a State and an international organization, and a balance would clearly have to be found in the triangular relationship sometimes established between the sending State, the host State and an international organization.

26. The Special Rapporteur raised two very important questions in his report (*ibid.*) regarding the scope of privileges and immunities and the uniformity or adaptation of international immunities. Those questions were, first, what kind of international organizations should be covered, in other words what should be the scope *ratione personae* of the draft; and secondly, what kind of privileges, immunities and facilities should be accorded, in other words what should be the scope *ratione materiae* of the draft? It was clear from previous debates in the Commission that the general view was that, for the time being, the Commission should not try to differentiate between different kinds of organization, although that could perhaps be done at a later stage, when it was clear whether or not only organizations of a universal character within the United Nations system should be covered. His own view was that the Commission should not be over-ambitious and should confine itself to organizations of a universal character, because the longer the list of organizations, the more difficult would be the situations to be covered. In any event, special organizations, for example financial institutions, were regulated under internal law and by their own rules rather than under general international law.

27. Where privileges, immunities and facilities were concerned, functional necessity should be the guiding principle. Generally speaking, he could accept the schematic outline proposed by the Special Rapporteur (*ibid.*, para. 34). At the present stage, the outline should not be too detailed, but should be sufficiently precise to show the general framework of the topic and the main issues. It should, however, include a specific reference to waiver of immunity from legal process by an international organization or its staff. He took it that resident representatives and observers sent by international organizations to States or to other international organizations would be covered, as well as officials at headquarters: that should be made clear. A separate heading should perhaps be included for the duty of an international organization and its officials to respect the laws and regulations of the host State. A provision along the lines of article 41 of the 1961 Vienna Conven-

tion on Diplomatic Relations, article 55 of the 1963 Vienna Convention on Consular Relations or article 77 of the 1975 Vienna Convention on the Representation of States might be suitable. The draft should also include a general provision on the obligations of the host State regarding the legal protection and normal functioning of the international organization and its officials. Lastly, in view of the multiplicity of treaties and agreements already concluded, it was particularly important to clarify the relationship between the draft articles and international conventions in force: that, too, should be done in the draft.

*The meeting rose at 11.35 a.m.*

## 2025th MEETING

*Thursday, 2 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Riyadh Mahmoud Sami AL-QAYSI

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouñas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Relations between States and international organizations (second part of the topic) (continued) (A/CN.4/391 and Add.1,<sup>1</sup> A/CN.4/401,<sup>2</sup> A/CN.4/L.383 and Add.1-3,<sup>3</sup> ST/LEG/17)**

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. TOMUSCHAT said that, at the Commission's thirty-fifth session, in 1983, he had been among those who had asked the Special Rapporteur to provide more information on the overall structure of the draft articles he intended to submit. He therefore welcomed the helpful schematic outline of the subject-matter contained in the Special Rapporteur's third report (A/CN.4/401, para. 34). In addition, the existing conventions on the privileges and immunities of the United Nations and the specialized agencies provided useful guidance for the Special Rapporteur, who could also draw on the valuable materials assembled in the Secretariat study (A/CN.4/L.383 and Add.1-3) and in the collection of replies to the questionnaire sent to regional organizations (ST/LEG/17).

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.



2. At the 1983 session, the question of determining which international organizations would be covered by the topic had been left open. His own preference would be to deal in the first instance with organizations of a universal character, following the example of the 1975 Vienna Convention on the Representation of States. One argument in favour of that approach was the frequently ephemeral character of regional organizations. The situation of universal organizations was far less uncertain: despite their financial difficulties, none of the specialized agencies had entered the twilight zone which surrounded a considerable number of regional institutions.

3. Moreover, the present topic resembled more the 1975 Vienna Convention, which was confined to international organizations of a universal character, than the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which constituted a set of rules applicable to treaties concluded by any international organization. Those rules were based on the premise that there had to be full equality between the two parties to a treaty; hence the substantive status of the organizations concerned was not at stake. The position was totally different with regard to the present topic, in which the status of international organizations was the very subject-matter of the work. In the present instance, the Commission would have to face up to the perennial tension between, in particular, the interests of host States on the one hand, and those of international organizations on the other.

4. Another important consideration was that any attempt by the Commission to go beyond the United Nations family would give the impression of interference by the United Nations with regional systems. Every region had its own legal bodies and the legal issues relating to regional organizations concerned exclusively the relationship between the host State and the organization itself. Those were not matters of universal international law, and they should be left to the free choice of the States concerned.

5. Furthermore, it would be much easier to formulate rules confined to organizations of a universal character belonging to the United Nations family, for they were very similar in many respects, if only because of the large number of participating States and the presence of States from different political camps. The great disparity between regional organizations would, however, make it extremely difficult to establish general rules applicable to all of them. For example, an organization established by only two States would be far less detached from the internal legal order of those two States than the legal system of the United Nations was from the domestic rules of its various Member States. Moreover, even the actual number of regional international organizations was not known. It was significant in that connection to recall the difficulties that had arisen in endeavouring to draw up a list of international organizations to be invited to the 1986 Vienna Conference. It was equally significant that the questionnaire of 5 January 1984 had elicited replies from only 18 regional organizations, that seven others had confined themselves to submitting materials in writing and that

many had not replied at all (see ST/LEG/17). Clearly, if the Commission were to extend the scope of the draft articles to all international organizations, it would enter a jungle in which it could easily lose its way.

6. Mr. Yankov (2024th meeting) had advised the Commission not to engage in an academic exercise but to try to identify gaps in existing instruments. Actually, the two existing conventions dealing with the privileges and immunities of the United Nations and of the specialized agencies, respectively, had been overtaken by the pace of events, at least in some areas. They had been drafted in 1946 and 1947 and their authors could not have imagined the breadth of the issues that would arise 40 years later. Precisely for that reason, it had been found necessary to frame the 1975 Vienna Convention to govern the status of delegations to international organizations, and similar reasons could well justify the Commission's present undertaking. It was necessary, however, to state the reasons in support of that course, which could be done on the basis of the excellent materials assembled by the Secretariat.

7. Two examples would illustrate his argument. The first related to the status of the officials of an international organization. Under both of the relevant conventions, they could not be denied the right to enter the host State and were not subject to immigration restrictions. The need for that rule was obvious, for otherwise the host State could paralyse the work of the organization established in its territory. International officials also had the right to leave the host country. They did not, however, appear to enjoy the right to travel freely within the host country. Of course, there might not be any functional necessity for international civil servants to travel in the territory of the host State, but it would appear to be a human necessity to allow them to leave the headquarters from time to time. Without such authorization, the recruitment of officials would become difficult, thereby hampering the proper functioning of the organization itself.

8. The second example related to the problem of jurisdictional immunities. The two conventions in question specified that the United Nations and the specialized agencies enjoyed the right to institute legal proceedings and, as far as the passive aspect was concerned, provided for immunity from every form of legal process except in the event of an express waiver. The two instruments were thus based on the theory, current at the time they had been drafted, of absolute immunity applied in inter-State relations. Nowadays, that question would have to be carefully re-examined, all the more so since the Commission itself had opted for the theory of restricted immunity in its consideration of the topic of the jurisdictional immunities of States. Thus it would be difficult to adhere to the traditional pattern of absolute immunity for organizations when even States were required to yield in some measure to the territorial sovereignty of the State of the forum. In that regard, it was a well-known fact that the collapse of the International Tin Council had brought to light an apparent paradox, namely that States could in some instances be obliged to defend themselves in private suits, whereas their offspring—international organizations—would seem to be protected by immunity.

9. Those two examples showed that the process of reviewing, and possibly amending, the existing rules could not lead simply to a strengthening of the privileges and immunities enjoyed by international organizations. Such an approach would be politically unwise. There was much resentment in some States against international organizations, partly justified perhaps. If, on the other hand, the Commission undertook a careful scrutiny of the subject, article by article, the prospects for a future convention would be enhanced.

10. Another considerable advantage in confining the work to the United Nations and its specialized agencies was that the Commission would be relieved of the need to agree on a definition of international organizations, and that would enable it to avoid engaging in doctrinal disputes.

11. The question remained as to how the new instrument and the two existing conventions should be coordinated. If the new instrument were to take the form of a treaty amending the two existing conventions, the situation would be relatively easy, but only relatively, for many difficulties would none the less remain. In particular, as far as matters of status were concerned, there would always have to be one single solution, and not two, depending on whether the State concerned would be a party solely to the old conventions or to the new convention. That matter, however, could be left to the diplomatic conference, if the draft ever reached that stage.

12. Since the appointment of the present Special Rapporteur in 1979, the Commission had not made much progress on the present topic. That was not the fault of the Special Rapporteur, for the topic had had to give way to other more pressing subjects, particularly at the previous two sessions. He therefore urged the Commission to give greater attention to the topic at the next session, when it would have only five main topics on its agenda. The Special Rapporteur could submit a substantive report, which, together with the materials compiled by the Secretariat, should enable the Commission to establish the real needs of the international community in the matter. On that basis, it ought then to be easier to formulate draft articles bringing the existing conventions up to date.

*Mr. Al-Qaysi, Second Vice-Chairman, took the Chair.*

13. Mr. ARANGIO-RUIZ congratulated the Special Rapporteur on the calibre of his reports and said that he was particularly grateful for the clear and detailed schematic outline submitted in the third report (A/CN.4/401, para. 34). The remarks made by members at the previous meeting prompted him to revert to the question of the legal personality and capacity of international organizations. There were many good reasons, in his view, for avoiding any general provisions in that regard, and the proposition that all international organizations enjoyed legal personality was quite unacceptable. It was first necessary to distinguish between international personality and personality under municipal law.

14. In the case of personality under municipal law, it was quite clear that two or more States founding an organization could enter into any obligations they saw fit with regard to the status of that organization in their respective legal systems. Other States would have no voice in the matter, although third States might, if they so wished, join the member States in granting legal personality under their own municipal law to the entity in question, either independently of any request on the part of the member States by which the international organization had been set up, or pursuant to an international agreement by which they were required to do so.

15. International personality was another matter and one in which the role played by agreement was far less relevant. Distinguishing, as Mr. Bennouna (2024th meeting) had suggested, between objective and non-objective international personality was not enough. International legal personality could not be anything but objective. The member States of an international organization could, of course, always agree among themselves to act, severally or jointly, as though the body they had set up had legal personality in international law. But such an agreement could not *per se* bind any third States, who would continue to regard the organization as an organ common to the member States concerned until such time as they agreed to treat it as a separate entity. That kind of problem had arisen at the Conference on Security and Co-operation in Europe towards the end of its work on the Helsinki Final Act in 1975, at a time when Italy was occupying the presidency of the European Communities. Following very delicate negotiations, Aldo Moro had signed the Final Act both as Prime Minister of Italy and as President in office of the Council of the European Communities.

16. It was, and always had been, his firm conviction that the objective international personality of an international organization, and specifically of the United Nations, was not a matter for agreement but a question of general international law. The ICJ had been quite right, in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,<sup>4</sup> to affirm that the United Nations enjoyed international personality and was thus entitled to obtain reparation for damage suffered by one of its officials. However, it had been wrong, in his humble submission, when it had said—or had seemed to say—that recognition of the legal personality of the United Nations derived automatically from the agreement of the founding States. In support of his contention, he would refer members to the statement he had made at the thirty-seventh session,<sup>5</sup> and also to a passage from a course he had given in 1972 at The Hague Academy of International Law.<sup>6</sup> As a person in international law, the United Nations of course had the capacity to conclude agreements and to claim and obtain reparation for damage suffered. At the present stage, however, he would not commit himself on the question whether it

<sup>4</sup> Advisory Opinion of 11 April 1949, *I.C.J. Reports 1949*, p. 174.

<sup>5</sup> *Yearbook . . . 1985*, vol. I, pp. 289 *et seq.*, 1926th meeting, paras. 8 *et seq.*

<sup>6</sup> *Collected Courses of The Hague Academy of International Law, 1972-III* (Leyden, Sijthoff, 1974), vol. 137, pp. 675-680.

could incur some form of international responsibility, as had been suggested.

17. It was therefore necessary to be very careful in deciding whether to include in the draft any general provisions concerning the international legal personality of international organizations. His remarks concerning the United Nations, for instance, could not be extended without qualification to all kinds of international organizations. Moreover, it had been suggested that legal personality could be granted for certain limited purposes to occasional diplomatic conferences. While that might be true of conferences of a universal or very general character, he would have strong doubts about extending such personality to a conference—or indeed to any organization—that was not universal in character. He did not see any general rule in international law comparable to the rule in the Italian Civil Code, and presumably in the civil codes of most countries, whereby two or more persons could set up a company endowed with legal personality without permission and merely by means of a legal transaction concluded among themselves.

18. The question whether or not an international organization was an international legal person therefore had to be considered in the light of the nature of each organization, the kind of activities it carried on and its membership. It would depend on conditions and factors that were not dissimilar from those which decided whether or not a political entity became an international person.

19. For all those reasons, he believed that the Commission should avoid any general statements concerning the legal personality or capacity of international organizations. In particular, with regard to capacity, much as he favoured the proper development of the functions and powers of international and supranational organizations, he had the impression that the ICJ, in the above-mentioned advisory opinion, had gone a little too far in regarding the constituent instrument, and the interpretation of that instrument, as the essential basis for determining the functions and powers of the organization. In his view, the Court had been unduly influenced in that case by the municipal corporate body model and had taken it for granted that everything that could be done in municipal law could also be done in general international law by creating artificial juridical entities.

20. Mr. MAHIU said that it was the first time he had had an opportunity to speak on the present topic, firstly because he had occasionally been obliged to be absent, but chiefly because of the way in which the Commission had so far dealt with the question. The topic had been on the agenda for 10 years, yet the Commission was still discussing its scope and field of application. Admittedly the work had been intermittent: there had been a change of Special Rapporteur in 1979, the topic had not been considered at the 1980, 1981 and 1982 sessions, and only in 1983 had the Commission received a preliminary report, followed by a second report in 1985, and lastly a third report in 1986, the one now under consideration. Consequently, the second part of the topic

had in fact been one of the Commission's concerns for only five years.

21. While it was not his intention at the present juncture to ponder on the Commission's methods of work, it did seem that two lessons could be drawn from such ups and downs. First, the Commission, without ever explicitly saying so, was following the practice of momentarily postponing the consideration of some topics, which thus became marginalized. Secondly, thought could well be given to ensuring some balance in the allocation of work between the various items on the agenda.

22. In any event, the Special Rapporteur had advised that the discussion should be confined to the two main points in his third report (A/CN.4/401): the scope of the draft articles (*ibid.*, para. 31) and the schematic outline of the subject-matter to be covered (*ibid.*, para. 34). Personally, he would be inclined to confine the scope of the draft to certain organizations. Unlike States, existing organizations were so varied that there was no single notion of an international organization, such a concept had never been clarified, and theorists even seemed to have relinquished the idea of formulating one. A decision must therefore be taken and, in his opinion, pre-eminence should go to international organizations of a universal character, regardless of the criteria for making such a choice.

23. To take the geographical criterion first, it could be seen that a universal international organization had the merit of preserving the unity and consistency of the topic. It was not that regional organizations were less interesting from the point of view of developing international law, but two arguments could be adduced for excluding them. First, the 1975 Vienna Convention on the Representation of States was a precedent that confirmed the need to classify the problems and choose the terrain in which it would be possible to make the most rapid headway. Secondly, the diversity of regional organizations was such that it was difficult to find any unity in them. The Secretariat had produced a very interesting document concerning them (ST/LEG/17), from which it was apparent that it would be pointless to look for a single status for both types of organization.

24. While the criterion of the purpose of international organizations was not perhaps always pertinent, it was not negligible. For example, could a political organization, like the United Nations, and a technical, or even a military organization, be treated in the same way? The disparity in objectives would have to be reflected, one way or another, in the régime the Commission was endeavouring to create. But it would not be an easy matter.

25. Again, in terms of purpose, some organizations engaged in co-operation, others in integration (particularly regional organizations, which, in that connection too, posed a singular problem), and yet other organizations settled disputes (the ICJ, international tribunals and courts of arbitration). The value of that criterion was therefore not obvious, but it should certainly be borne in mind.

26. As to the criterion of the nature of the activities of international organizations, some were equivalent to an international public service (the ICJ and the United Nations, for example), whereas others were closer to an industrial or commercial entity, when they were non-profit-making. Was a single status reconciling so many differences conceivable? Connected with that was a problem which had arisen in relation to the jurisdictional immunity of States: for States there were "acts of sovereignty", which lay beyond jurisdiction, and other activities, which did not. It was true that an examination of the nature of the activities of international organizations could well lead the Commission beyond the present topic, but the problem of the jurisdictional immunity of international organizations would have to be tackled one day.

27. For all those reasons, he urged that the Commission should confine itself for the time being to international organizations of a universal character, a course that would preserve the unity of the subject-matter at the stage now reached in the study of the topic. There would always be time to extend the work to encompass other types of organization.

28. In the schematic outline proposed by the Special Rapporteur for the drafting of the articles (A/CN.4/401, para. 34), three questions seemed more important than the others, namely "1. Definitions and scope", "4. Privileges and immunities of the international organization" and "5. Privileges and immunities of officials". The other parts of the outline were constructed around those three and in some sense supplemented them.

29. The Special Rapporteur also set out in his third report his thoughts on the major principles underlying the topic. Other members had already mentioned them, and he would refer only to the notion of legal personality and the notion of the internal law of the organization. No one wanted to start out afresh on defining legal personality, but a distinction should none the less be drawn in that regard between international law and the internal law of the organization. From the point of view of international law, the notion of personality seemed less problematical if it was confined to international organizations of a universal character. The problem with regional organizations was the position of third States, which were often greater in number than the member States and might be loath to grant privileges and immunities to bodies in which they did not participate. In that case the issue underlying the problem of legal personality was the actual definition of international organizations. No doubt some were unambiguous in character, such as the United Nations. But what was to be made of the many bodies constantly being created by scission and proliferation, by the establishment of agencies or branches, and by participation in joint enterprises? Indeed, an International Sea-Bed Enterprise had been established only recently. Clearly it would be necessary at some time or other to agree on a practical and concrete definition.

30. A similar comment could be made with regard to legal capacity, which would doubtless vary depending on whether States were more or less favourably inclined to the establishment of an international organization in

their territory. Some States would probably go much further than the régime the Commission was to devise, whereas others would hold back.

31. The internal law of the organizations was certainly not a crucial matter, but was one that would inevitably arise when immunities had to be defined. For example, a contract concluded between an official and an international organization was normally outside the jurisdiction of the host State: it came under the internal law of the organization, which itself provided for remedies, although such a state of affairs was sometimes questioned. On the other hand, if a contract was concluded between the organization and a private individual who was not an official, the jurisdiction of the host State prevailed, unless otherwise specified in the headquarters agreement.

32. He offered those few comments for consideration by the Special Rapporteur, who had perhaps received too many recommendations for caution, for it was important to move ahead. On the basis of the quite comprehensive outline the Special Rapporteur had proposed, it should be possible for him to submit precise texts of draft articles at the Commission's next session.

33. Mr. SOLARI TUDELA, after congratulating the Special Rapporteur on his third report (A/CN.4/401), said that, following his advice, he would confine his remarks to the scope of the draft articles (*ibid.*, para. 31) and the proposed schematic outline (*ibid.*, para. 34). As to the scope of the régime the Commission was endeavouring to prepare, the question had already arisen as to whether its provisions should be extended to cover regional organizations as well as universal organizations. The work on the first part of the topic had already led to the conclusion of the 1975 Vienna Convention on the Representation of States, and it should be remembered that article 2, paragraph 2, thereof provided for possible relations between States and "other organizations". The fact was, however, that there were States in which some organizations enjoyed greater immunities and privileges than others, more often than not to the detriment of regional organizations, for universal organizations had greater negotiating power with the States in which their activities were conducted. Hence it would be right for the future convention to cover both types of international organization, universal and regional. In addition, Article 53 of the Charter of the United Nations specifically mentioned "regional agencies", and consequently there was no reason to exclude them.

34. The proposed schematic outline was by and large acceptable, although it was difficult to see where it could include the notion of the "right of legation" of international organizations, which had been mentioned in the second report (A/CN.4/391 and Add.1, para. 71). It was already common practice for international organizations to consult the host State on the appointment of representatives to the organization, a logical course inasmuch as a person deemed *persona non grata* by the host State might sometimes be appointed to an international organization. Furthermore, article 9 of the 1975 Vienna Convention entitled the sending State to appoint the members of its mission "freely", but sub-

ject to the restrictions applicable to cases in which a representative was not of the nationality of that State. That aspect of the discretionary power of the host State should be provided for in the draft articles.

35. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.25 a.m.*

## 2026th MEETING

*Friday, 3 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/391 and Add.1,<sup>1</sup> A/CN.4/401,<sup>2</sup> A/CN.4/L.383 and Add.1-3,<sup>3</sup> ST/LEG/17)

[Agenda item 8]

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

1. Mr. REUTER said that the statements made by other members had made it clear to him that the topic under consideration was still at the exploratory stage, since no one yet knew what treasures it held. By presenting the Commission with a detailed programme, which was more like a programme of research than a programme of practical performance, the Special Rapporteur appeared to share that point of view. The questions listed could not all be dealt with in depth, for that would take several years.

2. He had the impression that the Commission's agenda included several topics whose consideration would involve exploratory work designed to determine what the relevant sets of draft articles would cover. That was, to some extent, the case of international liability for injurious consequences arising out of acts not prohibited by international law and of the draft Code of Crimes against the Peace and Security of Mankind. When the Commission had completed the general part of the draft code, for example, it would have to consider

the crimes themselves, some of which had already been recognized as such by international law. In the case of the topic under consideration, the Commission would, as it were, also have to thread its way among the questions with which it could not deal and those which had already been settled, so as to determine the ones on which it should focus its attention.

3. Two ideas expressed with regard to such exploratory work should be taken into account. The first was that the outline proposed by the Special Rapporteur should be used to go over all the ground covered by the topic in order to pin-point the questions to be dealt with. The second was that it was not at the research stage, but in the second phase, that the Commission must, as Mr. Tomuschat (2025th meeting) had suggested, not go too far. Initially, the Commission should not limit its research, which might enable it to discover questions of concern not to regional organizations, but to organizations of a universal character with a limited purpose, whose constituent instruments, statutes and headquarters agreements were less elaborate than those of the major universal organizations themselves and which therefore encountered problems that the latter did not face. It was thus only when the Commission came to propose solutions to a particular problem that it would have to proceed somewhat cautiously.

4. He himself went even further than Mr. Tomuschat in wondering whether the Commission would be able to formulate draft articles to apply to a group as large as that of the specialized agencies, for although, as Mr. Mahiou (*ibid.*) had noted, some of those agencies were similar, others differed considerably from one another. That was especially true with regard to immunities and financial resources: IMF and the World Bank, for example, had always operated on a grander scale than the other specialized agencies. He was not even certain that, in its work on the topic, the Commission could hope to cover the United Nations system in its entirety. He recalled that, in its early work on the law of treaties, the Commission had discussed the question whether certain treaties concluded by the United Nations were binding only on one part or another of the Organization. For example, would an agreement concluded by UNICEF be a United Nations agreement or an agreement by only one part of the United Nations? Constantin Stavropoulos, who had been United Nations Legal Counsel at the time, had urged the Commission to leave aside that aspect of the problem as a matter of expediency.

5. Moreover, when a topic that required exploratory work was being studied, serious problems arose in obtaining information and, indeed, in deciding whether or not the undertaking was worth the effort. In the case of the topic under consideration, were the serious problems faced by the United Nations to be examined in general terms? That was a matter to be settled by means of personal contacts, in which the Chairman and the Special Rapporteur would have a special role to play, not a matter to be discussed in the Commission itself. Furthermore, the Secretariat might have a heavy burden to bear, as would all those whom the Commission would ask to do research work. Questions that might be considered included the international civil service and agreements concluded by the United Nations with

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

regional international organizations, such as the European Communities and organizations in socialist countries, concerning pension schemes for officials transferred from one organization to another.

6. The Commission must not forget that the United Nations Secretariat was being put to the test by the current policy of austerity. He was therefore somewhat concerned by the fact that the Commission might more and more frequently be dealing with topics for which it would need outside assistance. If it was to overcome all the obstacles involved in exploratory work, it would no longer be able to work on its own, as in the golden age of its consideration of the law of treaties. He was convinced that the Commission had to explain that aspect of the problem to the Sixth Committee of the General Assembly and tell it why it had to spend so much time on particular topics. It was for the Commission to weigh the problems involved in the topics it had before it and to determine which ones would require lengthy exploratory work, as well as outside assistance.

7. The CHAIRMAN said that the meeting would rise to enable the Planning Group's Working Group on Working Methods to meet.

*The meeting rose at 10.40 a.m.*

## 2027th MEETING

*Tuesday, 7 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Edilbert RAZAFINDRALAMBO

*later:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Relations between States and international organizations (second part of the topic) (continued)**  
(A/CN.4/391 and Add.1,<sup>1</sup> A/CN.4/401,<sup>2</sup> A/CN.4/L.383 and Add.1-3,<sup>3</sup> ST/LEG/17)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. SHI congratulated the Special Rapporteur on his reports and said that the schematic outline proposed

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

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

in the third report (A/CN.4/401, para. 34) made a definite contribution to the Commission's work on the topic. He also thanked the Secretariat for its very useful study on the practice of international organizations (A/CN.4/L.383 and Add.1-3). He subscribed to most of the views expressed by previous speakers on the scope of the topic and the general approach to it, and, on the whole, had no difficulty in accepting the Special Rapporteur's proposed outline. He wished, however, to raise certain points for the Special Rapporteur's consideration in formulating the draft articles.

2. First, he unreservedly agreed with the Commission's conclusions on the general approach to the topic, as stated in the Special Rapporteur's second report (A/CN.4/391 and Add.1, paras. 10 and 15), namely that the Commission should, in view of the complex issues involved, proceed with great caution, adopting a pragmatic approach in formulating specific draft articles and avoiding protracted debates of a theoretical or doctrinal nature. That was an important point to which due regard should be paid, particularly since the 1975 Vienna Convention on the Representation of States, which had been concluded on the basis of the Commission's work on the first part of the topic, had still not received the necessary ratifications for entry into force.

3. Secondly, given the difficulties inherent in arriving at a precise and comprehensive definition of international organizations, the Commission should be satisfied with the definition laid down in the 1975 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

4. Thirdly, for the reasons stated by Mr. Tomuschat (2025th meeting), the scope of the draft articles should be confined to international organizations of a universal character. In that connection, the privileges and immunities of international organizations formed only one part of relations between States and such organizations; the draft should therefore also include specific provisions on the obligations of international organizations and their officials towards States.

5. Fourthly, as the Special Rapporteur had rightly noted in his second report (A/CN.4/391 and Add.1, paras. 59-60), the internal personality of international organizations was accepted by member States without much difficulty, but States were more reticent where international personality was concerned. That was because internal personality operated within the framework of the municipal law of member States, whereas international personality involved sensitive theoretical and political issues. In general, States were not prepared to regard international organizations as subjects of international law and active members of the international community on a par with sovereign States. Mr. Arangio-Ruiz (2025th meeting) had been right to say that the Special Rapporteur should not include in the draft articles any general provisions on the objective personality of international organizations.

6. Fifthly, the nature of the privileges and immunities of international organizations and their officials, and the questions of waiver of immunity and protection of

international officials, should receive ample and realistic treatment.

7. Sixthly, the privileges and immunities of international officials who were nationals of the host State was a sensitive matter and should be studied carefully in the light of the treaties in force and the practice of States and international organizations. The draft should contain specific provisions in that connection.

8. Lastly, the Commission could perhaps include in its future reports to the General Assembly a section on international conventions concluded on the basis of drafts formulated by the Commission, following the practice of UNCITRAL. That would serve to remind States of the need for ratification or acceptance of, or accession to, the conventions in question. In the case of the topic under consideration, ratification of or accession to the 1975 Vienna Convention by an ever-increasing number of States would undoubtedly facilitate the Commission's present work.

9. Mr. BARSEGOV said that the Special Rapporteur's third report (A/CN.4/401) dealt directly with the issues to be resolved, and the documents prepared by the Secretariat (A/CN.4/L.383 and Add.1-3, ST/LEG/17) were a useful contribution to the debate. Relations between international organizations and States were one of the major issues of the present day, for such organizations were an important part of the institutional arrangements for intergovernmental co-operation, and they were playing an increasingly greater role. The study of the present topic, which was entirely in keeping with the development of international relations and of international law—in other words, which was aimed at *rapprochement* between States, the strengthening of interdependence and enhanced co-operation—should be geared directly to perfecting the ways and means of such co-operation. The formulation of a definitive legal framework should therefore seek to ensure that all member States, particularly host States, respected the character of international organizations and fostered the development of their activities, without discrimination in regard to their officials.

10. The problems posed by the activities of international organizations were not new and the Commission had gained sound experience in the matter. Codifying the rules governing the status of international organizations, filling gaps in the law, strengthening the privileges and immunities of organizations and protecting them from political whims could all make an essential contribution to the development of diplomatic law in the broadest sense and, at the same time, to the strengthening of the rule of law in international life. For example, the progressive development of the law had led to the adoption of the 1975 Vienna Convention on the Representation of States and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

11. However, there were new aspects to the problem of regulating relations between such large entities, and some members, like Mr. Barboza, feared that, in the absence of fundamental rules on the subject, the Com-

mission would be moving into uncharted territory. Accordingly, the subject-matter had to be accurately demarcated and placed in the general context of the development of international law. Only such a general standpoint would make it possible to determine the essential points and the overall directions leading to a solution.

12. Yet the scope of the régime to be prepared had still not been defined, and the Commission was still at the stage of defining the topic and formulating an outline. That was particularly surprising in view of the number of years already devoted to the topic and the fact that several reports had been submitted. At the present session, the ideas advanced had been as numerous as they had been varied. Some members suggested that the régime should be extended to cover regional organizations, while others proposed that it be limited to universal organizations. Others sought a solution in a classification of organizations according to their activities, rightly fearing that articles attempting to cover all types of organization, including those that would emerge in the future, might well be excessively abstract and thus of less value than the instruments already in force. In that regard, Mr. Mahiou (2025th meeting) was right, particularly since there was an even more pressing need for a precise classification as a result of the diversity of existing international organizations, having very broad attributes, as did the United Nations, or very narrow ones, as did those working in the industrial or commercial field.

13. As to organizations of a universal character, principally the United Nations and the specialized agencies, the views expressed were so numerous and so contradictory that it might well be asked whether a new régime should really be superimposed on a subject-matter that was already amply developed. The number of such organizations was increasing continually and the régime could therefore be built up by analogy. To that end, it would be enough to spell out and codify the rules of international law that defined the status of international organizations, to view the aim of such work as maintaining the development of the law at the same level, and to endeavour to utilize the existing treaty provisions, in keeping with the needs of the present day. For example, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies referred to the 1946 Convention on the Privileges and Immunities of the United Nations. In any event, the efficacy of the treaties in force should be not doubted: account simply had to be taken of the new requirements of international life.

14. The Commission should certainly pursue its endeavours, but was it sure that it would not find itself in an impasse? Such was the diversity of international organizations that it was questionable whether they lent themselves to a standard definition. In keeping with the logic underlying the consideration of the first part of the topic, the focus could be placed on organizations of a universal character, to the exclusion of others. The elaboration of a convention applicable to that kind of organization would be of considerable importance, for delegations, observers and permanent missions were indispensable in the new international diplomacy. In that sense, it could be said that the 1975 Vienna Convention

on the Representation of States marked a decisive stage in strengthening the legal status of such organizations.

15. At the present time, the Commission's task was to prepare draft articles intended to lay the legal foundation for the functioning of the executive organs of international organizations, as well as of a much wider group of organizations, including those on which there was no foreign government representation. In that regard, the Special Rapporteur had enumerated in his second report (A/CN.4/391 and Add.1, para. 54) the instruments in which international organizations had been given the status of a subject of law, and it could be seen that, apart from the major Conventions of 1946 and 1947, there were many instruments that concerned organizations other than those of the United Nations. However, the Special Rapporteur *a priori* restricted the field of application of the proposed régime to the subject-matter covered by the 1975 Vienna Convention, and it was a fact that, as Mr. Reuter had said, strengthening the privileges and immunities of international organizations was outmoded. That was apparent from the statements made in the Sixth Committee of the General Assembly, which the Special Rapporteur cited in his third report (A/CN.4/401, para. 8). In those circumstances, was it possible to engage in the work of codification by enhancing the status of the United Nations and the specialized agencies and by expanding the rights and privileges of those organizations? That would doubtless constitute progressive development of the law in a field where development was necessary, but it would also without doubt be a waste of energy and resources to deal with questions that had already been settled, when the concrete activities of those organizations were already guaranteed.

16. There should be no misunderstanding: he was entirely in favour of strengthening the rights and privileges of the United Nations and organizations of a universal character, whose importance for peace and co-operation was invaluable. But a clear idea of the aim to be pursued was essential. If the point was really to strengthen privileges and immunities, he was quite ready to make his contribution, but he could not go along with an exercise which watered them down on the pretext of developing or unifying the law. Accordingly, if the Commission took the view that the requirements essential for such development were met, there was nothing more to be said. Otherwise, it would perhaps be better for the Commission to consider directing its attention to other questions: to the organizations and institutions whose situation had not yet been sufficiently studied.

17. In his opinion, the definition of the present topic was tied in with the relations between the Commission and the General Assembly. The difficulties the Commission was experiencing in formulating the topic originated in a mistaken methodological approach: the Commission had embarked on the work without any accurate idea of the problem to be dealt with or its theoretical bases. The Special Rapporteur had said in his second report (A/CN.4/391 and Add.1, para. 30): "When the time comes to prepare the . . . draft articles, it will have to be decided to which organizations the draft applies." But that was precisely where the work should have started. It was not for the Commission, but

for the General Assembly, to define the topic to be studied. To find a way out of the situation, the Commission should prepare a number of variant texts, accompanied by commentaries, and refer the dossier to the Sixth Committee for its opinion. It would also be advisable for the Special Rapporteur to reflect on the scope of the draft articles, in the light of the comments made in the course of the discussion, and state his conclusions at the Commission's next session.

18. The schematic outline proposed in the third report (A/CN.4/401, para. 34) posed fewer problems. It was based on the traditional pattern of conventions and included 11 sections. One member of the Commission would like further elaboration of sections 1, 4 and 5 of the outline. But it was difficult to decide on the merits of the outline without first defining the organizations to which it related. Other members had proposed that the question of the privileges and immunities of experts should be considered; but there, too, everything would depend on the definition of international organizations.

19. Lastly, he willingly complied with the Special Rapporteur's request that the discussion be limited to the scope of the draft articles and the schematic outline. He simply regretted that such a limitation failed to do justice to the extensive deliberations and reports on the topic, more particularly on the fundamental theoretical issues discussed both in the third report and at previous sessions, namely the definition of international organizations and their legal capacity and personality. The new members of the Commission were thus deprived of the opportunity of stating their views on all those questions. Accordingly, he had no choice but to reserve the right to speak on those matters when the problem of the scope of the topic had been settled and the Commission ultimately embarked on the formulation of the draft articles.

*Mr. Razafindralambo took the Chair.*

20. Mr. SEPÚLVEDA GUTIÉRREZ said that the Special Rapporteur's third report (A/CN.4/401) had the twofold merit of taking full stock of the situation and indicating the path to be followed. He also wished to thank the Secretariat for its comprehensive document on the status, privileges and immunities of regional organizations (ST/LEG/17). The present topic was all the more worth while in that international organizations were daily playing a more important role and there were numerous lacunae in the law applicable to them, including practices which were not yet harmonized and developments which often went beyond the letter of the constituent instruments. On those points, the third report was indeed thought-provoking. Nevertheless, he would confine himself to a few general aspects of the question, in the hope of helping the Special Rapporteur in his work.

21. Like other members, he thought that the scope of the draft should be confined to intergovernmental organizations of a universal character, for it was already a quite difficult and wide-ranging subject. In addition, regional organizations had purposes, goals and relations with States that were highly varied. The Commission could revert to them after defining the régime applicable to organizations of a universal character. That did not



mean that regional organizations were unimportant to the member States, since they supplemented the work of organizations of a universal character, even though there were enormous differences between the two kinds of bodies—for example, in the field of human rights or collective security—and there were also duplications in functions, sometimes to the detriment of some States or indeed to the international community as a whole. For all those reasons, the Commission should, for the time being, focus solely on international organizations of a universal character.

22. The schematic outline proposed by the Special Rapporteur (A/CN.4/401, para. 34) took a broad view, moved in the right direction and, above all, was in keeping with the mandate assigned to the Commission by the General Assembly. Clearly, the various sections would have to be developed and supplemented. But it was the only outline admissible in view of the Commission's objective, and nothing could be cut out without mutilating it. Moreover, at its next session, the Commission would have the time to move ahead in its work and could gain from the experience of its 14 new members. For the Special Rapporteur, it would be an opportunity to submit a new study reflecting the views expressed in the course of the discussions and making it possible to tackle the preparation of the articles.

23. In more general terms, it was difficult to ascertain the nature of the normative instrument that was to be prepared. Was it to be a parallel convention supplementing the 1975 Vienna Convention, a separate convention covering all the possible types of relations that the various categories of international organizations could maintain, or a series of recommendations that could lead to a code of conduct? The Commission would have to decide, but should do so without haste, for everything would depend on its choice.

24. As to the content of the future instrument, the Special Rapporteur stated in his third report (*ibid.*, para. 36) that the aim was to harmonize "an elaborate and varied network of treaty law" and to consolidate "a wealth of practice". The question was to determine how to proceed. Perhaps it would be useful to have a detailed presentation of the information supplied by the Special Rapporteur in that regard. Generally speaking, however, the aim seemed to be not to expand the privileges and immunities enjoyed by international organizations, for there was obvious resistance in that respect from the member States, but to supplement and spell out provisions which had not been clear from the start or were open to various interpretations. The point was to reorganize, not to innovate.

25. Mr. OGISO congratulated the Special Rapporteur on his third report (A/CN.4/401), which carefully summarized the deliberations on the topic in the Commission and in the Sixth Committee of the General Assembly. Members who had already spoken seemed to have made two major points: first, that the Commission should adopt a pragmatic approach and avoid discussions of a doctrinal nature; and secondly, that the scope of the draft convention should be limited to international organizations of a universal character. While both views were acceptable in the main, he had some hesitation about proceeding too quickly to the process

of drafting articles without further studying certain theoretical assumptions. It would be regrettable if the Commission decided at the present stage to leave aside the question of international legal personality—even if a discussion of the issue did run into some obstacles—and to confine itself to consideration of the existing conventions. Furthermore, the host countries of the various specialized agencies did not at present seem to take a very positive attitude to a review of the relevant conventions, and he wondered whether such a review would produce constructive results.

26. In his second report (A/CN.4/391 and Add.1, paras. 15 and 31), the Special Rapporteur had proposed formulating general rules governing the legal status of international organizations, remarking that an international organization acted and operated in the international community with its own personality, even though its personality was not clearly defined. However, the personality of an international organization derived from certain objective criteria and gave rise to various categories of status. He would therefore like to raise two questions which should be clarified in the Special Rapporteur's next report: first, what elements constituted the pre-conditions of international personality; and secondly, what was the relationship between the capacity to operate on an international level and the legal personality of an international organization?

27. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on his third report (A/CN.4/401), in which he affirmed his intention to display prudence and pragmatism. He welcomed that departure from the approach the Special Rapporteur had adopted in his second report (A/CN.4/391 and Add.1), which had dealt with fundamental principles. It was, of course, important to formulate fundamental principles in preparing the draft articles, but those articles should be concerned mainly with the privileges and immunities of international organizations. The question of their status should therefore be incidental, for even if the Commission wished to do so, he did not think that it would ever be able to draw up a statute for international organizations or a charter of their rights and duties. Status should be regarded only as a basis for the development of privileges and immunities; in that way, doctrinal entanglements and possibly insurmountable difficulties would be avoided.

28. The essence of the topic was concerned with the need to recognize that international organizations had an objective international legal personality—to borrow the expression used by the ICJ in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*,<sup>4</sup> which had dealt with the capacity of the United Nations to bring international claims—and that, inasmuch as international organizations, along with States, played a role in international life, they were entitled to certain privileges and immunities in order to facilitate their task. That right had already been recognized in international practice and in the practice of States, but the question that remained was: for which international organizations should

<sup>4</sup> *I.C.J. Reports 1949*, p. 174.

privileges and immunities be recognized? As the matter had already been decided in principle, he considered that the Commission should continue to define the various privileges and immunities and, when a list had been drawn up, it could decide to which international organizations the list would apply.

29. The background to the topic, which the Commission had been invited to consider in 1958 and had been placed on its agenda in 1962, also dictated the need for a pragmatic approach. In that connection, he noted that the Special Rapporteur, in compliance with the wishes of the Commission, included in his third report (A/CN.4/401, para. 31) a list of the privileges and immunities of an international organization and subdivided them into different groups. That list had in effect been taken from the preliminary report of the previous Special Rapporteur, the late Abdullah El-Erian, who had presented<sup>5</sup> an indicative catalogue of the privileges and immunities enjoyed by the United Nations and the specialized agencies at the time, and it could be accepted as a basis for the Commission's work. Mr. Reuter (2026th meeting) had suggested that the list should be regarded as a programme of research rather than of practical performance. He agreed up to a point, but not entirely, for presumably the Commission was not going to engage solely in a programme of research into each and every privilege and immunity. Moreover, every privilege and immunity would not necessarily remain on the list. In any event, performance and research should go hand in hand.

30. The Special Rapporteur also presented a schematic outline for the drafting of the articles (A/CN.4/401, para. 34), which was apparently a slightly modified version of the first list. For his own part, he was not quite sure whether those modifications were improvements, and he particularly had doubts about the reference in section 4.A (b) to freedom of assembly, which was not a felicitous expression. Similarly, sections 1 to 3 and 7 to 11 of the outline were presented in a somewhat disorganized manner. There too, the Special Rapporteur would presumably introduce a more logical order in future, possibly along the lines of that adopted for the articles of the first part of the topic. On the other hand, sections 4 and 5 were well organized and in a way reflected the eventual content of the relevant articles.

31. He would be very interested to hear how the Special Rapporteur planned to proceed, particularly since many members considered that the topic was not ripe for development and had doubts about the theoretical bases for the articles. The topic had, however, been before the Commission for many years and his fear was that, if some significant progress were not made, the same discussion would recur all over again when the new membership was elected in four years' time, with the result that the topic would never get off the ground. It was true that the Commission should proceed with prudence, as indeed it did in all its deliberations, but that quality should not be overdone, for otherwise it would make no progress at all in its work. He was none the less confident that, under the guidance of the Special Rapporteur, the Commission

would move ahead at a pace consistent with its obligations to the General Assembly.

*Mr. McCaffrey resumed the Chair.*

32. Mr. AL-BAHARNA said that he would begin with a few general observations. The first related to the approach to the present topic. The previous Special Rapporteur, Abdullah El-Erian, had recommended a pragmatic approach, so as to formulate specific draft articles and avoid doctrinal issues. For his own part, he would certainly like to avoid a discussion of the theoretical aspects of the topic, but he failed to see how the Commission could altogether escape considering the theory of the powers and functions of international organizations. There were considerable differences among States and among scholars as to whether international organizations were based upon the "delegation of powers" or "implied or inherent powers". The practice of the United Nations had shown time and again that those were not merely academic questions, but very real issues, the answers to which had varied according to the theory of international organizations. Fortunately, the ICJ, in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, had provided an authoritative answer by affirming:

... Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. . . .<sup>6</sup>

33. That principle of international law—which the Commission should bear in mind in its consideration of the status, privileges and immunities of international organizations—had both positive and negative implications: positive inasmuch as it stated that the powers of the Organization transcended its constituent instrument, and negative inasmuch as those powers were limited by considerations of functional necessity.

34. As to the scope of the topic, he too thought that the Commission's main concern should be with international organizations of a universal character. Any attempt to include regional organizations as well would involve both theoretical and practical difficulties. Furthermore, the aspects of relations to be codified should be defined at the very outset. In the time available, the Commission would not be able to deal with all aspects of relations between States and international organizations. On the other hand, the Commission could not limit its study to questions of status, privileges and immunities. He therefore suggested the adoption of a flexible approach that would cover only relations which might be characterized as "political" and at the same time take into consideration aspects other than status, privileges and immunities. Perhaps it was also desirable to include the question of the obligation of States not to seek to influence the Secretary-General and the staff of the United Nations in the discharge of their responsibilities, as well as the obligation of international officials not to seek or receive instructions from Governments.

35. On the question of methodology, the main problem was how to limit the topic to reasonable propor-

<sup>5</sup> *Yearbook . . . 1977*, vol. II (Part One), p. 153, document A/CN.4/304, paras. 70-71.

<sup>6</sup> *I.C.J. Reports 1949*, p. 182.

tions. He believed that, in the earlier discussions on the topic, the Special Rapporteur had been asked to adopt a selective approach and to consider problems concerning international organizations as a first stage, postponing consideration of more delicate problems, such as those relating to international officials, to a later stage. That point was mentioned in the third report (A/CN.4/401, para. 27).

36. In the interests of a more scientific methodology, the topic could be delimited on the one hand by the principles of international law inherent in international organizations and, on the other, by adopting an inductive approach to the whole problem. The constituent instruments of international organizations enunciated some basic principles of international law governing the relations between States and international organizations and their officials, and the Commission could draw on those principles in formulating operative rules for international organizations and their officials. In the case of the United Nations, Articles 100, 104 and 105 of the Charter would be relevant for that purpose. The interpretation of those provisions by the ICJ was particularly significant in that regard. In other words, the operative rules to be framed by the Commission should stem from the constituent instruments themselves as authoritatively construed by the ICJ. Such practice as was reflected in unilateral declarations by host States or in legal opinions of international organizations did not have the same authority. The Commission should keep that distinction in mind in assessing the juridical significance of the various sources of information available to it.

37. Consequently, the Commission should adopt an inductive approach to the study of the available sources, particularly the valuable studies prepared by the Secretariat in 1967 and 1985 on the practice of the United Nations and the specialized agencies. With that approach, the Commission should be able to formulate operative rules that were logically correct and politically acceptable to the community of States.

38. The fundamental issue underlying the topic, however, was the personality of international organizations. The view that international organizations had a personality of their own, distinct from that of their member States, had gained ground in international law since the above-mentioned advisory opinion of the ICJ in 1949. Consequently, international organizations enjoyed certain attributes in international relations. Nevertheless, those attributes could not be considered as having been determined once and for all, for they changed with the development of international relations. It was therefore essential to define them in such a way as not to jeopardize their future growth and development. In his second report, the Special Rapporteur had stated that "international organizations are recognized, although in some instances with certain limitations, as having legal personality and capacity" (A/CN.4/391 and Add.1, para. 56). It was therefore appropriate to examine what those limitations were and whether they were justifiable in international law.

39. In the same report (*ibid.*, para. 74), the Special Rapporteur had submitted, under the heading "Legal personality", two alternatives of the same text, one con-

stituting article 1 and the other articles 1 and 2. In his view, those provisions were couched in unduly narrow terms. That was true, for example, of the phrase "to the extent compatible with the instrument establishing them", in paragraph 1 of article 1. Similarly, paragraph 1 (a), (b) and (c) gave the impression that international organizations had no attributes other than those expressly specified therein. The Commission should be careful not to do anything that might affect the growth of international organizations in the future, and should avoid a restrictive definition of their present powers.

40. He also had doubts regarding the words "and under the internal law of their member States", in the first sentence of paragraph 1. No doubt the internal law of some member States expressly accorded legal personality to international organizations, but that was not universally the case. Moreover, the position of international organizations under the internal law of member States was hardly relevant to compliance with international obligations. Hence the words in question seemed to be unnecessary.

41. On the other hand, he endorsed the Special Rapporteur's suggestion that paragraphs 1 and 2 of draft article 1 (alternative A) could be made two separate articles (alternative B). Draft article 2, on the treaty-making capacity of international organizations, would probably require strengthening. Not all the constituent instruments of international organizations expressly provided for the conclusion of treaties or international agreements, but such treaties and agreements were now the practice of the organizations and that would have to be reflected in article 2.

42. Mr. Sreenivasa RAO said that international organizations, which had come to play such an indispensable role in the affairs of the international community, symbolized the ever-present interdependence of peoples and nations. The part played by intergovernmental organizations of a universal character had a great impact on the development, interpretation and application of international law. Indeed, even intergovernmental organizations of regional or less than universal membership were fulfilling an important role in certain areas.

43. While those international organizations could be characterized as essentially political or functional, depending on their type of activity, the United Nations at the universal level and EEC at the regional level had to be singled out as having a more significant and special character and as possessing legal personality and capacity that were quite unique.

44. The legal personality and capacity of the United Nations were set out by the Charter itself, as were the extensive constitutional functions which it performed, not only on behalf of its Member States, but on behalf of the entire international community. The ICJ, for its part, had on more than one occasion clarified the content of the legal personality and capacity of the United Nations. There was thus no need to enter into detail on the subject of the personality of the United Nations and the doctrine of its "implied powers", except to note its capacity to contract and to acquire and dispose of movable and immovable property, which was beyond

question. Besides, the United Nations, its subsidiary bodies and its specialized agencies enjoyed full functional privileges, and their officials were recognized as international civil servants enjoying functional privileges and immunities for all their official activities.

45. There was thus a universally accepted practice with respect to the privileges and immunities applicable to the United Nations and its organs. Moreover, the special problems faced by Member States in their relations with organizations of the United Nations family, particularly at Headquarters, were customarily discussed in the Committee on Relations with the Host Country with a view to amicable settlement. EEC was different in that it purported to be more than a mere intergovernmental organization: it was the first of its kind, aiming at integration in certain selected areas. For present purposes, however, the Commission did not need to deal with EEC because of its special scope and character.

46. As to the other intergovernmental organizations, in almost every case they had special instruments governing their constitution, composition, functions and legal personality and capacity. Those constituent instruments determined in what respects the organization had legal personality and capacity: in most instances, it had the capacity to contract and to acquire and dispose of movable and immovable property. In that connection, draft article 1 as submitted by the Special Rapporteur in his second report (A/CN.4/391 and Add.1, para. 74) was acceptable.

47. As the Special Rapporteur recalled in his third report (A/CN.4/401, para. 23), the codification of the law on the topic, and its progressive development to the extent that there were any gaps or any need for harmonization in existing practice, were necessary to complement the Commission's work in the field of diplomatic law that had culminated in the 1961, 1963, 1969 and 1975 Conventions.

48. A number of issues and delicate policy questions should also be investigated with due attention and caution, such as those referred to in the second report (A/CN.4/391 and Add.1, para. 6) and the third report (A/CN.4/401, para. 22). In addition, a number of issues had been raised during the discussion regarding the relationship between the present topic and the existing treaties, agreements and special arrangements.

49. Another question had been raised as to whether the draft articles should be regarded as superseding existing arrangements, or whether they should instead be deemed to have a residual character to supplement the law where the existing instruments were silent or embodied mutually conflicting provisions. A further possibility was for the draft articles to take the form of recommendations or guidelines for use by States and international organizations in the negotiation of any questions relating to privileges and immunities.

50. In his view, the exercise in which the Commission was engaged should result in a set of draft articles which, whatever their form or ultimate status, would not affect the status of the existing treaties, agreements and arrangements. The draft articles should be seen as providing only the necessary guidelines and recommen-

dations for States and international organizations to adopt as they saw fit.

51. With regard to the scope of the privileges and immunities to be granted, certain factors would be highly relevant, such as the permanence of organizations and their objectives, which might be political or diplomatic as opposed to purely commercial operations. Again, it was practically axiomatic that the privileges and immunities of an international organization and its officials were essentially functional, in other words intended to enable them to perform their functions unhindered. However, the privileges and immunities of officials were slightly more restricted than those of the organization itself, for which a minimum of privileges and immunities appeared to be indispensable, namely inviolability of premises and archives, privileged communications, immunity from legal process, exemption from the fiscal and financial regulations of States, particularly the host State, and the right to acquire and hold property and assets.

52. The Commission should also study the question of abuse of privileges and immunities, bearing in mind certain recent allegations of violations. It would have to display some sensitivity, focusing only on safeguards and general principles and avoiding any controversy.

53. The settlement of disputes should generally be confined to such known means as resort to the Committee on Relations with the Host Country, negotiations, good offices and mediation. A formal procedure for third-party determination was not suitable for relations between States and international organizations. The possibility of referral to the ICJ or to some specially constituted body for an advisory opinion would be appropriate, but only as a last resort.

54. Lastly, the outline proposed by the Special Rapporteur was largely acceptable, subject of course to the need to give careful thought to the many points made during the debate.

55. Mr. KOROMA said that he had already expressed his views on the present topic, which was very relevant and timely, at a previous session and would therefore confine himself to a brief examination of a few points raised by other members. It was hardly necessary to stress the importance of international organizations, which covered the entire spectrum of human activities, such as the maintenance of international peace and security, international economic and technical cooperation and economic development. It was enough to note the tendency of States to create more and more organizations.

56. It had been suggested that the scope of the topic should be restricted by excluding the problem of the legal personality and capacity of international organizations and also by concentrating on privileges and immunities. Such a course would be an over-simplification of the issues at stake. The Commission was the proper body to study such questions as the legal personality and capacity of international organizations: avoiding them would mean shirking its responsibilities.

57. Moreover, he did not believe that the question of the legal personality and capacity of organizations was

as difficult as had been suggested. In practice, it was the functions and responsibilities of an organization that were involved, and, for the most part, they were set forth in the constituent instrument. As Mr. Reuter (2024th meeting) had pointed out, the consequence of international personality was that international organizations had the capacity to conclude treaties and to assume certain responsibilities. That being so, it should be possible for the Commission to consider the matter and he strongly urged it to pronounce itself on that all-important issue.

58. In its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ had recognized the personality of international organizations. Without equating the status of international organizations with that of States, it had acknowledged that the United Nations had been assigned certain functions and rights; that, in order to exercise those functions and rights, it had international personality and the capacity to conclude treaties; and that, although it was not on a par with States, the Organization was a subject of international law, having rights and duties and being endowed with legal capacity. The Court had concluded:

... the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.<sup>7</sup>

That important opinion of the ICJ constituted the repudiation of a certain form of neo-positivism which tended to make the existence of the international personality of an international organization dependent on recognition by States. It was also interesting to note the recognition of the legal capacity of WHO by the ICJ in its advisory opinion of 20 December 1980 on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.<sup>8</sup>

59. He agreed with Mr. Calero Rodrigues's suggestion that the Commission should first concentrate on the privileges and immunities of the organizations themselves. He also agreed that the Commission's first task was to deal with international organizations of a universal character. Having done that, however, the Commission should also deal with regional organizations: it could not ignore such important bodies as OAS and OAU.

*The meeting rose at 1 p.m.*

<sup>7</sup> *I.C.J. Reports 1949*, p. 185.

<sup>8</sup> *I.C.J. Reports 1980*, p. 73.

## 2028th MEETING

*Tuesday, 7 July 1987, at 3.05 p.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Ben-

nouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### The law of the non-navigational uses of international watercourses (*continued*)\* (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.411)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE

TITLES OF PARTS I AND II OF THE DRAFT *and*  
ARTICLES 1 TO 7

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of parts I and II of the draft and draft articles 1 to 7 as adopted by the Committee (A/CN.4/L.411), which read:

#### PART I

#### INTRODUCTION

##### *Article 1. [Use of terms]<sup>a</sup>*

##### *Article 2. Scope of the present articles*

1. The present articles apply to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters.

2. The use of international watercourse[s] [systems] for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

##### *Article 3. Watercourse States*

For the purposes of the present articles, a watercourse State is a State in whose territory part of an international watercourse [system] is situated.

##### *Article 4. [Watercourse] [System] agreements*

1. Watercourse States may enter into one or more agreements which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof. Such agreements shall, for the purposes of the present articles, be called [watercourse] [system] agreements.

2. Where a [watercourse] [system] agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that

<sup>a</sup> The Drafting Committee agreed to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980. Thus the word "system" appears in square brackets throughout the text.

\* Resumed from the 2014th meeting.

<sup>1</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the international watercourse [system].

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse [system], watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a [watercourse] [system] agreement or agreements.

*Article 5. Parties to [watercourse] [system] agreements*

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any [watercourse] [system] agreement that applies to the entire international watercourse [system], as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse [system] may be affected to an appreciable extent by the implementation of a proposed [watercourse] [system] agreement that applies only to a part of the watercourse [system] or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

PART II

GENERAL PRINCIPLES

*Article 6 [6 and 7]. Equitable and reasonable utilization and participation*

1. Watercourse States shall in their respective territories utilize an international watercourse [system] in an equitable and reasonable manner. In particular, an international watercourse [system] shall be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the international watercourse [system].

2. Watercourse States shall participate in the use, development and protection of an international watercourse [system] in an equitable and reasonable manner. Such participation includes both the right to utilize the international watercourse [system] as provided in paragraph 1 of this article and the duty to co-operate in the protection and development thereof, as provided in article . . .

*Article 7 [8]. Factors relevant to equitable and reasonable utilization*

1. Utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of an international watercourse [system] in one watercourse State on other watercourse States;

(d) existing and potential uses of the international watercourse [system];

(e) conservation, protection, development and economy of use of the water resources of the international watercourse [system] and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 6 or the present article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of co-operation.

2. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) thanked the members of the Drafting Committee for their hard work and co-operation during the 27 meetings at which the Committee had considered those draft articles and welcomed the

fact that some members of the Commission who were not members of the Committee had taken an active part in its work. He also thanked the Special Rapporteur for his constant willingness to find solutions acceptable to all.

3. He recalled that, at its thirty-second session, in 1980, the Commission had provisionally adopted six draft articles on the topic and had accepted a provisional working hypothesis as to what was meant by the term "international watercourse system". At its thirty-sixth session, in 1984, it had referred to the Drafting Committee draft articles 1 to 9 as submitted by the previous Special Rapporteur, Mr. Evensen, in his second report; the first six of those nine draft articles had constituted revised versions of the articles and the working hypothesis provisionally adopted by the Commission in 1980. The 1980 texts and the nine draft articles referred to the Drafting Committee in 1984 had been reproduced in the second report of the present Special Rapporteur (A/CN.4/399 and Add.1 and 2, para. 4 and footnotes 20 and 22 to 29).

4. The Drafting Committee had taken account in its work of the discussions held on the topic at earlier sessions and, in particular, of the comments made at the previous session on the four points concerning draft articles 1 to 9 as submitted in 1984 to which the Special Rapporteur had drawn the Commission's attention.<sup>3</sup>

5. With regard to the texts proposed by the Drafting Committee (A/CN.4/L.411), the Committee had followed the standard practice of referring to "the present articles" and had not used the words "the present Convention", which had appeared in some of the draft articles submitted in 1984. Moreover, the words "article 6 [6 and 7]" were used to indicate that the new article 6 combined the texts of draft articles 6 and 7 referred to the Committee in 1984. Similarly, article 7 corresponded to draft article 8, referred to the Committee the same year.

6. Due to lack of time, the Drafting Committee had been unable to complete its consideration of draft article 9, referred to it in 1984, or to take up draft articles 10 to 15, which the Commission had referred to it at the present session. The Committee would consider those seven draft articles at a future session of the Commission.

TITLE OF PART I OF THE DRAFT

7. The Drafting Committee recommended that the first section of the draft should be called "Part I" and entitled "Introduction", in keeping with several recent codification conventions. That was, as usual, a provisional designation pending completion of the work on the draft as a whole.

8. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the title of part I of the draft.

*The title of part I of the draft was adopted.*

<sup>3</sup> See the summary of the debate in *Yearbook . . . 1986*, vol. II (Part Two), pp. 62-63, paras. 234-241.

## ARTICLE 1 [Use of terms]

9. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, at its thirty-second session, in 1980, the Commission had accepted a provisional working hypothesis as to the meaning of the term “international watercourse system”. At its thirty-sixth session, in 1984, it had referred to the Drafting Committee article 1, which contained an explanation (definition) of the term “international watercourse”. The question of the use or non-use of the term “system” and that of a precise definition of an international watercourse had proven somewhat controversial.

10. In accordance with the general trend of the discussion in 1986, the Drafting Committee had agreed to leave aside for the time being the question of the inclusion in the draft of an article on the use of terms, as well as the question of the use of the term “system”. It had also agreed that, until it reverted to those questions, it would continue to work on the basis of the 1980 provisional working hypothesis, without adopting or rejecting it at the present time. Thus, in order not to prejudge the matter, the word “system” had been placed in square brackets wherever it appeared in the draft articles adopted by the Committee. That decision had been set forth in the footnote to draft article 1. In order to simplify matters, he would, in the remainder of his statement, use the term “watercourse”, on the understanding that what was meant was an “international watercourse [system]”.

11. Article 1 thus appeared in the draft with the usual title “Use of terms”, which had been placed in square brackets as a reminder that definitional provisions were still pending, particularly as far as the matters dealt with in the footnote to the article were concerned.

12. Mr. BARSEGOV said that the Drafting Committee’s decision had indeed been provisional, yet the terms the Commission subsequently decided to use would necessarily affect the content of the draft articles. The Commission therefore had to settle that question, and the sooner the better. He would, however, have no objection if the Commission decided to use square brackets on a provisional basis.

13. Mr. ROUCOUNAS said it seemed that, at the present stage in the Commission’s work, the terms “system” and “watercourse” had been placed on an equal footing. However, the footnote to draft article 1 was not very clear in that regard, for it implied that the Commission had already opted for one of those terms.

14. Mr. BEESLEY said that, in the light of the explanations given by the Chairman of the Drafting Committee, he agreed with the provisional compromise solution, but reserved his position with regard to the inclusion of the term “system” at a later stage in the work on the draft.

15. The CHAIRMAN, speaking as a member of the Commission, said he agreed with those members who took the view that it had been provisionally decided to retain the term “system”.

16. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission agreed to leave aside for the time being the question of

article 1 (Use of terms) and that of the use of the term “system”, to continue its work on the basis of the provisional working hypothesis accepted at its thirty-second session, in 1980, and to place the word “system” in square brackets throughout the text.

*It was so agreed.*

## ARTICLE 2 (Scope of the present articles)

17. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 2 was based on article 1 as provisionally adopted in 1980, and on draft article 2 as submitted by the previous Special Rapporteur in 1984. In paragraph 1, the Drafting Committee had retained the reference to international watercourses “and their waters” in order to make it clear that the term “watercourse” meant not only a pipe or conduit for the waters, but also the waters themselves. That was, of course, a definitional matter with which the Drafting Committee would be able to deal when it reverted to article 1. In the mean time, the Drafting Committee had deemed it sufficient to make that point clear in article 2, paragraph 1, as well as in the commentary to that provision, without repeating the reference to watercourses and their waters in the remainder of the draft. The Committee had also decided to retain the words “measures of conservation” without adding “administration and management”, as had been proposed in the 1984 text. It had considered that, for the time being, the term “measures of conservation” should be interpreted to include measures of administration, management and co-operation. Obviously, those terms could be added later, depending on the content of future articles. Paragraph 2 had not been changed, with the exception of minor adjustments to which he had already referred, such as the inclusion of the word “system” in square brackets and the deletion of the words “of the waters”. Similarly, the title had not been changed.

18. Mr. EIRIKSSON said that, until the Commission had discussed the article on the use of terms and the draft articles as a whole, it could deal only provisionally with the scope of the articles. He nevertheless had four suggestions to make concerning the wording of draft article 2. First, since the expression “of their waters” involved a definitional matter that would be settled once a decision had been taken on the wording of draft article 1, he suggested that, in order to avoid any confusion in the other draft articles proposed by the Drafting Committee, it should be explained in a footnote that the term “watercourse[s]” should be understood as including the waters they contained. Secondly, he was concerned about the use of the term “conservation”. The term “protection” was used more frequently in the other draft articles, and he thought that it might be advisable to use that term rather than “conservation”. Thirdly, he suggested that, at the end of paragraph 1, the word “of” should be inserted before “their waters”, in line with the wording in the first part of the paragraph, which read: “uses of . . . watercourse[s] . . . and of their waters”. Fourthly, he had some doubts about the double negative that seemed to be implied by the words “uses . . . for purposes other than navigation”, in paragraph 1, and “the use . . . for navigation is not within the scope”, in paragraph 2. He therefore suggested that those two paragraphs should be replaced

by a single paragraph consisting of two sentences, the second of which would replace paragraph 2 and would read:

“The present articles shall, however, also apply to the use of international watercourse[s] [systems] for navigation in so far as other uses affect navigation or are affected by navigation.”

19. Mr. KOROMA said that it was not certain that the term “conservation” would be defined in draft article 1 and that, in any event, it was not known what form that definition would take. The oral report by the Chairman of the Drafting Committee had made it clear that “conservation” included administration and management, but the term actually had several meanings and it might be taken in the sense of “water conservation”, its original meaning, whereas the Drafting Committee had given it a political connotation. The question therefore called for some clarification.

20. The Chairman of the Drafting Committee had also said that the Committee proposed deleting the reference to “the waters” of a watercourse in the remainder of the draft. Those words had originally been included in order to highlight the term “international watercourse[s]”, since it was just as difficult to refer to an international watercourse without thinking of its waters as it was to refer to a State without thinking of its territory. He personally had no objection to the retention of those words for the time being.

21. Mr. TOMUSCHAT said that he would like some clarification concerning the relationship between the concept of “conservation” in draft article 2 and the concepts of “protection” and “development”, which were used in draft article 6. Did “conservation” mean protection and development? Some consistency was required.

22. Mr. BARSEGOV said that, if his understanding was correct, the Chairman of the Drafting Committee had been speaking in his personal capacity in presenting his oral report, since the Drafting Committee had not yet considered the question in detail. He therefore wished to qualify to some extent the comments made by the Chairman of the Drafting Committee, who had said that some terms had been deleted from the text of draft article 2 because they were repetitive and that the wording chosen would cover the concepts of administration and management. That was a very serious question and one which called for some response.

23. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said he challenged any assertion that his reporting reflected ideas of his own. Indeed, he had endeavoured to recount as faithfully as possible the decisions taken in the course of the Drafting Committee’s work. If he had made any mistakes in presenting matters, it was for the members of the Committee to draw attention to them. However, the draft articles he had presented had been discussed at a number of meetings, particularly draft article 2, and that article would not have been presented to the Commission if it had not been adopted by the Drafting Committee. As Chairman of the Drafting Committee, he did not have, nor did he aspire to, the power to change a draft article on his own initiative.

24. Mr. Eiriksson’s suggestion to explain the words “and of their waters” in a footnote seemed acceptable. Nevertheless, the commentary would in any event give ample explanations about the use of that expression in paragraph 1 of article 2.

25. The expression “measures of conservation” was drawn from draft article 2 as submitted by the previous Special Rapporteur, but the Drafting Committee had not thought it necessary to use the whole of the expression in question, namely “measures of administration, management and conservation”. As far as the Committee was concerned, the concept of conservation encompassed those of protection, administration and management.

26. He was not in favour of combining the two paragraphs of article 2, for they covered quite different concepts, and merging them into a single provision would merely make for confusion.

27. Mr. BARSEGOV said that he would like to clear up some points, so as to avoid any controversy. The comments made both in the Drafting Committee and in the Commission were always of special importance, but, since they were not submitted for approval by the members, they had no legal value. Accordingly, no conclusions could be drawn therefrom. If the points of view did match and an agreement did appear to emerge, he would raise no objection, but those comments could not be presented as an interpretation by the Drafting Committee. He would not like to convey the impression that he endorsed such an agreement.

28. Mr. BEESLEY asked the Special Rapporteur whether, in his view, it was desirable to leave aside the question of using the word “protection” and combining the two paragraphs of draft article 2, and whether Mr. Eiriksson’s proposal altered the meaning of article 2 as a whole. For his own part, he would add, without wishing to embark on a discussion or to prolong the debate, that if the Chairman of the Drafting Committee could not present his report as he saw fit, the text should be circulated. It was disturbing to see an emerging practice of dissociating oneself from the statements made by the Chairman of the Drafting Committee. He none the less realized that, if a member did not endorse the remarks by the Chairman of the Drafting Committee, he had the right, if not the duty, to make known his own point of view.

29. The CHAIRMAN said that the commentaries to each draft article adopted by the Commission were prepared by the Special Rapporteur himself, and they too were approved in plenary. The comments made by the Chairman of the Drafting Committee summarized or explained the Committee’s decisions and were intended to clarify the meaning of each draft article for members of the Commission who were not on the Drafting Committee. But those comments were one thing, and the commentaries to be attached to the draft articles in the final report were another.

30. Mr. YANKOV asked whether the Special Rapporteur could not, in preparing the commentaries, give a historical review of some of the draft articles—particularly in the case of texts which the Commission had already adopted—and indicate the changes made. The



report would thus be more accurate and the information would be useful to anyone wishing to refer back to the preparatory work. The term “conservation”, for example, had appeared in article 1 as provisionally adopted by the Commission in 1980. It would thus be easier to make a comparison either by reproducing the text in a footnote, or by giving the appropriate reference in square brackets alongside the title of the new article.

31. He could agree to draft article 2 in its present formulation, with a reservation regarding the use of the term “watercourse systems” or “watercourses”. In the work of the Third Committee of the Third United Nations Conference on the Law of the Sea, however, the words “protection”, “conservation” and “preservation” of the marine environment had had specific meanings at that time. In his opinion, the meaning of the term “conservation” could not be reduced to the idea of protection. If the terminology of draft articles 2 and 6 was to be harmonized, perhaps the best course would be to speak of “protection”. In any event, his comment was intended not as a formal proposal but simply as an explanation to facilitate the work in hand.

32. Mr. EIRIKSSON noted that paragraph 1 (e) of draft article 7 mentioned “conservation” and “protection” and he suggested that only one of those terms should be utilized in that provision; he would revert to the matter later. He appreciated the point of view expressed by the Chairman of the Drafting Committee on his proposal to combine the two paragraphs of draft article 2 and would not, therefore, press the point. Nevertheless, he still felt that paragraph 2 should be worded as he had suggested (para. 18 above), so as to avoid the double negative he had mentioned.

33. Mr. CALERO RODRIGUES said that, as a member of the Drafting Committee, he unreservedly accepted the proposed text. Although it was not entirely what he would have liked, it did represent a satisfactory compromise. The fact remained that members of the Commission were entitled to suggest changes, and more particularly to raise issues which might have escaped the Drafting Committee’s attention: there was no reason to keep to the text prepared by the Drafting Committee and to rule out any possibility of amendment. However, among the many changes proposed, only one, namely the proposal to replace the term “conservation” by “protection” in paragraph 1 of draft article 2, enlisted his support, particularly in view of Mr. Tomuschat’s comments concerning draft article 6. It would not be a mistake to use the term “conservation”, provided that an explanation was given of its meaning. But in the light of the discussion he was convinced that the word “protection” was preferable. The other proposed amendments would not improve the Drafting Committee’s formulation.

34. Mr. GRAEFRATH said the fact that the terms “international watercourse[s]” and “[systems]” were used with square brackets did not mean that either term had been accepted. Personally, he was not prepared to accept the term “system” and believed that it had been placed in square brackets precisely because no final decision had been taken on it.

35. The terms “administration” and “management”, which had appeared in the previous text and had led to some objections, had been deleted not because those concepts would be encompassed by the concept of conservation, but because they were more of a means than a purpose, and it was an open question to what extent administration and management were institutionalized. It would be very strange to interpret “conservation” as something that included the concepts of administration and management, for the administration and management of a watercourse were much broader than what was implied by the idea of conservation. A proposal had then been made to speak not of conservation, but of protection. For his part, he would be tempted to endorse the proposal to refer to measures of “protection” instead of “conservation”, provided that the words “and development” were added, so as to bring the text of draft article 2 into line with that of draft article 6.

36. Mr. ILLUECA said that draft article 2 could not be viewed in isolation from the other provisions prepared by the Drafting Committee, and pointed out that, for third world countries, the term “protection” had unpleasant connotations of “protectorate” and of the law of the strongest, even though such reasoning was more political than juridical. Perhaps the Special Rapporteur could explain the points of concordance between the various draft articles, so as to determine what the “measures of conservation” referred to in article 2 were related to. If those measures related to uses, there might be a link with draft articles 6 and 7, and particularly with paragraph 1 (e) of article 7, for those provisions employed the terms “use”, “development” and “protection” on the one hand, and “conservation”, “protection”, “development” and “economy of use” on the other.

37. Mr. Sreenivasa RAO said that, as a member of the Drafting Committee, he endorsed a number of the comments made by Mr. Barsegov and Mr. Graefrath. The expression “measures of administration, management and conservation” had been discussed at length and it had been adduced that, since administration and management were means to an end, they could not be dealt with as if they were separate goals. Accordingly, it had been tentatively decided not to use those terms together. The question whether the idea of “conservation” included those two concepts or whether it was necessary to mention measures of administration and management had not really been discussed. In his opinion, therefore, the Commission need not determine for the time being whether conservation was the only goal to be pursued, or whether conservation included administration and management. The issue of harmonizing the terms employed in the various draft articles had not been considered by the Drafting Committee, which had examined one by one each of the articles referred to it. He had thought that the Drafting Committee would deal with that matter on second reading. However, the question had been raised, and he would be inclined to think that the term “conservation” had been used with its own particular meaning and could easily be replaced, for the purposes of uniformity, by “protection” or “protection and development”. No final decision had been taken on the term “system”. To decide on that matter, it would be necessary to see the whole of

the draft and determine the relationships between the various provisions.

38. Mr. KOROMA said it was apparent from the discussion that the term "conservation" did not cover the concepts of administration and management, but could encompass those of development and protection. Since the term was broader in scope than the word "protection", he proposed that draft article 2 should speak of "measures of conservation, including protection and development". To use the word "protection" alone would be to restrict unduly the scope of the draft.

39. Mr. BEESLEY said that it was obviously necessary to harmonize the terminology used. Nevertheless, he was not only concerned but alarmed at the Commission's tendency to take the place of the Drafting Committee and change a word here and there without any clear idea of the effects of the changes. At the present stage, the Commission was not required to decide on the use of a particular term. Moreover, he was ready to support any comment by the Chairman of the Commission, the Chairman of the Drafting Committee or the Special Rapporteur explaining that no decision had yet been taken on the terms that were to be used and that the terminology would ultimately depend on the comments made in the course of the discussion.

40. Despite Mr. Eiriksson's remark about the need to harmonize the terminology, he would prefer the Commission to refrain from deciding on the use of the term "conservation" or "protection". It would also be remembered that the Commission could call on experts before reaching a final decision. He noted that terms such as "planning", "conservation", "utilization", "development", "management" and "control" were used in the Delaware River Basin Compact, cited in the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2, para. 17). Hence it would be better, until such time as members had a clearer idea of the concepts they were endeavouring to define, not to take a decision in that regard.

41. Mr. TOMUSCHAT noted that everyone acknowledged the need for consistency between draft articles 2, 6 and 7. Personally, he thought that the idea of development was not really included in the concepts of protection or conservation, and hence there was a need for it to be expressly mentioned. As to the concepts of protection and conservation, he was not a native English speaker and could not say which concept was the broadest. Like Mr. Graefrath, Mr. Illueca and Mr. Sreenivasa Rao, he was of the opinion that article 2 should perhaps speak of "protection and development" or "conservation and development".

42. The CHAIRMAN, speaking as a member of the Commission, said he had no difficulty in accepting draft article 2 in its present wording. The term "conservation" had many connotations in Spanish, but in the present instance it fully reflected what the Commission was seeking to express. However, he had no objection to adding the terms "protection and development" in paragraph 1. Moreover, Mr. Illueca and Mr. Yankov had been right to emphasize the need to harmonize the terminology used in draft articles 2, 6 and 7. The form of article 2, namely its division into two

paragraphs, was satisfactory and he could not agree to Mr. Eiriksson's proposal.

43. Mr. McCAFFREY (Special Rapporteur) said that there was always a problem of timing, since it was customary for the Commission to adopt draft articles before a special rapporteur prepared the relevant commentaries. Obviously, a special rapporteur had very little time to prepare the commentaries in the interval between approval of the draft articles by the Drafting Committee and their presentation to the Commission. Moreover, articles and commentaries had to be submitted for translation. Perhaps the Commission could consider that matter when it came to discuss its methods of work; but he was not sure that it would be possible in practical terms for him to draft the commentaries as and when the Drafting Committee was putting the final touches to the texts of the articles. So far, the Commission had always approved the commentaries to draft articles during the adoption of the relevant chapter of its report. While he shared the concern of the members of the Commission who wondered about the meaning of certain terms and the way they were to be explained in the commentary, he did not see how the situation could be remedied at the present stage.

44. In any event, the report by the Chairman of the Drafting Committee could do no more than reflect and sum up as accurately as possible the Drafting Committee's discussions. Naturally, members of the Committee whose views were not properly reflected in the report were entirely free to explain them in plenary during the consideration of the draft articles.

45. With reference to all the draft articles now before the Commission, it would be remembered that they had not been considered at the present session or in 1986, or even in 1985, and most of them had been examined only superficially in 1983 and 1984. It was therefore perfectly natural for questions to be raised in connection with certain terms and expressions that some members of the Commission were seeing for the first time. He none the less hoped to be able to reflect in the commentaries the agreement that appeared to be emerging in the discussion.

46. The Drafting Committee had done its best to keep closely to the texts of the articles provisionally adopted in 1980, which contained the term "conservation". Mr. Evensen, in revising those articles, had added the terms "administration" and "management". The Drafting Committee had interpreted the term "conservation" as covering measures to deal with pollution and other types of harm to an international water-course, as well as flood control, erosion, sedimentation and salt-water intrusion. As Special Rapporteur, he was not wedded to the term "conservation" and thought, as did Mr. Calero Rodrigues and other members of the Drafting Committee, that it would perhaps be preferable to harmonize the terminology used in draft article 2 with that of subsequent draft articles, particularly article 6. The term "protection" could therefore replace "conservation". The question as to which term had the broader meaning was definitional, almost subjective. In English, the term "conservation" had the connotation partly of protection and partly of not wasting a resource. Before the "environmental

revolution”, it had been customary to speak of the “law of conservation”, not “environmental law”. The term therefore encompassed a number of concepts and he had no objection to using the term “protection”, particularly in the sense in which it was used in subsequent draft articles.

47. He also endorsed the suggestion to introduce the idea of development in paragraph 1, especially since that term was used in a number of places in the draft. It would indicate more accurately the subject of the draft. The concepts of “administration” and “management” were certainly not ruled out, since Mr. Evensen’s outline, which had been the basis for his own work, had envisaged a chapter on administration and management. However, administration and management did not entail legal obligations and a reference to them would simply be a recommendation to States regarding the best means of achieving optimum use. Unless members of the Commission were emphatic on the matter, it did not even seem necessary to speak of administration and management in the commentary. On the other hand, an explanation could be given of what “protection and development” were taken to mean.

48. With regard to harmonization of the terminology, reference had been made to paragraph 1 (e) of draft article 7. He would suggest that the question should be dealt with when the Commission came to consider that provision. For the time being, it would be remembered that the factors enumerated in article 7 were much broader and the terms used therein were intended to point out for States the kinds of considerations they would have to take into account in the use of watercourses. Thus the purpose of the provision was not the same as that of article 2, in which it would be difficult to use all those terms. When the time came to examine article 7, the Commission might perhaps consider whether there was a useful distinction between “conservation” and “protection”.

49. He had no objection to Mr. Eiriksson’s suggestion to insert the word “of” before “their waters”, at the end of paragraph 1. In regard to Mr. Eiriksson’s proposal concerning paragraph 2 (para. 18 above), Mr. Beesley had asked whether it altered the meaning of article 2 as a whole. Personally, he was in principle opposed to any use of double negatives, but the proposal would not change the actual sense of the article and would be a source of ambiguity, for the topic was entitled “The law of the non-navigational uses of international watercourses”: in the proposed modified form, article 2 would depart from that title. Paragraph 2 was better drafted in its present form, for the emphasis was placed on the fact that navigation, with a few exceptions, did not come within the scope of the draft. If worded as Mr. Eiriksson had suggested, the paragraph would convey the idea that, generally speaking, the draft related to navigation, with a few exceptions.

50. As to Mr. Yankov’s wish for an explanation to be given in the commentary of the evolution of the draft articles, he had had no intention of adopting such a course, fearing that it might lead to questions and pointless comparisons, and even criticisms. But he would of course follow that suggestion if the Commission so wished. In that case, he should perhaps do so

concisely, without actually juxtaposing the successive versions of the draft articles, and simply indicate that a particular article was based on an article provisionally adopted in 1980 or proposed by the previous Special Rapporteur in 1984. In any event, the relevant chapter of the Commission’s report would give a historical review of the Commission’s work on the topic and point out that some articles had been provisionally adopted in 1980. Perhaps it was not essential for the Commission to take a decision on the matter at the present meeting.

51. The CHAIRMAN said that there appeared to be a consensus in favour of the present wording of paragraph 1 of draft article 2, on the understanding, however, that the words “of conservation” would be replaced by “of protection and development”.

52. Mr. KOROMA said he was still of the opinion that paragraph 1 should retain the concepts of conservation, protection and, if necessary, control.

53. Mr. BEESLEY said that he was prepared to agree to virtually any proposal on a provisional basis. His final position would depend on the decisions to be taken in connection with draft articles 6 and 7, for he accepted all the explanations given by the Special Rapporteur, except the explanation concerning draft article 7. In fact, article 7 could not contain provisions that were wider in scope than the article on the scope of the draft. He would revert to that matter later. As far as he was concerned, the term “conservation” was different in meaning from the term “protection”, but he would not press the point.

54. Mr. EIRIKSSON pointed out that the Chairman of the Drafting Committee had agreed to his suggestion to explain the expression “of their waters” in a footnote, since it was a definitional matter that would be dealt with later in article 1. Furthermore, the wording he had proposed for paragraph 2 of article 2 (para. 18 above) contained the word “however”, which would clearly demonstrate that it was an exception to the scope of the draft. In actual fact, paragraph 2 as currently worded did not fully meet the Special Rapporteur’s concern.

55. Mr. YANKOV, supported by Mr. GRAEFRATH and Mr. CALERO RODRIGUES, said that, in instruments which included provisions on measures of conservation, those measures were concerned specifically with living resources and were not simply taken to mean measures of protection against pollution and other harm to the environment. They were also intended to protect certain species against depletion, and to improve stocks. For example, in the 1982 United Nations Convention on the Law of the Sea, the term “conservation” was used only in the provisions on fisheries. Using the terms “protection” and “development” would not broaden the scope of the draft, which would thus be more in keeping with the Commission’s understanding of the expression “non-navigational uses”. Nevertheless, he thought it advisable to use only those two terms, namely “protection” and “development”, for the three terms together could well overlap.

56. Mr. ILLUECA said that he did not think there was any consensus to use the terms “protection” and

“development”. Like Mr. Beesley, he saw no reason not to use the term “conservation” as well.

57. Mr. BEESLEY, explaining some of the reasons why he would prefer to retain the term “conservation”, pointed out that, in paragraph 1 of draft article 2, measures of conservation were tied in with the concept of utilization, and, as Mr. Yankov had said, the term “conservation” was used in some conventions in connection with living resources. In the case of the non-navigational uses of watercourses, it would therefore be wise to retain that term, if only to provide for protection of salmon runs. Furthermore, since the terms “conservation” and “protection” reflected slightly different concepts, the best thing would be to use both of them for the time being.

58. He had no objection to the term “development”, pending further explanation at the appropriate time. However, in draft article 6 the term was predicated on a different assumption, namely that when States developed an international watercourse they had to act in an equitable and reasonable manner. Yet everyone knew of cases of virtual overdevelopment of a watercourse. It was therefore understandable that members of the Commission were reluctant to adopt the concept of development, but did not want to rule it out entirely. In the circumstances, he could agree provisionally to a compromise solution in the light of the discussion on draft articles 6 and 7, a solution that seemed possible if the Commission chose terminology that occupied the middle ground, or rather common ground.

59. Mr. FRANCIS said that, during the consideration of the Special Rapporteur’s third report, he had raised the question of changing weather patterns (2008th meeting), for while some watercourses had abundant water, others did not. In those cases, the downstream States might, depending on the climate, be affected by excessive use upstream. From that point of view, conservation should constitute an important factor in any use of watercourses. He therefore urged the Commission to reflect further before departing from the text worked out by the Drafting Committee. Personally, he would prefer a form of words that mentioned conservation, along with the other elements to which members of the Commission attached importance.

60. Mr. Sreenivasa RAO proposed that paragraph 1 should speak of “measures of conservation, including protection and development”, for the use of those terms as three different concepts would require a discussion lasting much longer than the time still available to the Commission.

61. Mr. KOROMA pointed out that article 2 related to the scope of the draft and that watercourses formed part of the environment. In general, when one spoke of conservation one had in mind conservation of the environment. In other words, conservation implied something natural, whereas protection entailed physical intervention. However, the Commission could reach a consensus on the basis of the definition of the term “conservation” given in the draft articles for the preservation and protection of the marine environment submitted by Kenya at the Second Session of the Third United

Nations Conference on the Law of the Sea (Caracas, 1974):

“Conservation of the marine environment” means the aggregate of measures taken to render possible the maintenance of the natural quality, productivity and ecological balance of the marine environment.<sup>4</sup>

In his opinion, conservation was much broader than protection and the term “conservation” was the one best suited to the present topic. Thus the Drafting Committee had been right to use it. In view of the doubts among some members, however, perhaps the Commission could adopt the proposal by Mr. Sreenivasa Rao, even if it meant reverting to the various terms later on.

62. Mr. BARSEGOV said that paragraph 1 should speak of “protection”. The term “conservation” in Russian (*sokhranenie*) implied the adoption of a set of regulations on the rational use of water. Naturally, abuses could occur, and if a State’s conduct was not in keeping with the requirements of conservation, that State’s attention could be drawn to the measures to be taken for the purposes of rational utilization of the watercourse. However, using the term “conservation” would have major consequences, for until the Commission had resolved issues of substance, such as that of “watercourse[s] [systems]”, it would not be able to reach agreement on a provision of such scope.

63. Mr. McCAFFREY (Special Rapporteur) said that, if the expression “measures of protection and development” did not cover the idea of conservation, then conservation should also be mentioned in paragraph 1. However, some members had already said that the terms “protection” and “conservation” overlapped to some extent: that could therefore be indicated in the commentary, and draft article 2 could use only the expression “measures of protection and development”. If the term “conservation” were included, draft article 6 would also have to be changed. In his opinion, “conservation” applied not only to living resources, but also to water resources in the context of watercourses, where it meant the husbanding of supplies of water and protection against pollution, against overfishing, and so on. The term “protection” also had other meanings. In that regard, chapter IV of the outline for a convention prepared by his predecessor had been entitled “Environmental protection, pollution, health hazards, natural hazards, safety and national and regional sites”. At the present stage, he did not yet know whether the draft would actually contain provisions regarding the protection of dams, for example, but it was a possibility. In that case, the term “protection” would be better than “conservation”. If the Commission decided to speak only of protection and development, it could explain in the commentary that the term “protection” covered the concept of conservation. It could not, however, claim that “conservation” covered the idea of development, which referred to works undertaken by States in order to combat salt-water intrusion, for instance, to prevent erosion or to produce hydroelectric power—works which did not all come under the heading of “conservation”. Consequently, he could agree to

<sup>4</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. III (United Nations publication, Sales No. E.75.V.5), p. 245, document A/CONF.62/C.3/L.2.

either one of two proposals, namely replacing the expression “measures of conservation” by “measures of protection and development” or by “measures of conservation, protection and development”.

64. Mr. BENNOUNA said he saw no reason to harmonize things that were not comparable. The Drafting Committee had used different terms precisely in order to convey different concepts. Since draft article 2 was concerned with the scope of the draft, the Drafting Committee had used the broadest possible generic term, in other words “conservation”. Yet from a careful reading of paragraph 1, it was apparent that “measures of conservation” were added to all non-navigational uses, including, therefore, development. Consequently, the paragraph did not relate to conservation alone. Draft article 6 was quite different in purpose, since it specified the way in which States were to participate in the utilization, development and protection of a watercourse. Thus there was no reason to use the same terms in all the provisions of the draft, since the provisions dealt with different issues. If the Commission did not wish to restrict the scope of article 2, the term “conservation” was the one that appeared to have the broadest meaning, for it could include all activities intended not only to protect, but also to develop resources, including living resources. In its present formulation, article 2 seemed to be entirely in keeping with the proper goal, which was to cover all non-navigational uses.

65. Mr. AL-KHASAWNEH said that he had no firm ideas on the question of using the term “protection” or “conservation”. Indeed, was there any major difference between those two concepts? It was difficult for jurists to say. Perhaps other experts could give a more accurate definition. To advance the Commission’s work, he would suggest the adoption of a minimalist approach, in other words using the expression “measures of protection and development”, which, rightly or wrongly, seemed to some members to be narrower than “measures of conservation”.

66. Mr. TOMUSCHAT said it appeared that the expression “measures of conservation, protection and development” met with the consent of the majority of members of the Commission, although personally he thought the expression “measures of protection and development” would suffice.

67. Mr. BEESLEY said that, in dealing with the scope of the draft articles, the Commission was dealing with the subject-matter itself, and the time spent on that question was in no sense time wasted. He was ready to accept any term, provided the Commission could revert to terminological problems when it came to consider draft articles 6 and 7. He knew of cases in which works had been constructed—for example, fish ladders, for the conservation of salmon—in which it would be possible to speak of the development of the watercourse, and other cases in which the development of the watercourse—for example, hydroelectric development—had been forgone in order to conserve certain living resources. For that reason he would prefer to use all three terms: conservation, protection and development. In his opinion, it would be a mistake to adopt a narrower formulation. The idea of development was doubtless attractive, but it should not be forgotten that

excessive attachment to that concept had led in the past to the pollution of entire ecosystems, and that the Commission’s goal was precisely to prevent a recurrence of that kind of development. If the Commission did not retain the term “conservation” in paragraph 1 of draft article 2, he would have to reserve his position until such time as he was able to see how terms were used in other draft articles.

68. Mr. AL-BAHARNA said that, when draft article 2 had been referred to the Drafting Committee, paragraph 1 had contained the expression “measures of administration, management and conservation”, which had been discussed at length because some members of the Committee feared that it would place heavy obligations on States. One member of the Committee had then proposed that only the term “conservation” should be used, explaining that it was a milder term but one which could include administration and management. Accordingly, the term had been accepted not for the reasons adduced later on—namely that it was a substitute for “protection and development”—but for reasons of convenience. It was surprising to see that the argument put forward in the Drafting Committee, namely that use of the term “conservation” as a compromise solution implied that it included the ideas of management and administration, and perhaps even protection, was now giving way to quite the opposite argument. It had just been explained that the expression “protection and development” covered the idea of conservation. If it continued in that way, the Commission would merely reach an impasse. Having listened attentively to the various points of view, he was convinced that it was essential to come closer to draft article 7, since the purpose of draft article 2 was to indicate which factors would be enumerated in article 7.

69. The present wording of paragraph 1 was satisfactory, but he was ready to accept the expression “measures of conservation, protection and development” if it could command a consensus. On the other hand, he would be opposed to replacing the term “conservation” by “protection and development”.

70. Mr. ROUCOUNAS said that the term “conservation” covered particular situations to which the term “protection” was not applicable. He, too, thought that the expression “measures of conservation, protection and development” should be used in draft article 2.

*The meeting rose at 6.10 p.m.*

## 2029th MEETING

*Wednesday, 8 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes,

Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

**Relations between States and international organizations (second part of the topic) (concluded)\***  
(A/CN.4/391 and Add.1,<sup>1</sup> A/CN.4/401,<sup>2</sup> A/CN.4/L.383 and Add.1-3,<sup>3</sup> ST/LEG/17)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

1. Mr. ILLUECA said that the Special Rapporteur's third report (A/CN.4/401), which displayed logic combined with concision, was a tribute to the spirit of Simon Bolivar, who, more than a century and a half ago, had convened the Amphictyonic Congress in Panama, the underlying purposes of which had heralded the world organization of today. The Special Rapporteur, as urged, had moved with prudence and pragmatism by submitting a tentative outline for the draft articles. It should not be forgotten that, at its twenty-eighth session, the Commission, in offering guidance for the Special Rapporteur at that time, the late Abdullah El-Erian, had specified that the second part of the topic of relations between States and international organizations covered the status, privileges and immunities of international organizations, their officials, and experts and other persons engaged in their activities not being representatives of States.<sup>4</sup> It was with the consent of the Commission that the previous Special Rapporteur had decided that the draft should also extend to resident representatives and observers able to act as representatives of one international organization in another international organization.

2. International organizations were recognized as subjects of international law and were thus governed by general international law. Hence the task was not to consider the functions attributed to them under their constituent instruments, from which an internal law peculiar to each one of them flowed. In that regard, the Special Rapporteur was right to point out (*ibid.*, para. 24) that it had been generally agreed that initially the subject-matter of the study should not be unnecessarily restricted and that he should be given some latitude.

3. Furthermore, with regard to international organizations of a regional character, the Commission had concluded that:

For the purposes of its initial work on the second part of the topic, [it] should adopt a broad outlook, inasmuch as the study should include regional organizations. The final decision on whether to include such organizations in a future codification should be taken only when a study was completed;<sup>5</sup>

\* Resumed from the 2027th meeting.

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

<sup>4</sup> *Yearbook* . . . 1976, vol. II (Part Two), p. 164, para. 173.

<sup>5</sup> *Yearbook* . . . 1985, vol. II (Part Two), p. 66, para. 264 (c).

4. Again, as stated in the second report (A/CN.4/391 and Add.1, para. 4), the Special Rapporteur was authorized, in his research, to study the agreements and practices of international organizations, whether within or outside the United Nations system. In that connection, ICRC, a private non-governmental organization, should not be overlooked, for it engaged in international activities. It should also be considered, when the Special Rapporteur deemed it opportune, whether or not the draft articles were to encompass regional organizations and international non-governmental organizations referred to in Articles 52 and 71 of the Charter of the United Nations.

5. Section 2 of the schematic outline, dealing with the legal personality of international organizations (A/CN.4/401, para. 34), should make it possible to examine the factors which created, modified or terminated legal personality. It would prove essential, in codifying the topic, to consider both the process of the constitution and also possible cases of the dissolution of international organizations, either because the organization had been established for a limited period or because it had achieved its goal, or, again, dissolution under an express or implicit resolution of the members not calling for unanimity. The precedent in that regard was the League of Nations and the PCIJ, which had been dissolved by resolutions adopted on 18 April 1946 by the Assembly of the League of Nations at its twenty-first session. Thought should also be given, among the consequences of dissolution, to the liquidation of the organization's property and assets, and possible transfer thereof to another organization.

6. In addition, the Commission should scrutinize situations giving rise to the succession of international organizations in respect of rights, duties and functions. Suffice it in that regard to mention the establishment of OECD, which had replaced OEEC in 1960. Perhaps the Special Rapporteur could study those issues—constitution, succession, dissolution, liquidation—in the context of section 2 of the outline, on legal personality.

7. Lastly, the proposed outline, which reflected a consistent outlook on the topic, deserved the approval of the Commission.

8. Mr. AL-QAYSI said that the topic under consideration had been on the Commission's agenda for nearly a decade and was one of great practical utility if kept within reasonable bounds. The second report (A/CN.4/391 and Add.1, para. 12) and the third report (A/CN.4/401, paras. 20 and 26) revealed that it did not seem appropriate to criticize the Special Rapporteur's outline on the grounds that it unduly emphasized the question of privileges and immunities, since that was the very core of the topic. The Secretariat studies indicated a multiplicity of rules applicable to a wide variety of international organizations, and it was difficult to envisage a régime applying to all. Indeed, it was doubtful whether such an enterprise would be useful or necessary. In the interests of practicality, the Commission should be modest in its efforts, which at the present stage should concentrate on international organizations of a universal character.

9. He, too, thought that the schematic outline proposed by the Special Rapporteur (A/CN.4/401, para. 34) was appropriate and that doctrinal problems should be avoided. He agreed with Mr. Reuter (2024th meeting) that the broadest possible survey was required, and that the help of the Secretariat in that respect would be crucial.

10. Rules applied by international organizations on the subject did exist, and since international organizations generally adopted a pragmatic approach, there were almost no lacunae. Problems none the less arose, and the Commission should endeavour to tackle them. Reference had been made, for example, to inviolability of the computerized archives of international organizations, freedom of travel of international officials and their right of protection. It had also been suggested that certain principles might not be applicable to international organizations. In his view, the discussion of reciprocity between international organizations in relation to the right of protection involved first of all determining to whom such reciprocity was due, and the basis thereof. Questions of that kind required detailed study, on the understanding that the goal was to articulate functional solutions rather than resolve doctrinal questions.

11. Another fundamental point was the future relationship between the Commission's work and the rules that international organizations already applied. Unless the work was scrupulously synchronized with the existing rules and practice of international organizations, it would become purely academic. Consequently, close co-operation with international organizations was essential.

12. He thanked the Special Rapporteur for his clear and succinct report and expressed the hope that future reports would cover the widest possible parameters of the topic.

13. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said it was regrettable that he had not had the time necessary to review all the points made in the course of the debate. The topic had led to a most varied range of comments, some members taking the view that the subject was very straightforward and simply needed the finishing touches, whereas others thought that it was one of the most difficult and that, as in the case of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission would, as its study moved ahead, inevitably encounter gaps that lent themselves to the progressive development of international law, in addition to matters that could be codified.

14. At the thirty-seventh session, he had indicated that, since the Commission had already approved the previous Special Rapporteur's plan of work, he had started out with the idea that it would be pointless to submit a new outline and had thought that the study would continue on that basis.<sup>6</sup> Accordingly, it had been at the insistence of two members that he had submitted a schematic outline in his third report (A/CN.4/401, para. 34). However, no member who had spoken on the

subject had been opposed either to the outline or to the suggestions to restrict the topic to international intergovernmental organizations of a universal character, on the understanding, of course, that the Commission could always decide later to extend the application of the draft articles to regional organizations, or even some non-governmental organizations, such as ICRC.

15. At the beginning of the discussion, Mr. Bennouna (2024th meeting) had raised a number of questions, the first relating to the harmonization of the existing texts. His own intention was not to harmonize existing provisions but to seek to co-ordinate and concretize. On the basis of the current rules concerning the privileges and immunities of international organizations and their officials, in other words on the basis of practice and instruments such as headquarters agreements or the two conventions of 1946 and 1947 on the privileges and immunities of the United Nations and the specialized agencies, his task was not only to codify, but also to find any gaps, namely cases in which such privileges and immunities had to be clarified. He had in mind, for example, the question of freedom of movement of international officials in the host countries, mentioned by Mr. Tomuschat (2025th meeting), and the case of archives, referred to by Mr. Reuter (2024th meeting). Codification and progressive development would therefore have to go hand in hand.

16. With reference to the capacity of international organizations to defend before the courts officials who acted on their behalf, Mr. Bennouna had also asked whether he, the Special Rapporteur, endorsed the advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*. Personally, he thought that the Court had, in that opinion, established the legal bases for the personality and capacity of international organizations. In requesting the advisory opinion, the United Nations had sought to determine whether it could claim for itself or for the victims reparation from the State recognized as responsible. According to the Court:

... It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals.<sup>7</sup>

But the Court had taken its reasoning a step further by adding:

... To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization... In particular, he should not have to rely on the protection of his own State.<sup>8</sup>

And the Court had concluded that, to enable the international Organization to perform its duties in general and to protect its agents in particular, the States Members could only have endowed the Organization with "capacity to bring an international claim". The opinion further stated that the Organization

... is a subject of international law and capable of possessing international rights and duties, and... has capacity to maintain its rights by bringing international claims.<sup>9</sup>

<sup>7</sup> *I.C.J. Reports 1949*, p. 182.

<sup>8</sup> *Ibid.*, p. 183.

<sup>9</sup> *Ibid.*, p. 179.

<sup>6</sup> *Yearbook*... 1985, vol. I, p. 305, 1929th meeting, para. 5.

and added that “the action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization”.<sup>10</sup> From those considerations, it followed that the Organization could even, where necessary, bring a claim against the State of which its agent was a national.

17. Mr. Bennouna had also asked whether the topic was solely one for codification or whether it lent itself to progressive development of the law. Needless to say, there was always room for progressive development of the law, and he himself had always maintained that progressive development was of essential importance in the Commission’s work, and that the present topic afforded a wide-ranging field of research.

18. It was apparent from the discussion that the Commission was of the opinion that the study of the topic should be continued in accordance with the proposed schematic outline, the study being confined for the time being to international intergovernmental organizations, since there was no reason for the second part of the topic to be founded on bases different from those underlying the first part.

19. His reply to the question whether the draft could provide for lesser privileges and immunities than those guaranteed in headquarters agreements or other relevant instruments was in the negative: the goal was to supplement the rules in force and to elaborate a new set of rules to help resolve the problems that international organizations faced in their relations with States, whether or not host States.

20. He had from the very outset placed before the Commission the question of the definition of international organizations, a matter raised by Mr. Mahiou (2025th meeting), and the Commission had urged him to “proceed with great caution” and endeavour “to adopt a pragmatic approach to the topic in order to avoid protracted discussions of a doctrinaire, theoretical nature”.<sup>11</sup> However, it was difficult, if not impossible, to elaborate a set of legal rules without engaging in doctrinaire discussions: while its importance should not be exaggerated, theoretical debate was none the less of some value. Nor should excessive importance be attached to caution, since progressive development of international law called for boldness. In other words, the meaning to be attached to the privileges and immunities of international organizations could not be studied without taking account of what the actual concept of an international organization covered. So far, no agreement had been reached on a legal definition of the concept. Efforts had been made from various angles, but without success. The Commission had simply managed to restrict the scope of the concept by applying criteria relating to membership (universal organizations, regional organizations) or functions (public, technical, political or general activities). Thus international organizations had been the subject of a systematic classification rather than an actual definition. In due course, he would nevertheless have to propose a definition, or at least pin-point the meaning to be attached to an international organization in the draft articles.

<sup>10</sup> *Ibid.*, p. 186.

<sup>11</sup> *Yearbook . . . 1983*, vol. II (Part Two), p. 80, para. 276.

21. It was deplorable that some topics, such as the one assigned to him, disappeared from the Commission’s agenda for a number of years, for when the Commission reverted to them, it had meanwhile forgotten the earlier work thereon. It was better to embark on a race against time, as in the present instance, than to start out again from scratch.

22. In short, he noted that the Commission endorsed the outline he had submitted, subject to certain changes which he had taken note of and which he would take properly into account. He would also bear in mind the suggestions regarding the scope of the topic. Lastly, he would endeavour to combine the two working methods proposed: first, to follow his outline faithfully for the purposes of codification; and secondly, to seek initially the gaps in the law applicable to the topic and subsequently to formulate draft articles.

23. Mr. MAHIOU said he hoped that the Special Rapporteur, while making full use of the freedom needed in his task, would submit to the Commission at its next session his first draft articles, accompanied by explanations, so that the draft could start to take shape.

24. The CHAIRMAN thanked the Special Rapporteur for his thorough and comprehensive summing-up and said he was confident that the Special Rapporteur would keep Mr. Mahiou’s suggestion in mind. The Commission functioned best when it had draft articles to focus on, but the Special Rapporteur should be the one to decide at which stage the work was ripe for drafting articles.

25. If there were no objections, he would take it that the Commission agreed that the Special Rapporteur should proceed with his study of the topic, on the basis of the schematic outline proposed in his third report and the discussion in the Commission.

*It was so agreed.*

*Mr. Díaz González, First Vice-Chairman, took the Chair.*

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,<sup>12</sup> A/CN.4/406 and Add.1 and 2,<sup>13</sup> A/CN.4/L.411)**

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (*continued*)

ARTICLE 2 (Scope of the present articles)<sup>14</sup> (*concluded*)

26. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that a consensus appeared to have emerged in the lengthy discussion at the previous meeting in favour of inserting the words “protection and development” after “conservation” in paragraph 1, and therefore suggested that members who did not agree to the change should enter reservations.

<sup>12</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

<sup>13</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>14</sup> For the text, see 2028th meeting, para. 1.



27. Mr. BARSEGOV said that the precedent of altering the text of a draft article already adopted by the Drafting Committee in the light of the opinions expressed previously by members of the Commission was deplorable.

28. It was in the general interest that the natural resources under the permanent sovereignty of States should be protected. However, the wording now being proposed lent itself to an interpretation whereby States could no longer use some of those natural resources—in the present case, their water resources. Such a situation would be particularly dangerous for small States, for the Commission had not yet defined the subject of the draft articles: frontier rivers, frontier lakes or all of a country's waters. Since the ambiguity was a source of danger, States certainly would not agree to a text which affected their permanent sovereignty over their natural resources, and the consequence would be that the draft articles would simply be in the nature of a recommendation. He could not oppose adoption of the text modified in that way, but he was compelled to enter a general reservation regarding document A/CN.4/L.411 as a whole.

29. Mr. HAYES said he hoped that the Chairman of the Drafting Committee would continue to explain the decisions arrived at, particularly in regard to changes in the draft articles. However, the Chairman of the Drafting Committee was not infallible, and he himself shared the view that it was for members of the Commission to indicate whether they agreed or disagreed with an explanation. Nor was the Drafting Committee infallible, and as a member of the Committee he did not feel obliged to support every proposed text in all its details.

30. As for the expression to be used in place of "measures of conservation", the activities covered by the draft articles should be those with the potential to affect the legitimate enjoyment of the benefits of the watercourse by other users. The most obvious were use and development. Although conservation and protection overlapped to a certain extent, he believed the use of both terms was necessary in order to provide adequate coverage of activities. He therefore supported the proposal by the Chairman of the Drafting Committee.

31. Mr. BEESLEY said that he endorsed the proposed change, essentially for the same reasons as Mr. Hayes, and in view more especially of Principles 21 and 22 of the Stockholm Declaration. He hoped that the commentary would touch on the considerations set out in a book by Jan Schneider<sup>15</sup> which he had mentioned in the Drafting Committee and which referred to measures of protection of anadromous species, including the halting of hydroelectric development projects. Lastly, he would like to make it clear that he could also have accepted the original formulation.

32. Mr. EIRIKSSON said that his proposal had been designed to bring article 2, paragraph 1, into line with the other provisions of the draft. Whether the proposal

by the Chairman of the Drafting Committee did so would be seen after consideration of the other articles. For the time being, he had no objection to the proposal.

33. For the purposes of the Commission's future discussion on its methods of work, five lessons could be drawn from the exchange of views: first, it was impossible to deal with articles in a piecemeal fashion, in other words without placing them within the overall structure of the draft; secondly, the proposal by the Chairman of the Drafting Committee confirmed the value of informal consultations; thirdly, there should never be too long a period between substantive consideration of articles in the Commission and their presentation by the Drafting Committee; fourthly, the Drafting Committee should have clearer guidelines from the Commission on the substantive proposals referred to it; and fifthly, the Drafting Committee had too much work for it to give all due attention to purely drafting matters.

34. Mr. REUTER said that the exchange of views on the terms to be used in draft article 2, paragraph 1, was out of place, for it brought into question the substance of the future draft articles. He had no objection to the proposal by the Chairman of the Drafting Committee. For his own part, however, he did not interpret article 2 as determining the existence in general international law or in the future draft articles of rules of law that went in one direction or another. In that regard, the Commission was still free to do what it liked. To his mind, article 2 simply described, relatively skilfully, the scope of the draft.

35. Mr. SOLARI TUDELA said that the wording of paragraph 1 should be retained in its present form, for the addition of the term "protection" would be purely tautological. If the Commission wished, despite everything, to speak of protection, it should do so in the way proposed by Mr. Sreenivasa Rao at the previous meeting, namely by saying "measures of conservation, including protection". The effect of introducing the concept of development would be to give the provision a meaning different from the meaning it should have in the other articles.

36. Mr. McCAFFREY (Special Rapporteur) said that he supported the changes suggested by the Chairman of the Drafting Committee, for they were the closest the Commission would come to a form of language commanding a consensus. A scope article was like scaffolding: it had to be put up in order to erect the edifice, after which it might be incorporated into the building or fall away. Certainly, at the present stage the Commission should leave itself ample room to develop the draft articles fully. As Mr. Reuter had said, the Commission should not be unduly frightened of draft article 2, which simply defined in very broad terms what the draft articles would be concerned with. However, as some members had said, if the Commission agreed to the formula, corresponding changes would be necessary in article 6.

37. As for speaking of measures of conservation "including protection", he did not believe that the terms "conservation" and "protection" were synonymous: protection included such matters as health hazards or natural hazards. He therefore hoped that the Commis-

<sup>15</sup> *World Public Order of the Environment: Towards an International Ecological Law and Organization* (University of Toronto Press, 1979), p. 28.

sion would use the formula that appeared to have the broadest acceptance.

38. Mr. GRAEFRATH said that he very much regretted the turn taken by the debate. He recognized that the language of draft article 2 should be brought into line with that of draft article 6, something which the Drafting Committee should have done originally. But the accumulation of terms in article 2, combined with a specific interpretation that the Drafting Committee had not had in mind when it had adopted the article, compelled him to reserve his position. He certainly could not agree that, by adopting the article, the Commission was making an interpretation of or giving an application to other international instruments.

39. Mr. KOROMA said that he shared Mr. Graefrath's views: draft article 2 did not refer to any other international instrument and the interpretations by individual members during the debate were not necessarily the ones the Special Rapporteur would include in the commentary.

40. Mr. CALERO RODRIGUES said that he would not stand in the way of a consensus on the formulation suggested by the Chairman of the Drafting Committee, but he did have a reservation concerning the use of the terms "conservation" and "protection". If both terms were used, a distinction would have to be drawn between them, and the article would not be as clear as it would with either term alone.

41. Mr. ARANGIO-RUIZ said that he would accept the compromise text for the sake of advancing the Commission's work. As a matter of logic and semantics, however, he failed to see how the term "conservation" could add anything to "protection" and "development", which together expressed the concept of conservation in all its possible technical meanings. Consequently, he would have to reserve his position concerning any future articles dealing with matters relating to "conservation, protection and development".

42. Mr. Sreenivasa RAO said the debate showed that there were fundamental differences of approach to the draft articles. To avoid further complications, the Commission should revert to the original formulation proposed by the Drafting Committee. The formulation "including protection" would also be a possible compromise.

43. Mr. AL-QAYSI said that he was prepared to accept either the original text or the text with the proposed additions.

44. Mr. BENNOUNA said he would have hoped that draft article 2 could be adopted without delay and without any superficial misunderstanding: semantic discussions should not overlook the goal being pursued. Apparently, Mr. Barsegov had reservations regarding the new formulation proposed by the Chairman of the Drafting Committee. However, it was difficult to see how the term "conservation" could be criticized, or why the nuances between the two formulations were so important. As to the use of the term "conservation", it should be noted that, as stated in the article, they were "measures of conservation related to the uses"; in other

words it was not a question of general protection of the environment.

45. Mr. Barsegov had also raised the question of the nature of the watercourses concerned: were they transboundary, frontier or national watercourses? Although the distinction had no bearing on article 2 itself, it would none the less be useful to investigate the matter further in a future report.

46. To get out of the impasse, members who had conflicting views regarding the wording of draft article 2 could meet and come to an understanding, and the Commission could then take its decision. Otherwise, the draft article would be adopted with an unfortunate number of reservations.

47. Mr. BARSEGOV said that there was indeed a misunderstanding. While he had raised the question of the nature of the watercourses concerned, his intention had not been to start up a new discussion but to call attention to cases in which a watercourse was situated entirely within the territory of one single State. Many countries, including some from which members of the Commission came, were familiar with that type of situation. Furthermore, the use of the words "watercourse system" implied that the scope of the future convention would encompass ground water and all waters connected with one another.

48. As to the term "conservation", it had, in Russian at least, a very specific meaning: "to conserve" meant "not to use up", as could be said in the case of coal, for example. In that regard, the future international régime could well end up by preventing a State from using its water potential as it thought best. The issue, therefore, was the permanent sovereignty of States over their natural resources, and it was surprising that some members of the Commission agreed so easily to a clause with clearly restrictive consequences. It was for States which shared a watercourse to decide between themselves on the rules they intended to apply in using common waters, for example in allocating the amounts of water for each. One example that came to mind was not the rivers in the USSR, to which such a situation did not apply, but the Tigris and the Euphrates, in connection with which Iraq and Iran had to agree on the portion of the flow that each could use for its irrigation works.

49. Mr. ILLUECA pointed out that the Commission was considered as a body of jurists which, in a sea of political vicissitudes, was an island of reason and common sense. No member represented a State, even if he expressed the point of view of a particular legal system. However, contrary to that very principle, the Commission appeared to be embroiled in a fruitless discussion that was making it lose time, when a number of special rapporteurs and the Drafting Committee had devoted many hours to formulating the text under consideration.

50. Nor should it be forgotten that, after consideration on first reading, the text would be submitted to the Sixth Committee, then to the General Assembly, then to Governments, and would then return to the Sixth Committee and, lastly, to the Commission. Accordingly, regardless of the Commission's immediate decision, its

choice was far from binding. It was surprising to find the discussion at such a standstill, something that had never occurred in all the time he had been a member. One would think that efforts were being made to delay the work for political reasons, perhaps in order to avoid other issues.

51. Mr. BEESLEY said that, as he had consistently stated, he could accept the Drafting Committee's proposal and would like to revert to the language used in draft articles 6 and 7. He would also like to know whether there were any members who, in the light of the discussion, now considered rejecting the proposal by the Drafting Committee.

52. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, while some members rejected draft article 2 as proposed by the Drafting Committee, it was for the Commission, and not the Committee, to decide what was to be done.

53. Mr. THIAM pointed out that it was not the first time that a text proposed by the Drafting Committee had failed to command unanimous support. In such instances, the Commission's custom was to note the reservations in its report to the General Assembly—for consideration of the matter was not completed with its own discussions—and then carry on with the remainder of the text. Later it went on to find a formulation acceptable to all.

54. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Chairman might quite simply note that there was no unanimity and ask for the reservations by some members to be included in the Commission's report to the General Assembly.

55. Mr. TOMUSCHAT noted that there seemed to be a majority of members who considered that the formulation "conservation, protection and development" should be used. If the aim was to bring the discussion to an end, that would be achieved by proposing adoption of the amended text, not the original text.

56. Mr. MAHIOU said that he was ready to agree to either solution. However, according to the tradition mentioned by Mr. Thiam, it was necessary to revert to the original text, for that was the custom when an amendment did not command sufficiently broad support.

57. Mr. AL-QAYSI, endorsing Mr. Mahiou's remarks, formally proposed that the Commission should adopt article 2 as originally proposed by the Drafting Committee, on the understanding that any member who so wished could enter a reservation. The Commission could decide on the form of article 6 when it came to take up that article.

58. The CHAIRMAN said that the Commission had a formal motion for adoption before it.

59. Speaking as a member of the Commission, he confirmed Mr. Mahiou's observation, namely that texts had sometimes been adopted with explicit reservations. Personally, he had no objection to the original text and regretted the dispute that had arisen over the term "conservation". That term had, however, been adopted by

the Drafting Committee as a compromise solution after lengthy consultations.

60. Mr. AL-BAHARNA observed that it was unfortunate that the Commission had no rules of procedure of its own. The Chairman of the Drafting Committee had submitted an amendment whereby three elements would be included in draft article 2, namely conservation, protection and development. Some members thought that the amendment reflected a measure of consensus within the Commission. As a matter of procedure, he could not agree that the Commission should revert to the original text. If it was going to vote on the article, it should start with the amendment and then proceed to a vote on the original text. Accordingly, he agreed with Mr. Tomuschat that members should be sounded out on their views, first on the amendment, and then, if it were rejected, on the original text.

61. The CHAIRMAN pointed out that it was not customary for the Commission to vote. As the more long-standing members would remember, the Commission had voted on only two or three occasions, in exceptional circumstances.

62. Mr. AL-QAYSI, referring to Mr. Al-Baharna's remarks, said that in fact the Chairman of the Drafting Committee had, after consultations and in the interests of arriving at a consensus, produced a form of wording, which had proved unacceptable. The question therefore was whether to revert to the original text or to introduce into that text the various amendments submitted. In his view, the only viable solution, and the one that would command the broadest support, was to revert to the original text presented by the Drafting Committee, as had been formally proposed.

63. Mr. MAHIOU pointed out that the draft article was being considered on first reading and that, even on second reading, it was extremely rare for the Commission to take a vote. In his opinion, a decision should be taken on the original text.

64. Mr. HAYES, supporting the proposals made by Mr. Mahiou and Mr. Al-Qaysi, said that the Commission should adopt the text of article 2 as proposed by the Drafting Committee, with such reservations as members might express. His own reservation arose out of the new elements that had emerged during the debate, for the main emphasis in the Drafting Committee had been on retaining terms such as "management" and "administration". The inclusion of the terms "protection" and "development" had not been considered.

65. Mr. AL-BAHARNA said that, in his earlier statement, he had not of course meant that the Commission should proceed to a vote in the literal sense of the term, but rather that members should be sounded out on their views. He none the less continued to think that the Chairman of the Drafting Committee had submitted an amended form of wording for draft article 2 that would include the three elements of conservation, protection and development. Perhaps the Chairman of the Drafting Committee would provide further clarification on that point.

66. Mr. FRANCIS said that, under the rules in the United Nations system, a proposal could of course be

withdrawn at any time, and that was what the Chairman of the Drafting Committee had done. As to the conduct of the debate, he suggested that, in view of the lateness of the hour and the need for the Commission to move forward in its work, members should be allowed to submit any reservations in writing to the Secretary to the Commission.

67. The CHAIRMAN, pointing out that Mr. Eiriksson had proposed an amendment relating purely to the form of the English text of draft article 2 (2028th meeting, para. 18), suggested that the English-speaking members of the Commission should meet to choose the terminology they deemed appropriate.

68. As to the substance, he proposed that the Commission should provisionally adopt article 2, on the understanding that the reservations expressed would be included in the summary records of the meetings and in the Commission's report.

*It was so agreed.*

*Article 2 was adopted.*

#### ARTICLE 3 (Watercourse States)<sup>16</sup>

69. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 3 was based on article 2 as provisionally adopted in 1980 and on draft article 3 as submitted in 1984. It used the expression "watercourse State", which had appeared in the draft articles submitted in 1984 and which it was believed could be employed without prejudging whether or not the term "system" was to be used.

70. The Drafting Committee recognized that the article contained definitional elements. Thus, at a later stage, the provision might find its way into article 1, on the use of terms. The various language versions had been altered to bring out the definitional element, which was already highlighted in the French text. The article had also been amended in some languages in order to emphasize the physical or geographical elements of the definition. For example, in the English text, the word "exists" had been replaced by "is situated", in line with the provisional working hypothesis. Similarly, in the Spanish text, *exista* had been replaced by *se encuentra*. The title was the same as in the 1984 text.

71. Mr. KOROMA said that, in his view, the proper place for the provision was in article 1, relating to the use of terms. Moreover, the words "is situated" were not satisfactory, and he therefore wished to enter a reservation on that score.

72. Mr. AL-KHASAWNEH said that, if the Commission agreed to retain the words "is situated", a corresponding change would have to be made in the Arabic text of the article. Indeed, there were a number of instances throughout the draft in which the Arabic text did not correspond closely to the other language versions, and the English version in particular. In order not to delay the Commission's work, he proposed to consult his Arabic-speaking colleagues on those matters and communicate the required changes direct to the Secretariat.

73. The CHAIRMAN recommended that the Arabic-speaking members of the Commission should follow the example of their Spanish-speaking colleagues: it would be enough for them to agree on the terminology they thought suitable and to communicate it direct to the Secretariat.

74. Mr. AL-KHASAWNEH recalled that a question had been raised in the Drafting Committee as to whether a State which was not a natural system State would be covered by the definition in draft article 3. Perhaps the Special Rapporteur could deal with that point in the commentary.

75. Mr. McCAFFREY (Special Rapporteur) said it was not possible to answer that question at the current stage in the work. Personally, he would be very reluctant to define an international watercourse so as to include such man-made diversions as a canal, which might take the water of an international watercourse into another drainage basin. The term "international watercourse" was normally used to refer to a watercourse created by nature and not to any artificial diversions. In his view, it should be so interpreted until such time as a definition was finally adopted.

76. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 3.

*Article 3 was adopted.*

#### ARTICLE 4 ([Watercourse] [System] agreements)<sup>17</sup>

77. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 4, based on article 3 as provisionally adopted in 1980 and on draft article 4 as submitted in 1984, had been the subject of considerable discussion in the Drafting Committee and the version now before the Commission differed from previous versions in a number of ways.

78. To begin with, it should be remembered that the article was one of the key articles of the draft, since it introduced for the first time the concept of a "framework agreement"—the basis of the Commission's work on the topic since 1980—by stating that watercourse States could enter into one or more agreements which applied and adjusted the provisions of the present articles to the characteristics and uses of a particular watercourse or part thereof.

79. Paragraph 1 had been recast to emphasize that fundamental point. Neither the 1980 text nor the 1984 text had been sufficiently clear in that regard. Moreover, the 1984 text had introduced unnecessary detail and extraneous matters. Members would note the use of the word "may", which emphasized the residual nature of article 4. Watercourse States were not required to conclude such agreements: if they did not conclude such agreements, the provisions of the future convention would apply without modification or adjustment. The second sentence of paragraph 1 was of a definitional character and merely specified that such agreements would be called "[watercourse] [system] agreements".

<sup>16</sup> For the text, see 2028th meeting, para. 1.

<sup>17</sup> For the text, *ibid.*

80. It should be added that some members of the Drafting Committee had raised questions or expressed doubts concerning the “framework agreement” approach, wondering whether it signified that the Commission had already decided to recommend that the draft should be adopted in the form of a convention. Although it was customary for the Commission to decide on the ultimate form to be recommended only at the end of its work on a draft, those members had stressed that acceptance of many provisions of the draft depended not only on their content, but also on the final form the Commission would decide to recommend.

81. Paragraph 2 again highlighted the residual nature of the article by beginning with the phrase “Where [an] . . . agreement is concluded”. It had also been adjusted to make it clear that, if such an agreement related to only part of a watercourse or to a particular project, programme or use, that agreement must not adversely affect to an appreciable extent the use of the watercourse by other watercourse States. The Drafting Committee had decided to retain the standard used in the 1980 text, namely “to an appreciable extent”, which was intended to provide an objectively verifiable threshold. While some questions had been raised as to the meaning of those words, the Committee had thought it prudent to retain them for the time being, with a full explanation being given in the commentary.

82. Paragraph 3 had been changed considerably. Instead of the ambiguous test expressed in the phrase “in so far as the uses of an international watercourse may require”, the new text was precise and clear as to what set its provisions in motion, namely when a watercourse State considered that adjustment or application of the provisions of the present articles was required because of the characteristics and uses of a particular watercourse. After lengthy discussion, the Drafting Committee had decided that the appropriate obligation in such cases was that of consultation, with a view to negotiating in good faith for the purpose of concluding a “[watercourse] [system] agreement”. The previous texts had referred to an obligation to negotiate. However, the members of the Committee had been of the view that an obligation to negotiate in that general context might be taken to refer to an unduly formal procedure, one which could not be forced upon unwilling States. The point was, if circumstances permitted, to encourage States to engage in discussions, especially at that initial stage: a conflict of interests should not automatically be presumed and the importance of co-operation should be emphasized. Thus the obligation laid down had been changed to an obligation to consult, with a view to negotiation. Of course, that was without prejudice to later articles which might stipulate an obligation to negotiate within a specific context. Lastly, the expression “watercourse States” did not imply that all watercourse States were necessarily required to consult: that question depended on the specific circumstances.

83. The title of the article reflected the choice, which would have to be made later by the Commission, between “watercourse agreements” and “system agreements”.

84. Mr. TOMUSCHAT suggested that the word “shall”, in the first sentence of paragraph 2, should be replaced by “should”. Otherwise, the rule laid down would seem to be one of *jus cogens*, which was quite out of the question.

85. Mr. KOROMA, referring to paragraph 3, said that he did not think the intention was to compel every State or group of States to conclude an agreement regarding their watercourses. The most important thing was for States to negotiate in good faith on the use of the waters. He therefore proposed that the last part of the paragraph should be amended to read “watercourse States shall consult with a view to negotiating in good faith regarding the use of their waters”.

86. Mr. ARANGIO-RUIZ, referring to Mr. Tomuschat’s suggestion, pointed out that paragraph 2 opened with the clause “Where a [watercourse] [system] agreement is concluded between two or more watercourse States”, which meant that States were free to conclude watercourse agreements or not, as they saw fit. The provision in question also stipulated that any such agreement would define the waters to which it applied. Therefore the word “shall” could not be interpreted as constituting a threat to the sovereignty of the States concerned.

87. Mr. EIRIKSSON said that he had nine drafting proposals to make and would therefore consult the Chairman on how best to proceed in order to submit them to the Commission.

88. He would like to know whether the proviso in the second sentence of paragraph 2 applied to agreements concluded in connection with an entire watercourse or merely to those relating to a part of the watercourse or to a particular project, programme or use.

89. Mr. BENNOUNA proposed that, in the French text, in the first sentence of paragraph 1 and in paragraph 3, the verb *appliquer* should be replaced by *mettre en œuvre*. The purpose of the agreements envisaged in those provisions would be to give effect to the convention the Commission was endeavouring to elaborate, which would be a binding convention. The term he was proposing would better reflect the idea of subsidiary agreements.

*The meeting rose at 1.10 p.m.*

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## 2030th MEETING

*Thursday, 9 July 1987, at 10.05 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo,

Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Tribute to the memory of Mr. Nicolas Teslenko, former member of the Commission's secretariat**

1. The CHAIRMAN announced with deep regret the death of Mr. Nicolas Teslenko, who had been a distinguished member of the staff of the Codification Division and, for many years, Deputy Secretary to the Commission.

*At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Nicolas Teslenko.*

*Mr. Díaz González, First Vice-Chairman, took the Chair.*

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.411)**

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (continued)

ARTICLE 4 ([Watercourse] [System] agreements)<sup>3</sup> (concluded)

2. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that several amendments to draft article 4 had been proposed at the previous meeting. Mr. Tomuschat had proposed that, in the first sentence of paragraph 2, the word "shall" should be replaced by "should"; Mr. Koroma had proposed that the last part of paragraph 3 should be amended; Mr. Eiriksson had proposed that the order of the paragraphs should be changed; and Mr. Bennouna had proposed that, in paragraphs 1 and 3 of the French text, the verb *mettre en œuvre* should be used in place of *appliquer*.

3. Following a procedural debate in which Mr. MAHIOU proposed that the Commission should proceed paragraph by paragraph and Mr. BARSEGOV regretted the fact that the written text of the proposed amendments had not been made available, the CHAIRMAN suggested that, in order save time, drafting amendments relating only to one language version should be transmitted direct to the secretariat, after consultation between the members of the Commission concerned by that language version.

4. Mr. GRAEFRATH said that all members were entitled to propose amendments and explain the reasons for them. It was then up to the Commission to decide

whether such amendments related to drafting or to substance.

5. Mr. BARSEGOV, stressing the need to consider substantive amendments, recommended that members should refrain from proposing amendments of a purely drafting nature.

6. The CHAIRMAN proposed that draft article 4 should be considered paragraph by paragraph.

*Paragraph 1*

7. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he had no objection to Mr. Bennouna's proposal that, in paragraphs 1 and 3 of the French text, the verb *appliquer* should be replaced by *mettre en œuvre*.

8. Mr. AL-QAYSI said he feared that, in the English text, the effect of that amendment would be that the words "apply" and "application" would be replaced by "implement" and "implementation", respectively.

9. Mr. McCAFFREY (Special Rapporteur) said that the change proposed by Mr. Bennouna affected the substance of the article, for there was a difference between "applying" the binding provisions of a régime and giving effect to them through subsidiary agreements designed to "implement" them.

10. Mr. CALERO RODRIGUES said that, in Spanish, the same word was used to translate *appliquer* and *mettre en œuvre*.

11. The CHAIRMAN, noting that the proposed amendment related only to the French text, requested the French-speaking members of the Commission to decide which wording they preferred.

12. Mr. EIRIKSSON said that the English text of article 4 sometimes used the verb "to conclude" and, at other times, "to enter into". He proposed that the text should be harmonized by using the verb "to conclude" throughout.

13. Mr. AL-BAHARNA said that there was a difference between those two terms and that the term "to enter into" was preferable. The "conclusion" of an agreement was a specific formality, usually the last one leading up to the entry into force of the agreement.

14. Mr. ARANGIO-RUIZ said that, since the Spanish text used the verb *celebrar* throughout, the problem was one of a drafting nature.

15. Mr. EIRIKSSON proposed that the second sentence of paragraph 1 should be deleted and that the idea to which it referred should be reflected in the first sentence, which would read: "Watercourse States may enter into one or more agreements, hereinafter referred to as [watercourse] [system] agreements, which apply and adjust the provisions . . ."

16. He also proposed that the first sentence of paragraph 2 should form a separate paragraph.

17. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he objected to Mr. Eiriksson's second proposal because paragraph 2 had a logic of its own.

<sup>1</sup> Reprinted in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>3</sup> For the text, see 2028th meeting, para. 1.

18. Mr. ARANGIO-RUIZ said he agreed that paragraph 2 should not be changed. Mr. Eiriksson's proposal would be more elegant, but it would mean that the rest of paragraph 2 would have to be reformulated.

19. Mr. EIRIKSSON said that, since he did not wish to waste the Commission's time, he withdrew his proposals.

20. Mr. AL-BAHARNA said that there was a problem with the tenses of the verbs at the beginning of the first sentence of paragraph 1 of the English text, which should read: "... one or more agreements which would apply and adjust ...".

21. The CHAIRMAN said that drafting amendments should be drawn to the attention of the secretariat.

22. If there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 1 of article 4 as proposed by the Drafting Committee.

*It was so agreed.*

#### *Paragraph 2*

23. Mr. EIRIKSSON proposed that the first sentence should be amended to read: "A [watercourse] [system] agreement shall define the waters to which it applies."

24. He further proposed that the proviso in the second sentence should form a separate sentence, reading: "A [watercourse] [system] agreement shall not adversely affect to an appreciable extent the use of the international watercourse [system] concerned by any watercourse State which is not a party to the agreement."

25. Mr. AL-QAYSI said that he could not comment on Mr. Eiriksson's proposals until he had seen them in writing. Since the Commission did not have enough time to engage in a debate on those proposals, he considered that the text of paragraph 2 should be adopted as it stood and that any drafting exercise should be left to a later stage.

26. Mr. CALERO RODRIGUES said that Mr. Eiriksson's proposals were a definite improvement on the original text and, if they had been submitted to the Drafting Committee, he would have supported them. At the present stage, however, a debate on those proposals would prevent the Commission from completing its work. He therefore favoured the retention of paragraph 2 as it stood.

27. Mr. BARSEGOV said that, while Mr. Eiriksson's proposals made the text of paragraph 2 clearer, it was not possible for the Commission to examine them at the present time. In any event, the text proposed by the Drafting Committee sufficed for the purposes of a first reading. Mr. Eiriksson's proposals should therefore be referred to the Drafting Committee for discussion at a later stage.

28. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, if a member had an entirely new form of wording to propose, the Special Rapporteur could always mention that fact in the commen-

tary and, if necessary, include the new text either in the commentary itself or in a footnote.

29. Mr. ARANGIO-RUIZ said that Mr. Eiriksson's first proposal was of a purely cosmetic nature. As to the second, Mr. Eiriksson had only to make it available to the Special Rapporteur, so that he might take it into account when he came to draft the commentary to article 4.

30. Mr. OGISO noted that the Chairman of the Drafting Committee had stated in his introductory remarks (2029th meeting) that the proviso in the second sentence of paragraph 2 would be explained in the commentary to article 4. He would appreciate it if the Special Rapporteur could read out the relevant part of the commentary.

31. Mr. McCAFFREY (Special Rapporteur) said that the final version of the commentary would not be available until the article itself had been adopted. The Drafting Committee's main concern had been to ensure that two States could not enter into an agreement with regard to a part of a watercourse which would adversely affect a third State. He would do his best, with Mr. Eiriksson's help, to reflect that point in the commentary.

32. Mr. Sreenivasa RAO said that, in his view, Mr. Eiriksson's proposals were useful and should be referred to the Drafting Committee. On that understanding, he could agree to the adoption of paragraph 2 in its present form.

33. Mr. KOROMA said that the Commission had not had an opportunity to examine the Drafting Committee's reports properly in plenary. Although it should not examine drafting points at the present stage in its work, it should not be rushed into approving texts where matters of substance were involved. In the case under consideration, he agreed that the proviso in the second sentence of paragraph 2 was in a category by itself and that it should therefore form a separate clause or article. Mr. Eiriksson's amendments were thus valid and should be duly taken into account.

34. Mr. AL-KHASAWNEH said that draft article 4 was very important because it introduced for the first time the concept of an umbrella agreement or the framework agreement approach. That approach, which had been adopted in 1980, had, however, not been debated in plenary as fully as its importance warranted. He had doubts about the appropriateness of that approach, the declared rationale for which was that watercourses differed in terms both of their geographical and natural characteristics and of the human needs they served, whereas such differences, even if they did exist, were for the most part immaterial for the purposes of the progressive development and codification of international law. He did not wish to delay the Commission's work any further, but would like his views to be placed on record.

35. Mr. AL-QAYSI said that, although Mr. Eiriksson's proposal concerning the proviso in the second sentence of paragraph 2 appeared to have some merit, he could not comment on it until he had seen it in writing and had been able to determine what effect it

would have. Paragraph 2 contained two parameters: the first was geographical, and the second substantive. The substantive one was the subject of draft article 9 and in draft article 4, paragraph 2, it appeared only as a parameter of the future agreement.

36. He formally proposed that the Commission should adopt paragraph 2 as proposed by the Drafting Committee, on the understanding that it would be reconsidered later in the light of the draft as a whole.

37. Mr. BEESLEY supported that proposal. He nevertheless stressed that the issue raised by Mr. Eiriksson's proposal was a substantive one.

38. Mr. KOROMA said that he would be prepared to accept paragraph 2 in its present form, on the understanding that it would be re-examined at a later stage in the Commission's work.

39. Mr. ARANGIO-RUIZ said that, like other members, he wished to reserve his position on the second sentence of paragraph 2 and to have his reservation reflected in the summary record of the meeting. In his view, the matter could not simply be dealt with in the commentary.

40. Mr. YANKOV said it was important that the reservations expressed by members of the Commission should be reflected in the summary record of the meeting. Moreover, the Special Rapporteur always had the possibility of suggesting amendments to his text in the light of comments made by members during the discussion.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 2 of article 4 as proposed by the Drafting Committee.

*It was so agreed.*

### Paragraph 3

42. Mr. EIRIKSSON proposed that the first part of paragraph 3 should be deleted and that the paragraph should begin with the words "Watercourse States shall, at the request of any watercourse State, consult . . .".

43. He also proposed that the last part of the paragraph should be replaced by the words "with a view to negotiating in good faith a [watercourse] [system] agreement". That wording would be closer to that used in the 1969 Vienna Convention on the Law of Treaties.

44. Mr. BARSEGOV said he had no objection to the adoption on first reading of paragraph 3 as proposed by the Drafting Committee, on the understanding that the drafting improvements proposed by Mr. Eiriksson would be considered at a later stage in the Commission's work.

45. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 3 of article 4 as proposed by the Drafting Committee.

*It was so agreed.*

*Article 4 was adopted.*

### ARTICLE 5 (Parties to [watercourse] [system] agreements)<sup>4</sup>

46. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the title of draft article 5 had been simplified and that the text was based on article 4 as provisionally adopted in 1980 and on draft article 5 as submitted in 1984.

47. Paragraph 1 closely followed the previous texts, with two basic exceptions. First, to align the text with article 4, paragraph 2, reference had been made to the "entire" watercourse, rather than to the watercourse "as a whole". Secondly, in order to give effect to the obligation set forth in the new version of article 4, paragraph 3, the words "as well as to participate in any relevant consultations" had been added.

48. Paragraph 2 also referred to "consultations", in line with the new version of article 4, paragraph 3. In addition, paragraph 2 had been amended in the light of the debate held at earlier sessions on the right of a watercourse State, under the conditions set forth in that paragraph, to become a party to the agreement referred to therein. If those conditions had been fulfilled, there appeared to be no reason why a watercourse State should not, in the circumstances envisaged, be entitled to become a party to the agreement in question. The commentary would nevertheless explain that the best way of solving the problem would be to proceed on a case-by-case basis. Thus the State concerned might, through a protocol, become a party to the elements of the agreement that affected it or it might become a full party to the agreement: the solution would depend entirely on the nature of the agreement, the elements of the agreement affecting the State in question and the nature of the consequences that might ensue for it. Lastly, the paragraph no longer contained a cross-reference to the preceding article, as had been the case in article 4 of 1980, for that had given rise to confusion and had created a possibility of misinterpretation, as the previous Special Rapporteur had pointed out in his second report.<sup>5</sup>

49. Mr. EIRIKSSON, noting that the words "any relevant consultations" at the end of paragraph 1 were too vague, suggested that they should be replaced by "any consultations relating to such an agreement".

50. At the end of paragraph 2, he suggested that the penultimate phrase should be replaced by the words "to the extent that its use is affected by it".

51. Mr. AL-KHASAWNEH said that he wished to place on record his reservations with regard to draft article 5. The entitlement it gave any watercourse State to become a party to any watercourse agreement was not adequately supported by doctrine and was not in conformity with political reality.

52. Mr. YANKOV said that the wording proposed by Mr. Eiriksson for paragraph 1 would improve the text.

<sup>4</sup> For the text, *ibid.*

<sup>5</sup> *Yearbook . . . 1984*, vol. II (Part One), p. 109, document A/CN.4/381, para. 42.



53. Mr. AL-QAYSI, supported by Mr. BEESLEY, said that draft article 5 complemented article 4. If the wording proposed by Mr. Eiriksson for article 5, paragraph 1, were adopted, the wording of article 4, paragraph 3, would also have to be amended. He urged the Commission to adopt article 5 in the form proposed by the Drafting Committee.

54. Mr. McCAFFREY (Special Rapporteur) also urged the Commission to adopt article 5 as proposed by the Drafting Committee.

55. Mr. EIRIKSSON said that his intention had not been to change article 4, paragraph 3. He had simply hoped that his amendments would remedy the inconsistencies between article 4 and article 5.

56. Mr. KOROMA said that he would like his view that article 5 was not in accordance with political reality to be placed on record. He hoped that that provision would be reviewed at a later stage.

57. Mr. REUTER said that he had no objection to the adoption of article 5, but wished to place on record his reservations concerning the incompatibility between paragraphs 1 and 2, and concerning the legal effects of paragraph 1. Those were matters of substance that would have to be discussed more thoroughly at a later stage.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5 as proposed by the Drafting Committee.

*Article 5 was adopted.*

59. The CHAIRMAN said that the meeting would rise to enable the Planning Group of the Enlarged Bureau to meet.

*The meeting rose at 11.35 a.m.*

## 2031st MEETING

*Friday, 10 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Tribute to the memory of Mr. Senjin Tsuruoka, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Senjin Tsuruoka, a former member of the

Commission, who had made an important and lasting contribution to its work.

*At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Senjin Tsuruoka.*

### Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued)\* (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.412)

[Agenda item 5]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

#### TITLES OF CHAPTER I AND PARTS I AND II OF THE DRAFT *and* ARTICLES 1, 2, 3, 5 AND 6

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of chapter I and parts I and II of the draft code and draft articles 1, 2, 3, 5 and 6 as adopted by the Committee (A/CN.4/L.412), which read:

#### CHAPTER I

#### INTRODUCTION

#### PART 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.

#### PART II. GENERAL PRINCIPLES

##### *Article 3. Responsibility and punishment*

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. 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.

...

##### *Article 5. Non-applicability of statutory limitations*

No statutory limitation shall apply to crimes against the peace and security of mankind.

\* Resumed from the 2001st meeting.

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

*Article 6. Judicial guarantees*

Any person 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:

1. In the determination of any charge against him, he shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty.

2. He shall have the right to be presumed innocent until proved guilty.

3. In addition, he shall be entitled to the following guarantees:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) 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;

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

3. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) recalled that draft articles 1 to 11<sup>3</sup> as submitted by the Special Rapporteur in his fifth report (A/CN.4/404) had been referred to the Drafting Committee at the present session (see 2001st meeting, para. 31). The Committee had devoted to them 12 of the 39 meetings it had held during the session and had finally adopted articles 1, 2, 3, 5 and 6 (A/CN.4/L.412) in the light of the discussion on them at the present session.

4. The Drafting Committee had decided to leave aside draft article 4 (*Aut dedere aut punire*) for the time being, and therefore had not discussed the article. On the other hand, it had discussed draft article 7 (*Non bis in idem*) at length. The principle laid down in that article was regarded by some members as essential, but others considered that it would be acceptable only if it were subject to certain conditions designed to prevent abuse. Due to lack of time, however, the Drafting Committee had been unable to agree on a new form of wording.

5. Also due to lack of time, the Committee had been unable to consider draft articles 8 to 11. Consequently, six draft articles would still have to be examined at future sessions of the Commission.

6. The Drafting Committee's first recommendation related to the actual title of the topic. As pointed out during the discussion in plenary, the word "crimes" had been used in some versions and "offences" in others—a difference that derived from General Assembly resolutions adopted towards the end of the 1940s. Having discussed the matter in an endeavour to harmonize all the language versions in substance and in form, the Committee recommended that the term "crimes" should be used in all languages. Accordingly, while the title of the topic would for the time being remain as it

appeared on the Commission's agenda and in General Assembly resolutions on the subject, the word "crimes" would henceforth be used in all languages in the titles and texts of the draft articles. If the Commission accepted that recommendation, it might wish to recommend in its report that the General Assembly approve that decision and amend the title of the topic in English with a view to greater harmonization and equivalence between the various language versions. The Commission therefore had to decide whether it wished to use the word "crimes" in all languages and whether to recommend to the General Assembly that the title of the topic in English should be amended accordingly.

7. Mr. JACOVIDES said that he supported the change proposed by the Drafting Committee, which responded to the wishes expressed in the past both in the General Assembly and in the Commission itself and for which there were cogent reasons. The proposed new title for the topic was more accurate legally and carried greater weight politically. In addition, the use of the term "crimes" in the English text would make for harmonization with the other language versions.

8. Mr. BEESLEY said that he could have accepted the retention of the term "offences" at the beginning of the English text of article 1, provided the word "crimes" was used in the subsequent explanation, namely the expression "crimes against the peace and security of mankind", so as to stress the seriousness of the crimes covered by the draft.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to accept the proposal by the Drafting Committee to replace the term "offences" by "crimes" in the English text of the draft and to recommend to the General Assembly that it amend the title of the topic accordingly.

*It was so agreed.*

TITLES OF CHAPTER I AND PARTS I AND II

10. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Drafting Committee had for the moment accepted the title of chapter I (Introduction) and the titles of parts I and II as proposed by the Special Rapporteur. They were, however, provisional and would probably have to be re-examined. In the mean time, the Committee recommended that the Commission adopt those titles.

11. Mr. CALERO RODRIGUES, supported by Mr. EIRIKSSON, said that, although he did not wish to press the point at the present stage, he still believed that the draft articles should be divided into parts and the parts into chapters, as was the Commission's usual practice. He therefore reserved his position on that question and trusted that, on second reading, the Commission would bring the wording into line with that adopted in most other conventions.

12. Mr. ARANGIO-RUIZ said that, strictly speaking, he had no objections to the Drafting Committee's proposals, but he did have a reservation with regard to the title of part I (Definition and characterization). A

<sup>3</sup> For the texts, see 1992nd meeting, para. 3.

definition was, as it were, a label, whereas characterization related to the substantive treatment of a crime. He therefore accepted the title of part I for the time being, subject however to any changes he might suggest in the light of the texts to be adopted later.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the titles of chapter I and parts I and II of the draft code.

*The titles of chapter I and parts I and II of the draft code were adopted.*

#### ARTICLE 1 (Definition)

14. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 1 was very close to the text submitted by the Special Rapporteur and referred to the Drafting Committee, except for the square brackets around the words "under international law". The construction of the sole sentence that made up the article now followed the English version, which had been taken as a model, and the text started in all languages with the words "The crimes . . .".

15. Some members of the Drafting Committee had considered that the words between square brackets should be retained, while others had taken the view that they should be deleted. The former had argued that those words had appeared in the 1954 draft code and felt they were a logical and necessary means of declaring that the crimes in question were crimes under international law as reflected in numerous conventions and declarations of the organized international community. Other members had feared in particular that the words would be a source of confusion between the present topic and the topic of State responsibility, for States would in any event be bound by the code and the crimes covered existed independently of the code. The Drafting Committee had decided to draw attention to the difference of views by using square brackets, and to revert to the matter later. The word "defined" had also given rise to some reservations, since the draft article did not seem to be a definitional article. The Committee had none the less decided to retain the word, on the understanding that it was taken to mean "indicated" or "determined".

16. The Drafting Committee had also considered the possibility of adding a second paragraph containing a general definition of the crimes covered by the code, together with certain criteria. In that connection, Mr. Pawlak had proposed the following text (A/CN.4/L.419):

"Crimes against the peace and security of mankind are the acts which jeopardize the most vital interests and the very existence of mankind, violate the fundamental principles of international law, and threaten civilization and the basic human right to life."

Some members of the Drafting Committee had taken the view that the question of a general definition should be discussed immediately, but most had considered that it was a complicated matter and that such a course would have been premature. The Committee had de-

cidated to leave the question aside and revert to it later, perhaps after the establishment of the list of crimes, which would probably contain specific criteria for each of the acts.

17. The title of the draft article as proposed by the Special Rapporteur remained unchanged.

18. Mr. BEESLEY said that he had some reservations regarding the use of the term "definition" as the title of article 1 but could wait until the Commission's work had made much more headway before coming to a final decision.

19. As to the text of the article, he was in favour of retaining the words "under international law", provided they were placed between the words "constitute crimes" and the phrase "against the peace and security of mankind". He therefore formally proposed that such a change be made. In particular, the word "defined" should be kept, for he could not possibly agree to an open-ended code, especially if the question whether or not there were grounds for adding other crimes were left to national jurisdictions.

20. He also wished to comment briefly on the revised text of article 1 proposed by Mr. Pawlak in the Drafting Committee, which the Special Rapporteur had read out (para. 16 above). The intention was commendable, but the text read more like a General Assembly resolution than an article for the code. Far from strengthening the definition of crimes against the peace and security of mankind, that text would, if adopted, tend to soften it. It would introduce a great many criteria into the definition and in effect create as many loopholes. He therefore did not favour its adoption.

21. In reply to a question by the CHAIRMAN, Mr. PAWLAK explained that his suggested reformulation of article 1 was not intended to be discussed at the present stage as a concrete proposal and should be taken up at a later stage of the Commission's work on the draft code.

22. Mr. MAHIOU said he thought that the reference to international law was appropriate and therefore favoured deletion of the square brackets around the words "under international law" for the reasons already stated by the Chairman of the Drafting Committee: the Commission was concerned with crimes under international law, not internal law, as was apparent from draft article 2. Moreover, the Commission had already used that expression, more particularly in the Nürnberg Principles.<sup>6</sup> The Drafting Committee had harmonized the wording of all the language versions, but article 1 as formulated by the Special Rapporteur<sup>7</sup> was more logical and apposite.

23. Mr. BARSEGOV said that the presence of the words "under international law" in square brackets raised a very important question of principle and the Commission must resolve it. A code of crimes could not possibly be drafted if there was any doubt about the fact that it dealt with crimes under international law. He had not envisaged any problem in that respect, in view of the

<sup>6</sup> *Ibid.*, footnote 12.

<sup>7</sup> *Ibid.*, para. 3.

numerous existing documents in which such crimes were carefully defined. If the acts covered by the draft code were not regarded as crimes under international law, the very basis for the Commission's consideration of the topic would be undermined. The Commission was examining acts which were considered as crimes under international law in accordance with recognized conventions and the general norms of international law. It was apparent from the title of the topic itself that the Commission was required to codify existing norms. If the reference to international law were excluded from the definition of crimes, the binding legal character of conventions such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid* or the Convention on the Prevention and Punishment of the Crime of Genocide, as well as other relevant norms of international law which defined crimes against humanity, would be called into question. For that reason, he could not fail to endorse Mr. Mahiou's proposal. The General Assembly would inevitably raise questions about the work of the Commission if the reference to international law were retained between brackets. In any event, there was no doubt that the overwhelming majority of members of the Commission considered that the crimes covered by the code were indeed crimes under international law. The other members who were in favour of deleting the reference were free to reserve their position on the matter.

24. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he saw no point, at the present stage in the Commission's work, in repeating statements which had been made to the Commission before the draft articles had been referred to the Drafting Committee and which had then been reiterated before the Drafting Committee. It would suffice if members of the Commission spoke for or against the Drafting Committee's proposals.

25. Mr. CALERO RODRIGUES pointed out that, when the Drafting Committee placed words between square brackets, it did so in the hope that the Commission would be able to settle the matter. It amounted to offering a choice between two alternatives.

26. Mr. ILLUECA said that, during the general discussion, he had spoken in support of the expression "crime under international law"; but in view of the divergence of views that had emerged and the deadlock facing the Commission, the best course would be to retain article 1 in its present formulation and invite the Sixth Committee of the General Assembly to express its views.

27. Mr. GRAEFRATH said that, in the Drafting Committee, he had accepted that article 1 be presented to the Commission as it appeared in document A/CN.4/L.412 because he had expected that the discussion in the Commission would lead to the removal of the square brackets around the words "under international law". Those words represented an important qualification of the kind of crimes covered by the draft code. He therefore strongly supported Mr. Mahiou's proposal to remove the square brackets. Members who preferred them to be retained could of course place their views on record.

28. Mr. ARANGIO-RUIZ said that he was opposed to Mr. Mahiou's proposal to remove the square brackets around the words "under international law". There were good reasons for retaining the text as it stood.

29. Mr. EIRIKSSON said he, too, was in favour of retaining the square brackets around the words "under international law".

30. Mr. JACOVIDES said that he supported Mr. Mahiou's proposal and could also accept Mr. Beesley's proposal regarding the placing of the words "under international law".

31. He had great sympathy with Mr. Pawlak's proposal for the text of article 1 (see para. 16 above), but found it much too ambitious in its present form. He therefore suggested that it should be recast so as to read:

"Crimes against the peace and security of mankind are the acts which jeopardize the most vital interests of mankind and violate the fundamental principles of international law."

That more modest language would prove more acceptable and still adequately underline the gravity and importance of the subject.

32. Mr. FRANCIS said that he agreed with Mr. Beesley regarding the placing of the words "under international law". He would have favoured the removal of the square brackets, but felt that the Commission was not in a position to take a decision on that point at the present stage.

33. Mr. ARANGIO-RUIZ said that the draft code would eventually take the form of an international convention, namely a body of rules of international law setting forth rights and obligations. There was no doubt that the provisions of the code would then form part of international law. The fact that the crimes were defined in an instrument of international law thus rendered any reference to international law superfluous. But for the persons who committed such crimes to be prosecuted, in other words for the code to be implemented—whether implementation was to be entrusted to an international tribunal, was to remain within the competence of States or was to be dealt with under a mixed or transitional system—the crimes covered by the code also had to be characterized as crimes under internal law. Far from limiting the scope of the code, the omission of any reference to international law in article 1 would strengthen the condemnation of the crimes. Only when the code had been incorporated by all States parties into their internal law would it be fully implemented. To dispel any ambiguity in that regard, he would again stress that the effectiveness of the code would depend on its being incorporated into the internal law of States.

34. Mr. CALERO RODRIGUES said that he supported Mr. Mahiou's proposal, as well as Mr. Beesley's useful suggestion.

35. Mr. PAWLAK said that he strongly supported Mr. Mahiou's proposal. The inclusion of the words "under international law" in article 1 was essential. It would be most surprising to omit them, bearing in mind the reference to "a crime under international law" contained in Principle I of the Nürnberg Principles, which the Commission itself had adopted at its second session,

in 1950.<sup>8</sup> Besides, in the 1954 draft code, article 1 stated that offences against the peace and security of mankind were “crimes under international law”.

36. As to his own proposed reformulation of article 1, which would be considered at a future date, he took note of the interesting suggestion made by Mr. Jacovides (para. 31 above).

37. Mr. HAYES said that it was still uncertain whether the draft code would be declaratory of existing crimes or constitutive of crimes against the peace and security of mankind, and thus open to the inclusion of new crimes. The words “under international law” were unnecessary if the code was to be purely declaratory. If, on the other hand, it was intended to cover new crimes, those words would be inappropriate.

38. The proposal by Mr. Beesley raised a different issue. If the words “under international law” were placed between the word “crimes” and the phrase “against the peace and security of mankind”, at the end of the article, they would become unnecessary if the draft code became international law and, of course, inaccurate if it did not.

39. Mr. AL-QAYSI said that, when the Drafting Committee had placed square brackets around the words “under international law”, it had done so in order to express its own intention to revert to the matter at some later stage.

40. A fundamental issue of substance had been raised, namely whether the draft code was to be declaratory of existing crimes or constitutive of new crimes. It was difficult to see how anyone could support both Mr. Mahiou’s proposal and Mr. Beesley’s seemingly innocuous proposal, since the first was based on the declaratory approach and the second on the constitutive approach. It would be remembered that, in the past, there had been considerable division of opinion as to whether or not such crimes as colonialism, mercenarism and *apartheid*, which had not appeared in the Nürnberg Principles, were to be regarded as crimes against the peace and security of mankind.

41. For his part, he would be prepared to support Mr. Mahiou’s proposal in regard to the substance, for those crimes were already crimes under international law, but he considered that the Commission would not be able to settle the matter at the present stage. He was therefore prepared to wait.

42. Mr. MAHIU said he had certainly not thought that his proposal would give rise to such a heated debate. At the same time, if an article prepared by the Drafting Committee gave rise to differences of view, it was only natural that the point at issue should be discussed in plenary. In the present case, the square brackets in draft article 1 indicated an area of disagreement which should be reflected in the summary records of the Commission, since the Drafting Committee’s work was of an informal nature. The use of square brackets was, moreover, a tradition of the Commission: for instance, in the draft articles on jurisdictional immunities of States and their property, article 6, in par-

ticular, contained a reference between square brackets to the “relevant rules of general international law”. Similarly, a number of draft articles on the status of the diplomatic courier contained expressions between square brackets, and members of the Commission had taken a position on them in plenary. At some point, therefore, the General Assembly would have to be enlightened as to the line of argument members of the Commission had followed with respect to the expressions between square brackets. He would not press for the immediate deletion of the square brackets in article 1, but would suggest that the Commission should adopt that article as it stood, particularly since those members who were in favour of a reference to international law were divided as to its proper place.

43. Mr. BENNOUNA said he did not think that the Commission was yet in a position to resolve the problem it had encountered. Admittedly, the Drafting Committee had pin-pointed the difficulties, but it had not resolved all of them, for it considered that the task would be easier when the work was more advanced. The difficulties of article 1 were evidenced by Mr. Pawlak’s proposal (para. 16 above), which, although certainly very interesting, had come too soon. In addition, the question of the universality of the code, which should command general acceptance, was still outstanding. From that standpoint, the definition of the crimes to be covered was difficult, since they were the most abominable crimes of all, which would entail the application of a rule of *jus cogens*. Article 1 was also criticized for proposing a definition that was not a definition, because it merely introduced the list of crimes that was to appear in the body of the text. In his view, however, it was a convenient solution which dispensed with the need to propose a general definition at the outset.

44. Again, article 1 raised a problem of substance which had been discussed in the Sixth Committee of the General Assembly: did it refer to crimes already recognized under international law? If so, interpretation of the code would involve referral to general international law. If not, it would be necessary to construe the provisions of the code itself.

45. In any event, the reference to international law should be included in the definition. The crimes concerned were obviously crimes under international law and whether or not they were recognized in internal law in no way changed their characterization. In other words, the crimes in question should be recognized irrespective of any convention.

46. The discussion was none the less premature. Only when the list of crimes against the peace and security of mankind had been established would it be possible to proceed on a case-by-case basis, to determine which crimes were recognized in international law, and to lay down a general definition. He therefore considered that the square brackets should be retained and that the views expressed during the session should be reflected in the Commission’s report to the General Assembly. It was to be hoped that the question would give rise to a debate in the Sixth Committee which would be of benefit to the Commission.

<sup>8</sup> *Ibid.*, footnote 12.

47. Mr. SEPÚLVEDA GUTIÉRREZ said that he was in favour of deleting the words "under international law" for the reasons already stated by, among others, Mr. Illueca and Mr. Arangio-Ruiz. Obviously the Commission could not take a final decision for the time being. Also, the expression *crímenes de derecho internacional*, in the Spanish text of article 1, was not, in his view, the best expression to use.

48. Mr. TOMUSCHAT said that he was in favour of retaining the square brackets until such time as the Commission had the list of crimes.

49. Mr. BARSEGOV said that he endorsed the text proposed by Mr. Pawlak for draft article 1 (para. 16 above) and considered that the definition of crimes against the peace and security of mankind proposed by the Drafting Committee should be further refined. The text before the Commission gave only an idea of the direction the definition should take. When the list of the crimes in question was available, their characteristics could be analysed and a definition laid down.

50. None of the legal arguments advanced in the Commission had persuaded him to abandon the idea of defining the subject of the code right from the start, namely in article 1. For instance, the argument that the Commission should wait until the complete list of crimes was available in order to find out whether they all came under international law was not very relevant. Nobody denied that the crimes involved were indeed crimes under international law. Moreover, in the absence of an accurate definition, it was difficult to see how the provisions of the code could be implemented.

51. At its 2029th meeting, the Commission had adopted in connection with international watercourses a provision which, in his view, ran counter to international law. Some members had voiced reservations and it had been decided to reflect them in the commentary. He did not see why the Commission should do otherwise in the case of the topic under consideration.

52. Mr. REUTER said that he endorsed the general intent of article 1. The significance of the square brackets had been considered by several members and he agreed with their arguments. In his view, however, the whole expression "crimes under international law" should be placed between brackets.

53. It would be noted that article 1 and article 2 already spoke of crimes, but it was still not known whether they were crimes by individuals or crimes by States. For his own part, he agreed entirely that State crimes should form the subject of a special régime, even though that would certainly pose problems in terms of criminal law. While it was obvious that the crimes envisaged came under international law, it was not yet known who committed them—States or individuals.

54. Mr. EIRIKSSON said that he still regarded article 1 more as a scope article than as a definitional article, which could create difficulties inasmuch as the content of the articles had yet to be decided. He was not certain what effect the wide range of views that would undoubtedly be expressed in the Sixth Committee of the General Assembly would have on the continuation of the Commission's work. Personally, he found the ex-

pression "crimes under international law" somewhat political and difficult to address in legal terms, either in the Commission or elsewhere. In any event, the debate in the Sixth Committee would, in his view, be unproductive until such time as there was an indication of the actual crimes to be included in the code.

55. He would remind the Commission that the General Assembly had at its last session, in resolution 41/81 of 3 December 1986, requested the Commission to indicate the substantive issues on which the views of Governments would be particularly relevant to the continuation of the Commission's work. Perhaps the subject under consideration was one such issue. If so, the views of members of the Commission should be clearly reflected in the commentary to ensure that the debate in the Sixth Committee was not unduly political.

56. Mr. GRAEFRATH said that the words "under international law" were neither superfluous nor inappropriate, for it was difficult to see how crimes against the peace and security of mankind could be anything other than crimes under international law. Crimes against the peace and security of mankind, moreover, were crimes of the utmost gravity and therefore must necessarily constitute crimes under international law, irrespective of their characterization under internal law. That should be made clear from the outset, in article 1.

57. As for including a list of crimes in the code, régimes like the *apartheid* régime should not be able to argue that *apartheid* was not a crime for which individuals could be punished under international law simply because a particular country had not ratified the *Apartheid* Convention or any future code of crimes against the peace and security of mankind.

58. Mr. SOLARI TUDELA said that, if the code was to include a list of crimes, the square brackets in article 1 should be deleted. It could be assumed, however, that the list would include crimes that were not regarded as such under the internal law of States. The crime of *apartheid*, for instance, was not covered by Peruvian law. Provision for a sanction should therefore be made, something which could be done only at the level of international law. Furthermore, the 1954 draft code had already referred to international law. If that reference were now deleted, the implication would be that there had been an evolution in thinking in the interim and that the new text marked a change of approach.

59. Mr. ROUCOUNAS said that four or five categories of crimes were recognized under international law. The crimes covered by the code obviously fell under international law and the only question to be settled was the place at which the relevant reference should appear. The potential difficulties of the relationship between internal law and international law were skilfully resolved in draft article 2. If draft article 1 were adopted in its present form, it would at least have the merit of indicating the direction for the continuation of the Commission's work and the establishment of the list of crimes, in which task the Commission should be as temperate as possible. He therefore favoured deletion of the square brackets.

60. Mr. BEESLEY, associating himself with the remarks made by Mr. Eiriksson and Mr. Reuter, said that it was necessary to adopt a very frank approach in the case of crimes against the peace and security of mankind. Did the Commission, for instance, have in mind the courageous action taken by the Government of Argentina concerning the crimes committed in the so-called "dirty war", or did it have something different in mind? And what about the question of Chernobyl, in which connection a criminal trial was under way in the country concerned? He could think of no better example of an unintended action that could have jeopardized the most vital interests of mankind and violated the fundamental principles of international law. He was not suggesting that that was what had occurred, nor was he speaking against any particular country. The branch of the law which the Commission was discussing, however, concerned a very serious issue, and great care was needed in examining the implications, over both the short term and the long term, of the Commission's actions. For the time being, he would be content to accept the Commission's decision, but he agreed that there should be a list of crimes and also a definition of specific terms, particularly since no international tribunal had yet been established.
61. Mr. BARSEGOV said that it was inappropriate to place a tragic accident like Chernobyl on the same footing as a régime such as *apartheid*.
62. Mr. BEESLEY said that his remarks had perhaps been misinterpreted. The point he had wished to make was that, if a situation which developed in a particular country was treated as a crime in that country since it threatened human life, the Commission would have to take account of that situation. He had also added that there was no intention on his part to criticize any particular country.
63. Mr. Sreenivasa RAO said that the draft code had been under consideration virtually since the creation of the Commission and a number of crimes against the peace and security of mankind had been identified, including crimes of aggression, war crimes, crimes against humanity and crimes of terrorism. Some of them were far from uncommon and he therefore wondered why there was so much difficulty about deciding whether or not they constituted crimes under international law. Even though the drafting might well be difficult, there was no problem as to content. He could not subscribe to the argument that agreement should first be reached on a list of crimes, since that was mere hair-splitting. It had also been said that the whole question was political; but there was a body of rules of international law that was purely legal. That distinction was difficult to sustain in an international forum such as the Commission, which had to take account of political realities and should not seek to separate law and politics in watertight compartments. He therefore favoured the removal of the square brackets around the words "under international law" in article 1.
64. Mr. AL-KHASAWNEH said that his position was similar to that of Mr. Graefrath, Mr. Sreenivasa Rao and Mr. Roucounas, for the reasons they had given.
65. Mr. DÍAZ GONZÁLEZ said that he endorsed the wording of article 1 as proposed by the Drafting Committee but favoured the deletion of the square brackets for the reasons stated more particularly by Mr. Al-Qaysi. It was necessary to bear in mind those crimes which would not have been foreseen either at Nürnberg or in the United Nations.
66. Mr. OGISO said that it would be advisable to retain the square brackets in article 1, first because members were still divided on the issue, and also because he would prefer the Commission to revert to the question after it had concluded its consideration of the question of a list of crimes.
67. Mr. PAWLAK said that he wished, in the light of Mr. Mahiou's proposal, to record his support for the deletion of the square brackets in article 1.
68. Mr. HAYES, clarifying his position as stated earlier, said that, if the words "under international law" were retained without the square brackets, the effective meaning of article 1 would be that some acts which were already crimes under international law would be classified as crimes against the peace and security of mankind. That would imply that the definition of crimes against the peace and security of mankind did not go beyond the existing crimes under international law. The Commission might, however, wish to go further when it defined crimes against the peace and security of mankind and he was therefore opposed to the retention of the phrase in question, at least at the present stage. If, on the other hand, a final definition or list included only those acts which were generally agreed to be crimes under international law, the opening words of article 1 would not add anything to the status of those acts as crimes under international law; nor, if omitted, would they detract from that status.
69. Mr. YANKOV said that he was in favour of deleting the square brackets in article 1. The Commission was not working in an unknown field. A draft Code of Offences against the Peace and Security of Mankind, including a definition and a list of crimes, had been adopted by the Commission in 1954; moreover, the various reports submitted by the Special Rapporteur provided sufficient support for the conclusion that acts covered by the draft code constituted crimes under international law. It would be regrettable if, more than three decades after the draft code had been adopted for the first time and nearly four decades after the Nürnberg trial, the Commission were to hold that the crimes envisaged by the draft code did not constitute crimes under international law.
70. Mr. THIAM (Special Rapporteur) said that the expression "crimes under international law" did not come from him: he had taken it from earlier texts, including the 1954 draft code. He would, however, like the Commission to make its position clear, since he needed to know exactly which crimes were involved for the continuation of his work. If, for instance, he included the crime of *apartheid* in the list, an objection could be raised that some countries had not ratified the relevant convention. He therefore wondered where the dividing line between internal law and international law was to be drawn.

71. Speaking as a member of the Commission, he said that he believed in the existence of crimes under international law. In his view, the brackets should be deleted.

72. The CHAIRMAN, speaking as a member of the Commission, said that, for the reasons he had already stated, he favoured deletion of the words between square brackets in article 1. As a member of the Drafting Committee, however, he supported the text in its present form, since it would indicate to the General Assembly that there was a divergence of views on the matter.

73. Speaking as Chairman, he suggested, in the light of the discussion, that article 1 should be provisionally adopted as proposed by the Drafting Committee and that the Commission should state in its report to the General Assembly that it had decided to retain the phrase "under international law" between square brackets to indicate that members' views on that point had been sharply divided.

*It was so agreed.*

*Article 1 was adopted.*

*The meeting rose at 1.10 p.m.*

## 2032nd MEETING

*Monday, 13 July 1987, at 11.40 a.m.*

*Chairman: Mr. Stephen C. McCAFFREY*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.*

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.412)

[Agenda item 5]

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

## DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

### ARTICLE 2 (Characterization)<sup>5</sup>

1. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the text of draft article 2 was basically the same as that submitted by the Special Rapporteur.<sup>6</sup> It contained two sentences in which the words "an act or omission" were used in order to make it clear what type of conduct could constitute a criminal act. Moreover, for the sake of greater precision, the word "prosecuted" had been replaced by "punishable" in all languages and, in the French text, the words *ne préjuge pas* had been replaced by *est sans effet sur*.

2. The exclusion under "internal law" related only to the question of characterization: internal law would obviously continue to be relevant with regard to other matters. The point of that rule was to prevent accused persons from invoking characterizations under internal law in order to counter characterizations under the future code.

3. Some members of the Drafting Committee had been of the view that it was important to add the phrase "under international law" after the words "crime against the peace and security of mankind", but most members had agreed that it was unnecessary to do so and that the inclusion of that phrase might create confusion or weaken the text. Some members had expressed reservations with regard to the exclusion of the phrase.

4. Several members of the Drafting Committee who had found that the second sentence of the article was superfluous had expressed reservations to that effect, pending an opportunity to review the text of the commentary. In the end, the Committee had agreed to retain the second sentence for the time being.

5. The title of the article remained unchanged.

6. Mr. ARANGIO-RUIZ said that he could agree to the proposed text of article 2, provided it was made clear in the appropriate place in subsequent articles how the code was to be "introduced" or "otherwise implemented" in the internal law of the States parties to the instrument in which the code would be embodied. He recalled that he had already explained (1996th and 2000th meetings) the reasons for that reservation during the discussion of draft article 2.

7. Mr. BEESLEY said that he, too, agreed with the wording proposed by the Drafting Committee, since it was in keeping with the spirit of the Commission's discussions. He took the words "independent of internal law" to mean that the characterization of a crime against the peace and security of mankind was independent of its recognition or qualification in the internal law of States.

8. Mr. KOROMA said that he was not very happy with the title of the article, since the word "characterization" was not commonly used in the legal system with which he was familiar and it did not have

<sup>5</sup> For the text, see 2031st meeting, para. 2.

<sup>6</sup> See 1992nd meeting, para. 3.



much bearing on the content of the article. In his view, it would be better to use the title “Determination”.

9. Mr. DÍAZ GONZÁLEZ said that, although he was satisfied with the text, he would prefer the words “The characterization of an offence as a crime against” to the words “The characterization of an act or omission as a crime against”.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 2.

*Article 2 was adopted.*

#### ARTICLE 3 (Responsibility and punishment)<sup>7</sup>

11. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 3 consisted of two paragraphs: the first was based on the text submitted by the Special Rapporteur<sup>8</sup> and the second was new.

12. On the basis of provisions such as article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which referred to “motive”, the Drafting Committee had added the phrase “irrespective of any motives invoked by the accused that are not covered by the definition of the offence” to the former text of paragraph 1. The aim was to rule out the possibility that “motives” might be invoked as a justification for a particular type of conduct, while providing for that possibility when the motives invoked were covered by the definition of a particular crime under the code. One member of the Drafting Committee had reserved his position on the grounds that the question of “motive” belonged more to the sphere of circumstances precluding wrongfulness or exceptions to responsibility.

13. Paragraph 2 catered for the concern expressed by some members of the Commission and was intended to make it clear that, even if an individual was being prosecuted for a crime under the code, a State could not be relieved of any responsibility under international law for an act or omission attributable to it. The inclusion of that new paragraph did not, of course, prejudice the still unsettled question of the criminal responsibility of a State for crimes against the peace and security of mankind.

14. The title had been changed in all languages except French and, in English, it now referred to “punishment” rather than “penalty”.

15. Mr. ARANGIO-RUIZ, noting that the Chairman of the Drafting Committee had referred to the “criminal responsibility” of a State for crimes against the peace and security of mankind, said that the concept of criminal responsibility was not—and, in his own opinion, should not be—referred to in article 3, for it was not possible to prejudge the nature of the responsibility (criminal, civil, international) of which the State could not be relieved.

16. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the new paragraph 2 met the concern of some members of the Commission who had wanted it to be made clear that a State could not be relieved of its responsibility even if an individual was being prosecuted for a crime covered by the code. No attempt was being made to prejudge the nature of such responsibility.

17. Mr. BEESLEY said it seemed to him that the proposed text presupposed that State responsibility would be incurred. The question whether such responsibility would be of a criminal nature had been skilfully resolved by the drafters: article 3 took account of the possibility that State responsibility might exist, but did not say what the nature of such responsibility would be.

18. With regard to paragraph 1, he welcomed the reference to “motives invoked by the accused that are not covered by the definition of the offence”. Any other formulation would have given rise to questions about the difference between “motive” and “intent”. The remainder of the sentence (“and is liable to punishment therefor”) was perhaps less clear and should be reconsidered.

19. Mr. FRANCIS said that he would have worded the last phrase of paragraph 1 (“and is liable to punishment therefor”) differently. It must not be forgotten that the crimes covered by the code were the most serious of all. On the basis of similar provisions contained in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages,<sup>9</sup> it might have been stated that the crimes in question would be “punishable by appropriate penalties which take into account their grave nature”.

20. Mr. Sreenivasa RAO said that, although he agreed with the wording of article 3, he would like some clarification concerning the exact meaning of the phrase “irrespective of any motives invoked by the accused that are not covered by the definition of the offence”.

21. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee), referring to the use of the term “motives” in paragraph 1, said that some legal systems made a very clear-cut distinction between motive and intent. The point was thus to rule out the possibility that the accused might invoke motives not covered by the definition of the offence. For example, *apartheid* was a crime, irrespective of the reasons that might be invoked by those who committed it.

22. Mr. THIAM (Special Rapporteur) said that a judge who tried a crime against the peace and security of mankind would have to consider not the justifications invoked by its perpetrator, but rather the extent to which the circumstances of the crime reflected the perpetrator’s intent. In short, it might be said that the motive invoked would have nothing to do with the matter and that only the real motive would be taken into account.

<sup>7</sup> For the text, see 2031st meeting, para. 2.

<sup>8</sup> See 1992nd meeting, para. 3.

<sup>9</sup> See 1995th meeting, footnote 10.

23. Mr. EIRIKSSON said he found that the phrase "irrespective of any motives invoked by the accused that are not covered by the definition of the offence" was clearer in French than in English. He would like the Special Rapporteur to include an in-depth analysis of the question in the commentary. It might be more elegant to use the words "invoked by him", rather than "invoked by the accused".

24. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said he feared that the use of the words "invoked by him", as suggested by Mr. Eiriksson, might make paragraph 1 somewhat obscure, since they would refer to the words "Any individual", which were rather far away in the sentence.

25. Mr. DÍAZ GONZÁLEZ said that he generally supported the wording of article 3. He was nevertheless surprised that the term "offence" was used in paragraph 1, since the code dealt with "crimes against the peace and security of mankind". At the end of paragraph 2, it might also be better to use the words "for a crime attributable to it", rather than "for an act or omission attributable to it".

26. Mr. AL-BAHARNA said that he, too, would prefer to retain the words "by the accused", since the crimes in question were very serious and their perpetrator had to be the "accused" in every sense of the term.

27. Paragraph 2 seemed to consist of a sentence in abeyance. In order to bring out the point of the argument, it might be possible to add, at the end of the sentence, an expression such as "in that regard", which would not be absolutely necessary, but would make for greater clarity. It would also explain to what State responsibility related, even though it was understood that, in the circumstances, what was involved was not criminal responsibility.

28. Mr. THIAM (Special Rapporteur) said that the commentary would deal at length with the distinction between motive, intent and incentive. Once the commentary had been made available, many of the Commission's doubts about article 3 would be dispelled.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 3.

*Article 3 was adopted.*

#### ARTICLE 5 (Non-applicability of statutory limitations)<sup>10</sup>

30. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in accordance with the general trend of opinion expressed during the debate in plenary and following a suggestion made by the Special Rapporteur, the Drafting Committee had decided to delete the words "because of their nature". Otherwise, the text was the same as that submitted by the Special Rapporteur.<sup>11</sup> Some members of the Drafting Committee had reserved their final position on the text until the list of crimes had been drawn up, as they were not sure

that the rule should apply to all the crimes to be included in the list. The title was unchanged.

31. The CHAIRMAN, speaking as a member of the Commission, said that he too would reserve his position until the list of crimes to be covered by the code had been drawn up.

32. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5.

*Article 5 was adopted.*

#### ARTICLE 6 (Judicial guarantees)<sup>12</sup>

33. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in large measure, the Drafting Committee had retained the text submitted by the Special Rapporteur.<sup>13</sup> In view of the importance of judicial guarantees and the need for specific provisions based on existing conventions, it had decided to retain an indicative list of guarantees rather than attempt to draft a more general provision.

34. The introductory clause had been amended by the insertion of the words "without discrimination" and the word "minimum" before "guarantees". Those additions had been made because similar concepts were to be found in article 14, paragraph 3, of the International Covenant on Civil and Political Rights. In the English text, it had been deemed appropriate to refer to the "guarantees due to all human beings" in order to reflect the same idea of "entitlement" as in the other language versions. The commentary would explain that the words "with regard to the law and the facts" referred to the applicable law and the establishment of the facts.

35. In paragraph 1, the word "competent" had been added before "independent and impartial" in order to bring the text into line with article 14, paragraph 1, of the International Covenant on Civil and Political Rights. The words "in accordance with the general principles of law" had been deleted as being superfluous.

36. With regard to the guarantees listed in paragraph 3, the Drafting Committee had decided, with one exception, to retain the wording of the guarantees provided for in article 14, paragraph 3, of the Covenant. The commentary would explain the meaning of those guarantees and, in particular, of the words "counsel of his own choosing", in paragraph 3 (b), and the words "used in court", in paragraph 3 (f).

37. In paragraph 3 (d), the Committee had decided to delete the words "in any case where the interests of justice so require". It had been of the view that, since the crimes dealt with in the code were of the utmost gravity and would undoubtedly entail serious punishment for those convicted, it was only logical that the interests of justice would require that legal assistance be assigned to the accused if he himself had not provided such assistance. The commentary to paragraph 3 (g) would make it clear that the words "Not to be compelled" related to cases of coercion, torture and threats.

<sup>10</sup> For the text, see 2031st meeting, para. 2.

<sup>11</sup> See 1992nd meeting, para. 3.

<sup>12</sup> For the text, see 2031st meeting, para. 2.

<sup>13</sup> See 1992nd meeting, para. 3.

38. The title of the article had been changed to "Judicial guarantees" so that it would better reflect the content.

39. Mr. THIAM (Special Rapporteur) suggested that paragraphs 1 and 3 should be merged and that paragraph 2 should become paragraph 1. Article 6 would then read:

*"Article 6. Judicial guarantees"*

"Any 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:

"1. He shall have the right to be presumed innocent until proved guilty.

"2. He shall have the right:

"(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."

40. Mr. OGISO said that, since the wording of article 14, paragraph 3, of the International Covenant on Civil and Political Rights was much clearer than that of the introductory clause of article 6, which was based on that provision of the Covenant, the word "following" should be inserted before "minimum guarantees", and the words "In particular" should be deleted. As it now stood, the first sentence did not make it clear enough that the minimum guarantees in question were those listed in the paragraphs that followed.

41. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in his view, Mr. Ogiso's proposal did not add anything to the text proposed by the Drafting Committee, since it was clear that the minimum guarantees in question were those listed in the following paragraphs and, because of the use of the

words "In particular", that the list was merely an indicative one.

42. Mr. YANKOV said that he agreed with the amendments proposed by the Special Rapporteur and shared Mr. Ogiso's point of view with regard to the introductory clause. The first phrase of paragraph 1, which had become part of paragraph 2 by virtue of the amendments proposed by the Special Rapporteur, should follow the wording of article 14, paragraph 3, of the Covenant and the word "criminal" should therefore be added before the word "charge". The rest of paragraph 1 would become subparagraph (a) and the other subparagraphs would be renumbered accordingly. Like Mr. Ogiso, he was of the opinion that the words "In particular" should be deleted, but he would not insist on that point if it would give rise to problems.

43. Mr. EIRIKSSON said that he endorsed the amendments proposed by the Special Rapporteur.

44. Mr. KOROMA said that, while he appreciated the efforts made to harmonize the different language versions, he thought that it might be preferable not to translate certain terms literally, but rather to use the equivalent terms in other legal systems. He had in mind, for example, the expression "right to a fair trial", which in common law was the equivalent of judicial guarantees. In the introductory clause, it might be advisable to replace the words "without discrimination" by "without exception". Moreover, the English text of the present paragraph 2 should be brought into line with the French by amending it to read: "He shall be presumed innocent until proved guilty."

45. The CHAIRMAN said that the English wording which had been used in article 6 and to which Mr. Koroma had just referred had been taken from the International Covenant on Civil and Political Rights. He believed that the Drafting Committee had endeavoured to follow the wording of the Covenant.

46. Mr. Sreenivasa RAO said that he could accept the amendments proposed by the Special Rapporteur, as well as Mr. Ogiso's proposals, which were designed to make it clear that the guarantees listed were minimum guarantees and that a State could grant the accused additional rights and guarantees. The wording of the present paragraph 3 (d) was not entirely clear, even though it was based on article 14, paragraph 3 (d), of the Covenant. In his own country, the idea of "legal assistance" was different from that of "counsel", and he therefore suggested that that idea should be incorporated in paragraph 3 (d). For the time being, however, he would not insist on that proposal.

47. Mr. AL-BAHARNA said that he agreed with the text of article 6 as amended by the Special Rapporteur. In the introductory clause, he would nevertheless prefer to use the words "with regard to the application of law and facts", but he would not press that point. With regard to the present paragraph 1, he was not sure what was meant by the words "established by law or by treaty". He agreed with Mr. Koroma that, in the present paragraph 2, it would be preferable to use the formula: "He shall be presumed innocent until proved guilty." In order to simplify the wording of the present

paragraph 3 (d), he suggested that it be divided into two new subparagraphs, which would read:

“(d) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing and to be informed of this right if he does not have legal assistance;

“(e) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;”

In the present paragraph 3 (e), he thought that the words “or have examined” were superfluous.

48. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the introductory clause referred to the applicable law and the facts. The law referred to in paragraph 1 was the *lex fori*, and the words “by treaty” meant any bilateral or multilateral treaty under which the tribunal had been established. The words “or have examined”, in paragraph 3 (e), referred to letters rogatory, in other words to cases where witnesses were examined by a court other than the one trying the case.

49. Mr. THIAM (Special Rapporteur) said that the commentary would answer the questions raised by members of the Commission concerning draft article 6.

50. Mr. BEESLEY said that, in his opinion, the proposals made by the Special Rapporteur, Mr. Ogiso, Mr. Yankov and Mr. Sreenivasa Rao were all logical and useful. If the Commission adopted those amendments, however, he was not sure whether the word “minimum” in the introductory clause should be retained or whether it might not be better to use the words “common to all legal systems”. He was also not certain whether the accused was entitled to be informed of his rights.

51. Mr. BENNOUNA said that he agreed with the changes suggested by the Special Rapporteur in order to make the text clearer and with the proposals by Mr. Ogiso and Mr. Yankov. He did not, however, see why sacrosanct terms should be used if they were ambiguous. The Commission’s role should, rather, be to explain and improve on such terms. It would therefore be preferable, in the introductory clause, to use the words “with regard to the applicable law and the establishment of the facts”. In the present paragraph 3 (f), he suggested that the words “used in court” be replaced by “during the judicial proceedings”.

*The meeting rose at 1.05 p.m.*

## 2033rd MEETING

*Monday, 13 July 1987, at 3 p.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr.

Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam.

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (concluded) (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.412)**

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (concluded)

ARTICLE 6 (Judicial guarantees)<sup>5</sup> (concluded)

1. The CHAIRMAN invited comments on the reformulated text of article 6 proposed by the Special Rapporteur and on the various amendments to the article suggested at the previous meeting. He also invited comments on the text proposed by Mr. Yankov, which had been submitted in writing since the previous meeting and which read:

### *“Article 6. Judicial guarantees*

“Any person charged with a crime against the peace and security of mankind shall be entitled without discrimination to the following minimum guarantees due to all human beings with regard to the law and the facts.

“1. He shall have the right to be presumed innocent until proved guilty;

“2. In the determination of any criminal charge against him, he shall be entitled:

“(a) To 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 ex-

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

<sup>4</sup> *Ibid.*

<sup>5</sup> For the text, see 2031st meeting, para. 2.

amination 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.”

2. Mr. THIAM (Special Rapporteur), referring to the amendment submitted by Mr. Ogiso (2032nd meeting, para. 40), said that, in his view, it would be preferable to retain the introductory clause of the article as worded to make it clear that the list of guarantees set forth in the article was not exhaustive. He agreed entirely with Mr. Yankov's proposed wording of paragraph 2 and would also have no objection to the proposal that the words “a fair and public hearing”, in the new paragraph 2 (a), should be replaced by “a fair and public trial”.

3. Mr. OGISO said that he would not insist on his proposal, provided his position was reflected in the summary record.

4. The CHAIRMAN pointed out that the proposal to replace the word “hearing” by “trial” would mean a departure from the language of the International Covenant on Civil and Political Rights on which article 6 was based.

5. Mr. GRAEFRATH said that there was no sense at the current late stage in trying to alter the text of the article. The Drafting Committee had decided after a lengthy discussion to follow the language of the Covenant, which had itself been ratified by more than 86 States after long years of consideration.

6. Mr. MAHIOU said that, although he agreed in part with Mr. Graefrath's remarks, he saw no reason why a particular text could not be improved. He did, however, have doubts about the need to amend the text of article 6. The expression “a fair and public hearing” was quite broad and covered committal proceedings as well as the trial itself; if the word “trial” were used, the result might be that the guarantees in question would apply only at the trial stage, not before.

7. Mr. AL-BAHARNA said that, while Mr. Yankov's proposed wording was a great improvement, he would prefer to retain the words “In particular” in the introductory clause. He also considered that it would be better to use the term “trial”, which was, in his view, broader than the term “hearing”. He found paragraph 2 (e) of the text proposed by Mr. Yankov somewhat confusing because of the punctuation and therefore proposed that it be amended to form two subparagraphs, reading:

“(e) To be tried in his presence, to defend himself in person or through legal assistance of his own choosing, and to be informed of this right if he does not have legal assistance;

“(f) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;”

Paragraph 2 (f) to (h) would then become paragraph 2 (g) to (i). He further proposed that the words “or have

examined”, in paragraph 2 (f) of the text proposed by Mr. Yankov, should be deleted.

8. The CHAIRMAN noted that the words “to examine, or have examined” were taken from the Covenant.

9. Mr. BARSEGOV said that there was a discrepancy between the French and English texts of the introductory phrase to the new paragraph 2. In his view, the two texts should be consistent.

10. The CHAIRMAN said that, once again, the difference stemmed from the Covenant.

11. Mr. PAWLAK proposed that the word “person”, at the beginning of article 6, should be replaced by “individual”, in line with article 3, paragraph 1.

*It was so agreed.*

12. He also thought that the words “In particular”, in the introductory clause of article 6, should be retained.

13. In the new paragraph 2 (a), he favoured the word “trial”, which was much broader than the word “hearing” and therefore preferable even if it did not appear in the Covenant. In any case, there was no reason why the Commission should not improve on the language of the Covenant.

14. Lastly, he proposed that the title of the article, “Judicial guarantees”, should be amended to read “Guarantees for a fair trial”.

15. Mr. THIAM (Special Rapporteur) said that the title of the article had been discussed at length in the Drafting Committee, which had decided against any change. He considered that it would be better not to insist on the word “trial”, rather than “hearing”, but would have no objection to replacing the word “person” by “individual”. Subject to that one change, he suggested that the Commission should adopt his reformulated text of article 6 (2032nd meeting, para. 39). Mr. Yankov's proposal had substantive implications and it would perhaps be better not to pursue it.

16. Mr. KOROMA said that the language of the code, as an instrument of criminal legislation, necessarily had to be more narrowly drawn than that of an instrument on human or political rights. The Commission could use the Covenant as a guide, but should not feel bound by it, and there was no reason why it could not improve on the language of the Covenant.

17. In the circumstances, he considered that “trial” rather than “hearing” was the proper word. In addition, he failed to understand the expression “the right to be presumed innocent” in the new paragraph 1, which should, in his view, be amended to provide that an accused should be presumed innocent until proved guilty.

18. Mr. CALERO RODRIGUES said that some of Mr. Al-Baharna's suggestions could have been useful if the Commission had had time to discuss them. He agreed, however, that for the time being the Commission should not try to improve on the language of the Covenant. He therefore proposed that the Commission should accept the text proposed by the Special Rapporteur, which was very similar to Mr. Yankov's text,

with the deletion of the first phrase of paragraph 2, "In the determination of any criminal charge against him".

19. Mr. EIRIKSSON proposed that those words should be transferred to paragraph 2 (a) of the new text, in line with the text proposed by the Special Rapporteur.

*It was so agreed.*

20. Mr. REUTER said that, in his view, the Commission should for the time being adopt the text of article 6 as proposed by the Special Rapporteur. It would, however, have to revert to the article later, first, because it had followed the language of the Covenant without trying to bring the English and French texts into line, and secondly, because a question not only of human rights, but also of the rights of other States was involved, which meant that the list of guarantees was not sufficient. He had in mind, for instance, the position of an extraditing State, which would require certain guarantees regarding the course of the proceedings.

21. Mr. AL-KHASAWNEH said he, too, considered that it was preferable for the time being to adopt the Special Rapporteur's proposal.

22. Mr. HAYES said that he supported the introductory clause of the original text of article 6,<sup>6</sup> as largely retained in the Special Rapporteur's reformulation (2032nd meeting, para. 39), since it was important to have a non-exhaustive list of judicial guarantees. He agreed that the phrase "In the determination of any criminal charge against him" should be transferred to paragraph 2 (a) of the new text.

23. He favoured the retention of the language used in the Covenant, since any departure from that language would raise the presumption that the Commission meant something different, and that would not make for an effective provision. Moreover, the relevant provisions of the Covenant were concerned with the exercise of domestic criminal jurisdiction and were therefore relevant to the code.

24. A "hearing", as he understood the word, was wider than a "trial", since it could include pre-trial procedures which involved the determination of a criminal charge but did not actually amount to a trial.

25. Mr. KOROMA said he maintained the view that paragraph 1 of article 6 as reformulated should be brought into line with the French text. He would not insist on that point at the current stage in the work, but none the less thought that there was no harm in rectifying an error: mistakes could slip into a convention and become part of that convention.

26. The CHAIRMAN said that the discrepancy between the French and English texts could be considered at a future date. On that understanding, he suggested that the Commission should provisionally adopt the text of article 6 as amended by the Special Rapporteur (*ibid.*) and as further amended by the proposals of Mr. Pawlak (para. 11-above) and Mr. Eiriksson (para. 19 above).

*It was so agreed.*

*Article 6 was adopted.*

**The law of the non-navigational uses of international watercourses (concluded)\* (A/CN.4/399 and Add.1 and 2,<sup>7</sup> A/CN.4/406 and Add.1 and 2,<sup>8</sup> A/CN.4/L.411)**

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (concluded)

TITLE OF PART II OF THE DRAFT

27. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Drafting Committee recommended that part II of the draft should be provisionally entitled "General principles", on the understanding that the title would be reviewed when all the articles of part II had been prepared.

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the title of part II of the draft on that understanding.

*The title of part II of the draft was adopted.*

ARTICLE 6 [6 AND 7] (Equitable and reasonable utilization and participation)<sup>9</sup>

29. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 6 combined the texts of articles 6 and 7 as submitted by the previous Special Rapporteur and reflected the underlying concepts of article 5 as provisionally adopted in 1980. The latter article, which dealt with the concept of a "shared natural resource", had been criticized on the grounds that it lacked legal precision. It had, however, been recognized that effect could be given to the legal principles underlying that concept without using the expression itself in the body of the article.<sup>10</sup> The Drafting Committee had therefore prepared an article based on the principles of equitable and reasonable utilization and participation in the belief that such an article would more appropriately reflect the principles to be embodied in the draft. The new text did not use the word "share" and it did not refer to the relativity aspect of the uses of a watercourse, a matter which was covered by the provisional working hypothesis and would eventually be covered by the definitional article. Certain members had regretted that the concept of "sharing", which had appeared in earlier texts, had been dropped.

30. Paragraph 1 began with a statement of the basic obligation applicable to all watercourse States, namely that they should in their respective territories utilize a watercourse in an equitable and reasonable manner. That principle had been reflected in the former article 7. The second sentence of the paragraph then explained that that concept meant that a watercourse should be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits

\* Resumed from the 2030th meeting.

<sup>7</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>8</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>9</sup> For the text, see 2028th meeting, para. 1.

<sup>10</sup> See *Yearbook* . . . 1986, vol. II (Part Two), p. 62, para. 237.

<sup>6</sup> See 1992nd meeting, para. 3.

therefrom consistent with adequate protection of the watercourse. Attaining optimum utilization and benefits did not mean achieving “maximum” use or the most technologically efficient use or that the State capable of making the most efficient use of the watercourse should have a superior claim to it. It meant the attainment of the best possible uses and benefits for all with a minimum of harm, in the light of all relevant circumstances and in a manner consistent with the adequate protection of the watercourse in terms, for instance, of flood or pollution control. Some members of the Drafting Committee had stressed that, at some future stage, consideration should be given to the possibility of defining “optimum utilization and benefits” in the article on the use of terms. Equitable utilization did not mean the equal sharing of a watercourse: there might well be cases of “unequal” sharing in the utilization of a watercourse which constituted equitable utilization. That basic concept would be fully explained in the commentary.

31. With regard to the terms used in paragraph 1, the expression “in an equitable and reasonable manner” would, of course, have to be interpreted on a case-by-case basis and the factors that were relevant in that regard were set forth in the new article 7. The words “adequate protection” covered not only measures of conservation, but also measures of “control” in the sense of measures to control floods, pollution or erosion. Although those words referred primarily to measures taken by individual States, they did not exclude co-operative measures or activities undertaken by States jointly.

32. Paragraph 2 provided for the consequences of equitable utilization, namely the equitable and reasonable participation by watercourse States in the use, development and protection of a watercourse. Equitable utilization by each State would necessarily lead to equitable participation by all the States concerned. An important element in that new paragraph was that equitable participation included both the right to equitable utilization, as provided in paragraph 1, and the duty to co-operate in the protection and development of the watercourse. The latter duty was linked to the future article on the general obligation to co-operate which was to be prepared on the basis of draft article 10 as submitted by the Special Rapporteur.<sup>11</sup> Article 6 therefore no longer spoke only of an entitlement, but also of a duty, which did not imply the creation of a collective management scheme but was, rather, linked to the general duty to co-operate. Since the future article 10 would contain references to such general principles as good faith, the Drafting Committee had not deemed it necessary to include them in paragraph 2 of article 6.

33. Doubts had been expressed in the Drafting Committee about some of the terms used in article 6, particularly the word “benefits” in the second sentence of paragraph 1 and the word “includes” in the second sentence of paragraph 2, which, it had been suggested, should be replaced by “shall be based on”. It had also been noted that the use in some languages of similar words, such as “use” and “utilize” in English, would have to be reconsidered.

34. Lastly, the title of article 6 was new and reflected the new content of the provision.

35. Mr. KOROMA said that he accepted the principle of equitable and reasonable utilization, but had serious doubts about extending that principle in such a way as to impose an obligation on States to participate in the use, development and protection of an international watercourse. He therefore proposed that the words “and participation” should be deleted from the title of the article and that the words “shall participate”, in the first sentence of paragraph 2, should be replaced by “may participate” or “may decide to participate”.

36. Mr. ROUCOUNAS recalled that, at the Commission’s thirty-eighth session, it had been agreed that the draft articles should reflect the idea of a “shared natural resource” without actually using that expression.<sup>12</sup> Article 6 as drafted, however, did not seem to reflect the idea that the waters of a watercourse were, by their very nature, shared among the States concerned.

37. Mr. AL-KHASAWNEH said he thought that the first sentence of paragraph 2 should be couched in less mandatory terms as he was not certain that the duty for which it provided really existed. He also had doubts about the second sentence of paragraph 2, which was lacking in legal precision. Did the word “includes”, for instance, mean that there were rights other than the right to use the international watercourse system? In any event, the corollary of that right was not the duty to co-operate in the protection and development of a watercourse system, but rather the duty not to cause injury to other States.

38. The CHAIRMAN, speaking as Special Rapporteur, said that article 6 had been the subject of a detailed discussion in the Drafting Committee, which had taken the view that the concept of equitable participation would convey the notion that States had a duty to co-operate and, in so doing, to achieve and maintain equitable utilization within the meaning of paragraph 1 of the article. The Drafting Committee, as he understood the position, had regarded the second sentence of paragraph 2 not as stating two corollaries, but rather as referring to two aspects of the specific duty of equitable participation. Determining the precise contours of that duty might, of course, have to await the further development of the draft.

39. Mr. AL-KHASAWNEH said that, as it now stood, the second sentence of paragraph 2 none the less gave the impression that the right and the duty referred to were corollaries—and he did not think that that had been the intention of the Drafting Committee. He would, however, not stand in the way of the adoption of article 6.

40. Mr. KOROMA said he was still not convinced that there was a rule of law which required watercourse States to participate in the use, development and protection of a watercourse system.

41. Mr. ARANGIO-RUIZ said that, in his view, the mandatory term “shall” applied not so much to participation in the use, development and protection of an

<sup>11</sup> See 2001st meeting, para. 33.

<sup>12</sup> See footnote 10 above.

international watercourse as to the requirement that such participation should be equitable and reasonable. The effect of the word "may", if it were to replace "shall", as suggested by Mr. Koroma, would be virtually to destroy the intent of the article, which was to ensure that the States which made use of a watercourse did so in an equitable and reasonable manner. It should also be borne in mind that, even if a State made no use whatsoever of a watercourse that flowed through its territory, that watercourse inevitably affected the territory of that State. Those considerations might dispel some of Mr. Koroma's doubts.

42. Mr. GRAEFRATH said that he shared Mr. Koroma's concern. "Participation" referred not to a shared watercourse system, but to the use a State made of the waters within its territory and its co-operation with other watercourse States under specific agreements.

43. Mr. CALERO RODRIGUES said that, in purely theoretical terms, he agreed with Mr. Koroma that paragraph 2 should not be interpreted as imposing on a State a strict obligation to participate in the use of a watercourse. However, he read article 6 not as Mr. Koroma did, but rather as Mr. Arangio-Ruiz did. He understood paragraph 2 to mean that, where each State along a given watercourse used the waters of that watercourse in its own territory, there was participation in the uses, and such participation should be equitable and reasonable. What was stated in the article was only a general principle of co-operation that would have to be developed later in the draft.

44. Mr. BARSEGOV said that he, too, shared Mr. Koroma's concern on a matter which involved the sovereign competence of States. As he saw it, the Commission's task was to draw up a set of recommendations to assist States in concluding agreements on specific uses of watercourses.

45. Mr. BEESLEY said that he could accept the text of article 6 as worded on the understanding that it was interpreted to mean that watercourse States participating in the use, development and protection of a watercourse system should do so in an equitable and reasonable manner and not as imposing any obligation on watercourse States.

46. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 6 [6 and 7] as proposed by the Drafting Committee.

*Article 6 [6 and 7] was adopted.*

47. Mr. EIRIKSSON said that he had two proposals which he was making following the adoption of article 6 to ensure that they did not give rise to any debate. The first was that the word "respective", in the first sentence of paragraph 1, and the word "both", in the second sentence of paragraph 2, should be deleted and the second was that the second sentence of paragraph 1 should be couched in the active, not the passive, voice.

48. Mr. ARANGIO-RUIZ said that he could not agree to the deletion of the word "respective", which clarified the meaning of the provision.

ARTICLE 7 [8] (Factors relevant to equitable and reasonable utilization)<sup>13</sup>

49. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 7 was based on article 8 as submitted by the previous Special Rapporteur in 1984. As indicated in its title, article 7 was concerned with factors relevant to the equitable and reasonable utilization of international watercourses and thus provided States with guidance as to the meaning and application of article 6. The introductory clause of paragraph 1 provided that the utilization of a watercourse in an equitable and reasonable manner within the meaning of article 6 required that account be taken of all relevant factors and circumstances, including those listed in paragraph 1 (a) to (f). In its new version, that clause did not include the words "In determining whether the use . . . is exercised in a reasonable and equitable manner", which had appeared in the previous Special Rapporteur's draft. The Drafting Committee had decided, in order to achieve a more widely acceptable text, to delete any reference to "determining", which, in the view of some members, implied third-party determination.

50. Article 7 as it now stood recognized that, in the first instance, it was for States to make the necessary assessments in weighing the various factors. The cross-reference to article 6 made it clear that watercourse States were the primary actors in equitable and reasonable utilization and participation. The article did not, of course, preclude the possibility that technical commissions, joint bodies or third parties might be involved in such assessments under any arrangements or agreements accepted by the States concerned.

51. The word *implique*, in the French text of paragraph 1, was meant to convey the idea of the need to ensure that the relevant factors were taken into account. Article 7 did not, of course, deal with the question of the weight to be accorded, in the first instance by States, to the various factors or with the extent to which individual factors were to be taken into account in any given situation.

52. With regard to the list of factors and circumstances, the Drafting Committee had agreed with the conclusion by the Special Rapporteur indicated in the Commission's report on its thirty-eighth session, namely that the Commission should strive for a flexible solution and confine the factors to a limited indicative list of more general criteria.<sup>14</sup> The Drafting Committee had accordingly decided not to adopt the detailed list proposed by the previous Special Rapporteur. The list contained in article 7, paragraph 1 (a) to (f), was therefore only of a general nature and was not intended to be exhaustive or to establish any order of priority. Each factor had to be viewed in relation to the particular watercourse concerned.

53. Subparagraph (a) concerned physical or natural factors and included the factor of "contribution", which was referred to in the 1984 text. Subparagraph (b), which was new, combined several elements of the

<sup>13</sup> For the text, see 2028th meeting, para. 1.

<sup>14</sup> *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 239.



former text. Subparagraph (c) related to the possibility of conflicting uses. Subparagraph (d), which was also new, spelt out a factor implicitly covered by subparagraphs (b) and (c). It should be noted, however, that “existing uses” were but one factor to be taken into account, and again no priority was assigned among any of the factors. Subparagraph (e) combined various elements of the former text. The expression “economy of use” referred to the avoidance of unnecessary waste and the cost of measures taken for that purpose was also highlighted. Subparagraph (f) provided for the availability of alternatives to a planned or existing use, but only where such alternatives were of a “corresponding value”. “Corresponding” referred to equivalence in the broadest sense, meaning equally convenient, economical and, on the whole, of the same value, “value” being interpreted in a broader sense that a simple “cost” figure to include elements of convenience and practicability as well. Indeed, “cost-effectiveness” was the element implicitly stressed. Moreover, the alternatives envisaged related not only to alternative uses of the watercourse, but also to alternative means of achieving the desired objective, even without utilizing the watercourse.

54. The new paragraph 2 was linked to the application of article 6, as well as to that of article 7, and it no longer referred to “determining”, for the reasons already stated in connection with paragraph 1 (para. 49 above). In addition, the requirement now involved an obligation to enter into consultations, rather than negotiations, in a spirit of co-operation. It had been considered that a reference to negotiation might be interpreted to imply the commencement of a procedure for the settlement of a dispute, when in fact, very often, a dispute as such did not exist. States might simply wish to exchange information or commence discussions. Paragraph 2 therefore aimed at dispute avoidance rather than dispute settlement and, at the present stage, the shaping and encouragement of co-operation was the objective being sought.

55. The phrase “when the need arises” was meant to serve as a “triggering” mechanism which was based on objective criteria and would bring paragraph 2 into play. It was not intended to mark the start of a formal dispute-settlement procedure to be invoked at the request of one State. In practical terms, if States applied the provisions of the draft articles in good faith and in a spirit of co-operation, a request by one State for consultations should not be ignored by the other States concerned.

56. The second sentence of paragraph 2 as proposed by the previous Special Rapporteur, which referred to the procedures for peaceful settlement to be provided for in the later parts of the draft, had been deleted. As the content of those provisions had not yet been discussed by the Commission, it had been considered premature to mention them at the present stage.

57. The title of article 7 had been adjusted in the light of the new wording.

58. Mr. BENNOUNA said that the text of article 7 was entirely satisfactory to him. He would, however, suggest that the word “or”, in the first part of

paragraph 2, should be replaced by “and” or by “and/or” to make it clear that articles 6 and 7 could be applied together.

59. Mr. MAHIOU, referring to the French text, suggested that the word *les* should be added at the beginning of paragraph 1 (a) to bring that subparagraph into line with the other subparagraphs.

60. The CHAIRMAN, speaking as Special Rapporteur, said that, in the English text at any rate, the absence of the definite article was a matter of euphony, not of substance, and did not mean that any particular factor carried less weight.

61. Mr. AL-BAHARNA said that he could accept article 7 as drafted. Without wishing to reopen the debate on article 6, however, he considered that, for the sake of consistency, the words “conservation and” should be added before “adequate protection” in the second sentence of paragraph 1 of article 6, in order to bring that provision into line with the wording of paragraph 1 (e) of article 7.

62. Mr. OGISO said that he, too, read article 7 in conjunction with article 6. He noted in that connection that article 6 consisted of two elements: equitable and reasonable utilization, as dealt with in paragraph 1, and equitable and reasonable participation, as dealt with in paragraph 2. The factors referred to in article 7, paragraph 1 (e), were particularly important with regard to participation. To make the relationship between the two articles clearer, he therefore proposed that the words “and participation” be added at the end of the title of article 7 and also after the word “utilization” in paragraph 1 of the article. He would not insist on his proposal if the Commission was reluctant to consider it at the present stage.

63. The CHAIRMAN, speaking as Special Rapporteur, said that personally he would have no objection to Mr. Ogisso’s proposal. The response to the same proposal in the Drafting Committee had, however, been that article 7 did in fact cover participation inasmuch as participation was involved in equitable utilization, as was apparent from article 6, paragraph 2. The only element not covered in article 7 was thus co-operation, which would be dealt with in a separate article.

64. Mr. AL-KHASAWNEH proposed that, in paragraph 2 of article 7, the words “paragraph 1 of” should be inserted before “the present article”.

*It was so agreed.*

65. He questioned the value of paragraph 1 of article 7, which was very ambitious and seemed to say that every case should be decided on an *ad hoc* basis and on its own merits. That would make the position of those responsible for taking a decision in such matters very difficult indeed, particularly since the paragraph laid down an imperative rule rather than a guideline.

66. The CHAIRMAN, speaking as Special Rapporteur, said that the Drafting Committee had endeavoured to comply with the Commission’s wish to provide States with some guidance in the form of a non-exhaustive list of factors applicable to the utilization of an international watercourse.

67. Mr. BEESLEY said that, in his view, the list of factors would be more complete and accurate if it contained the word "biological" at some point. He could, however, accept the article as drafted, since the list was only indicative and the Commission would presumably revert to it.

68. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 7 [8] as proposed by the Drafting Committee, with the amendment proposed by Mr. Al-Khasawneh (para. 64 above).

*It was so agreed.*

*Article 7 [8] was adopted.*

69. Mr. EIRIKSSON said that, had time allowed, he would have liked to introduce a number of amendments. For instance, he noted that the word "circumstances", in the introductory clause of paragraph 1, did not appear in the title of the article and he wondered whether it was really necessary. He would have preferred to delete the word "concerned", in paragraphs 1 (b) and 2. He did not like the use of both the singular and the plural in paragraph 1 (c) ("use or uses") or the use of the word "particular" in paragraph 1 (f). He would like to have an explanation of the expression "economy of use" in paragraph 1 (e) and, in that context, would have preferred to speak merely of "protection and development". In his view, the word "corresponding", in paragraph 1 (f), should be replaced by a term such as "comparable". He would also have liked to amend paragraph 2 to read:

"Watercourse States shall, at the request of any watercourse State, enter into consultations with respect to the application of article 6 or paragraph 1 of the present article."

70. Lastly, he thought it should be explained in a footnote that the numbers between square brackets were the original numbers of the articles, to avoid giving the impression that the Drafting Committee had been in doubt.

71. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and expressed appreciation for the patience and skill with which he had discharged his task.

*The meeting rose at 6.05 p.m.*

## 2034th MEETING

*Tuesday, 14 July 1987, at 10.05 a.m.*

*Chairman: Mr. Stephen C. McCaffrey*

*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. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas,*

*Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

### Draft report of the Commission on the work of its thirty-ninth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter I.

#### CHAPTER I. Organization of the session (A/CN.4/L.413)

##### Paragraph 1

*Paragraph 1 was adopted.*

##### Paragraph 2

2. Mr. PAWLAK (Rapporteur) proposed that the words "and sets out the five articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the second sentence and that the words "and sets out the six articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the third sentence.

3. Mr. BARSEGOV said that the Commission had not yet seen the commentaries referred to in those amendments.

4. The CHAIRMAN said that the commentaries would appear in documents to be submitted to the Commission shortly and would form part of the relevant chapters of the draft report.

5. Mr. BARSEGOV said that he could not agree to the approval of commentaries he had not yet seen. Moreover, because of the lack of time, those commentaries were likely to be approved in great haste.

6. Mr. PAWLAK (Rapporteur) explained that the amendments he had proposed were intended to show that commentaries would be attached to the articles which the Commission had provisionally adopted on two of the topics on its agenda. The content of those commentaries would, of course, be considered by the Commission at a later stage.

7. Mr. MAHIOU, noting that past reports had contained wording such as that proposed by the Rapporteur only when a set of draft articles had been adopted on first reading, proposed that the amendments should be left in abeyance until the Commission had approved the commentaries to which they referred.

8. The CHAIRMAN suggested that the Commission should adopt paragraph 2 on the understanding that it would consider the amendments proposed by the Rapporteur when it approved the commentaries to which they referred.

*Paragraph 2 was adopted on that understanding.*

##### Paragraphs 3 to 8

*Paragraphs 3 to 8 were adopted.*

## Paragraph 9

9. Mr. YANKOV said that he could agree to paragraph 9 if it was made clear that Governments should comment promptly on the two sets of draft articles provisionally adopted by the Commission at its previous session.

10. The CHAIRMAN said that that point would be covered in the chapter of the report dealing with agenda item 9 (Programme, procedures and working methods of the Commission, and its documentation).

11. Mr. ARANGIO-RUIZ noted that the second sentence of paragraph 9 stated that he had been “appointed during the session” as Special Rapporteur for the topic of State responsibility. Actually, his appointment had taken place so late in the session that he had not had time to produce a reasonable document for the attention of his colleagues.

12. Mr. CALERO RODRIGUES proposed that the words “during the session” should be replaced by “on 17 June 1987”.

*It was so agreed.*

*Paragraph 9, as amended, was adopted.*

*Chapter I of the draft report, as amended, was adopted.*

**CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/L.414 and Add.1)**

**A. Introduction (A/CN.4/L.414)**

Paragraphs 1 to 8

*Paragraphs 1 to 8 were adopted.*

## Paragraph 9

13. The CHAIRMAN, speaking as a member of the Commission, said that he had some reservations with regard to the second sentence of paragraph 9, since he did not believe that the “general trend” to which it referred had really existed. He recalled that he had reserved his position with regard to a similar sentence in earlier reports.

14. Mr. THIAM (Special Rapporteur) noted that, in the Commission’s report on its thirty-seventh session,<sup>1</sup> a similar sentence had been adopted without reservation.

15. The CHAIRMAN, speaking as a member of the Commission, said that he merely wished to have his reservation placed on record in the summary record of the current meeting. No mention of it would be made in the Commission’s report.

16. Mr. BARSEGOV said that he, too, had reservations about the second sentence of paragraph 9, which should also refer to the use of nuclear weapons and to terrorism, including State terrorism.

17. Mr. REUTER noted that the reference to certain offences had been qualified so as to make it clear that there had been doubts about the existence of a general trend in favour of their inclusion in the draft code.

18. Mr. DÍAZ GONZÁLEZ said that paragraph 9 was part of the account of the Commission’s earlier consideration of the topic. The “general trend” referred to in the second sentence had been a very real one and he himself had agreed with it.

19. Mr. MAHIU pointed out that the second sentence of paragraph 74 of the Commission’s report on its thirty-eighth session<sup>2</sup> was identical to the second sentence of paragraph 9 now under consideration.

20. Mr. ARANGIO-RUIZ drew attention to paragraph 101 of the Commission’s report on its thirty-eighth session,<sup>3</sup> which read: “Some members of the Commission indicated that the draft code should expressly and specifically condemn as a crime against humanity any acts committed, with or without support from abroad, in order to subject a people to a régime not in keeping with the right of peoples to self-determination and to deprive such people of human rights and fundamental freedoms.” Although he had first put that idea forward at the Commission’s thirty-seventh session, in 1985,<sup>4</sup> and had been supported by various other members, no reference to it had been included in paragraph 9 of chapter II of the draft report under discussion.

21. Following a brief exchange of views in which Mr. BENNOUNA, Mr. THIAM (Special Rapporteur) and Prince AJIBOLA took part, the CHAIRMAN suggested that the Commission should adopt paragraph 9 on the understanding that the comments and reservations made by members would be reflected in the summary record of the meeting.

*Paragraph 9 was adopted on that understanding.*

Paragraphs 10 to 15

*Paragraphs 10 to 15 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.414 and Add.1)**

Paragraphs 16 to 51 (A/CN.4/L.414)

Paragraph 16

22. The CHAIRMAN, speaking as a member of the Commission, suggested that the words “are contained in”, in the third sentence, should be replaced by “comprise”.

*It was so agreed.*

*Paragraph 16, as amended, was adopted.*

Paragraphs 17 and 18

*Paragraphs 17 and 18 were adopted.*

Paragraph 19

23. Mr. BARSEGOV said that the first sentence of the paragraph gave the impression that there had been general agreement on the establishment of an inter-

<sup>2</sup> *Yearbook . . . 1986*, vol. II (Part Two), p. 41.

<sup>3</sup> *Ibid.*, p. 46.

<sup>4</sup> See *Yearbook . . . 1985*, vol. I, p. 66, 1887th meeting, paras. 35-37.

<sup>1</sup> *Yearbook . . . 1985*, vol. II (Part Two), p. 11, para. 31.

national criminal jurisdiction and that there had been disagreement only as to method. Doubts had, however, also been expressed as to the feasibility of creating such a court; that point should perhaps be clarified.

24. The CHAIRMAN pointed out that the various views expressed by members during the discussion of the matter were reflected in paragraphs 21 to 26. Mr. Barsegov's point could perhaps be taken up when the Commission came to those paragraphs.

25. Speaking as a member of the Commission, he noted that paragraph 19 referred directly to draft article 4 without any explanation as to why draft articles 1 to 3 had not been discussed. Perhaps a sentence should be added, either at the beginning of paragraph 19 or in a footnote to the paragraph, to the effect that articles 1 to 3 had already been adopted and were discussed later in chapter II.

26. Mr. ERIKSSON said that, since the same point applied to draft articles 5 and 6, a separate paragraph could perhaps be included at the outset to indicate that the articles in question would be dealt with at a later stage.

27. Mr. GRAEFRATH said that the title of section B (Consideration of the topic at the present session) suggested that the whole of the topic would be dealt with, when that was not in fact the case. He did not think that the point could be covered by a footnote or a short sentence.

28. Mr. ARANGIO-RUIZ said he agreed with Mr. Graefrath that there was a lacuna in the text.

29. Mr. YANKOV said that the report followed the normal format of the Commission's reports. To meet the concern of certain members, a few paragraphs on the substance of articles 1 to 3 could, of course, be added, but in his view the Commission should abide by the established pattern for its reports and not try to introduce any innovation, which might make the reading of the report more difficult.

30. Prince AJIBOLA said that it would be more logical to follow the pattern of the discussion, starting at the beginning, with articles 1 to 3, and going on until the end.

31. Mr. THIAM (Special Rapporteur) pointed out, for the benefit of new members, that the different views expressed during the discussion were reflected in the commentaries to the articles. That had always been the method followed by the Commission; if it were changed, it would upset everything. Furthermore, the format of the draft report had been adopted by agreement with the Secretariat and in order to avoid repetition.

32. Prince AJIBOLA said that, while he appreciated that the Commission had a tradition in such matters, he continued to think that, logically, the draft report should follow the order of the articles with which it dealt.

33. Mr. MAHIOU suggested that it should be left to the Special Rapporteur to decide how best to solve the problem.

34. Mr. BARSEGOV said that, having listened to members' explanations, he no longer had any objection to paragraph 19. He did, however, think that, to save time and avoid undue repetition, the commentaries should be available to members when they discussed and adopted draft articles.

35. Mr. PAWLAK (Rapporteur), associating himself with the remarks made by the Special Rapporteur and Mr. Barsegov, said that he was quite prepared to include an appropriate reference to articles 1 to 3 and articles 5 and 6 in order to satisfy certain members. As to the possibility of producing commentaries at an earlier stage, the respective special rapporteurs could perhaps be asked to prepare them as soon as possible.

36. Mr. THIAM (Special Rapporteur) said that the commentaries could not be prepared until the debates on the relevant articles had been concluded. If the Commission wanted to have the commentaries earlier, it should adopt the draft articles sooner.

37. Mr. BARSEGOV said that the question should perhaps be taken up by the Planning Group at the Commission's next session.

38. Mr. TOMUSCHAT said that it might be difficult for the reader to understand why the debate on draft articles 4 and 7 to 11 alone was covered. He therefore proposed that a new paragraph should be added reading: "Articles . . . were adopted by the Commission at its present session. The views expressed by members on those articles are reflected in the relevant commentaries, which appear in section . . . below."

39. Mr. REUTER said that he agreed with Mr. Tomuschat, but did not think that a separate paragraph was necessary. He proposed instead that a sentence should be added at the end of paragraph 18, reading: "Draft articles 4 and 7 to 11, which were not adopted, were the subject of considerable discussion."

40. The CHAIRMAN suggested that the Special Rapporteur should be requested to work out a suitable form of wording, together with Mr. Tomuschat and Mr. Reuter, so as to take account of their two proposals.

*It was so agreed.*

*Paragraph 19 was adopted on that understanding.*

Paragraph 20

41. Mr. TOMUSCHAT said he did not think that the second sentence of the paragraph was correct, since he believed that the 1977 Additional Protocols to the 1949 Geneva Conventions also contained specific provisions on jurisdiction. He therefore proposed that the words "the only conventions" should be replaced by "the most prominent conventions" or some similar wording.

42. Mr. AL-BAHARNA proposed that the words "the only" should be deleted.

43. The CHAIRMAN suggested that the exact form of wording should be left to the Special Rapporteur to settle with Mr. Tomuschat.

*It was so agreed.*

*Paragraph 20 was adopted on that understanding.*

Paragraphs 21 and 22

*Paragraphs 21 and 21 were adopted.*

Paragraph 23

44. Mr. EIRIKSSON, referring to the second sentence, said that he was not very happy with the expression "aerial offences". Perhaps the Special Rapporteur could be asked to find some other expression, in consultation with the Secretariat.

45. Mr. GRAEFRATH, also referring to the second sentence, said it had been suggested not only that the Commission should adopt the compromise solution embodied in a number of recent conventions, but also that it should take account of the rules contained in the 1967 Declaration on Territorial Asylum. That point should be mentioned as well.

*It was so agreed.*

46. Mr. BARSEGOV asked what exactly was meant by the expression "aerial offences".

47. Mr. THIAM (Special Rapporteur) said that the expression referred to hijacking. He also did not like the expression, however, and would find another one to replace it.

48. Mr. AL-KHASAWNEH said that the expression "aerial offences" had originated with the Tokyo, Hague, and Montreal Conventions, commonly known as the "aerial offences conventions".

49. Mr. REUTER proposed that the expression "aerial offences" should be replaced by "certain offences relating to air travel".

*It was so agreed.*

*Paragraph 23, as amended, was adopted.*

Paragraph 24

*Paragraph 24 was adopted.*

Paragraph 25

50. Mr. YANKOV proposed that the following sentence should be added at the end of the paragraph: "It was also considered that an *ad hoc* international criminal court might be established on the basis of a special agreement."

51. Mr. BEESLEY suggested that a more appropriate place for that text would be the second sentence of the paragraph.

52. Mr. BARSEGOV proposed that the first sentence should be reworded to form two sentences. The comma after the words "international criminal court" should be replaced by a full stop and the words "which was, in their opinion" should be replaced by "In the view of some members".

53. Mr. BENNOUNA, supporting that proposal, said he trusted that the different views expressed during the discussion would be reflected in the paragraph.

54. Mr. THIAM (Special Rapporteur) said that there had been three main trends of opinion during the discussion: some members believed that an international criminal court was essential; others thought that such a

court was essential but not feasible; and still others were frankly sceptical about the idea. He therefore suggested that the first sentence of paragraph 25 should be replaced by the following text:

"With regard to the question of an international criminal court, there were several trends of opinion in the Commission. Some members were of the opinion that such a court was the only system that could guarantee full implementation of the code. Other members were in favour of such a court, but were sceptical about the possibility of establishing one at the current stage in international relations. Still others were opposed to the idea. It was also suggested that an *ad hoc* international criminal court might be established on the basis of a special agreement."

That text also took account of the proposal made by Mr. Yankov.

*It was so agreed.*

55. Mr. EIRIKSSON recalled that, at the 1996th meeting (para. 50), he had made a detailed proposal concerning the enforcement of the code and providing for optional international jurisdiction with residual national jurisdiction combined with an option of extradition.

56. Mr. BEESLEY suggested that the words "In that connection", at the beginning of the last sentence, should be deleted, since the proposal to which that sentence referred also related to the matter dealt with in the first sentence of the paragraph.

*It was so agreed.*

*Paragraph 25, as amended, was adopted.*

Paragraph 26

*Paragraph 26 was adopted.*

Paragraph 27

57. Mr. BENNOUNA said that the Drafting Committee's very fruitful discussion of the *non bis in idem* rule had focused on the question of means of avoiding abuses in the application of that rule and that it had been suggested that international machinery should be set up for that purpose. There should be some way of informing the General Assembly of the discussion of that question.

58. Mr. ARANGIO-RUIZ said that he had reservations with regard to the second sentence of paragraph 27, since an international criminal court would not be able to try the same crime twice and would have to apply the *non bis in idem* rule. Moreover, even if an international criminal court were established, the application of that rule would inevitably give rise to problems.

*Paragraph 27 was adopted.*

Paragraph 28

59. Mr. BARSEGOV said that the question of exceptions to the *non bis in idem* rule had been discussed at length in the Drafting Committee, whose members had, however, not been able to agree on appropriate wording for draft article 7. Although he was not sure whether the Commission's report could reflect the discussions held

in the Drafting Committee, he did think that it should take account of the view he had expressed in plenary (1993rd meeting), namely that the possibility of a second trial could not be precluded either in the case where new evidence of the guilt of the accused had been discovered or in the case where, for example, it became obvious following an initial trial that what had appeared to be a murder had been part of a policy of genocide.

60. Mr. THIAM (Special Rapporteur) said that it was difficult to take account in the report of discussions held in the Drafting Committee. He would, however, have no objection if Mr. Barsegov's view were reflected in the report.

61. Mr. OGISO said that he agreed with the Special Rapporteur, particularly since the discussion of draft article 7 had taken place in an informal group of the Drafting Committee.

62. Mr. ARANGIO-RUIZ said that, while he understood that the Drafting Committee's discussions could not be referred to in the Commission's report, he considered that paragraph 28 had to reflect the view that the problem of the *non bis in idem* rule would also arise in the case where an international criminal court was established. The Special Rapporteur might be requested to draft a suitable text with the Secretariat's assistance.

*It was so agreed.*

*Paragraph 28 was adopted on that understanding.*

Paragraph 29

63. Mr. CALERO RODRIGUES, referring to the sentence in brackets at the end of paragraph 29, said that the Drafting Committee's report did not exist in writing and could therefore not be referred to in the Commission's report.

64. Mr. THIAM (Special Rapporteur) suggested that that sentence should be deleted.

*It was so agreed.*

65. Mr. TOMUSCHAT said that it would be advisable to reconsider the translation of the French phrase *ne peut être invoquée* by the English phrase "cannot be pleaded in bar".

*It was so agreed.*

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 and 31

*Paragraphs 30 and 31 were adopted.*

Paragraph 32

66. Mr. BARSEGOV said that, if the Commission decided, as some members had suggested, to delete paragraph 2 of draft article 8, containing the reference to the "general principles of law recognized by the community of nations", it would not be taking account of historical events. The Nazi trials, for example, had been based on general principles of law. At the time, the view had been that international rules making genocide a crime did indeed exist. It could therefore not be said that the wording in question was so "imprecise and ambiguous" that it should be deleted. Paragraph 32 should

reflect the opinion of the members of the Commission who wanted that wording to be retained, since it had a sound legal basis.

67. Mr. BENNOUNA, supporting the view expressed by Mr. Barsegov, said that the debate on draft article 8, paragraph 2, had been based on the productive analyses of the concept of international law made during the consideration of article 1.

68. Mr. THIAM (Special Rapporteur) said that account would be taken of those points of view in the final version of the report.

*Paragraph 32 was adopted on that understanding.*

Paragraphs 33 to 36

*Paragraphs 33 to 36 were adopted.*

Paragraph 37

69. Following an exchange of views in which Mr. KOROMA, Mr. THIAM (Special Rapporteur) and Mr. ARANGIO-RUIZ took part, the CHAIRMAN suggested that the word "internationalists", in the fourth sentence, should be replaced by "jurists".

*It was so agreed.*

*Paragraph 37, as amended, was adopted.*

Paragraph 38

70. Mr. BARSEGOV said that he would like the very strong reservations he had expressed in plenary (1999th meeting) with regard to the exceptions provided for in draft article 9 (b) to be reflected in the report. He had, in particular, pointed out that there had never been any trial for war crimes or genocide in which attempts had not been made to invoke an exception to the principle of criminal responsibility.

71. Mr. THIAM (Special Rapporteur) said that he would certainly incorporate a text to be provided by Mr. Barsegov in the report.

*Paragraph 38 was adopted on that understanding.*

Paragraph 39

*Paragraph 39 was adopted.*

Paragraph 40

72. Mr. THIAM (Special Rapporteur) said that the words "at least", in the first sentence, should be deleted.

*Paragraph 40, as amended, was adopted.*

Paragraph 41

73. Mr. GRAEFRATH, supported by Mr. ROUCOUNAS, said that paragraph 41 reflected only the opinion of those members who had wanted the exception provided for in subparagraph (d) of draft article 9 to be deleted. He had been in favour of retaining that exception (1995th meeting) and was surprised that his opinion had not been taken into account in the draft report.

74. Mr. THIAM (Special Rapporteur) said that account would be taken of those comments in the final version of the report.

*Paragraph 41 was adopted on that understanding.*

Paragraphs 42 and 43

*Paragraphs 42 and 43 were adopted.*

Paragraph 44

75. Mr. EIRIKSSON said he did not think that the paragraph needed to include the third sentence, which made him think of the regrettable practice of conscripting children.

76. Mr. KOROMA said that the point made by Mr. Eiriksson had been raised during the Commission's discussion of draft article 9, when he himself had said (2000th meeting) that it was open to question whether minority could be invoked as an exception to the principle of criminal responsibility. That aspect of the discussion should be reflected in the report.

77. Mr. TOMUSCHAT said that the sentence in question was very obscure. It should either be deleted or be drafted more clearly.

78. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with Mr. Tomuschat.

79. Mr. CALERO RODRIGUES said that, in French, at any rate, the sentence was perfectly clear.

80. Mr. THIAM (Special Rapporteur) said that paragraph 44 merely reflected the comments he had made during the Commission's discussion of draft article 9. On the basis of the position he had taken at that time, he thought that the third sentence should be retained. He was, however, prepared to try to find a more suitable form of wording.

*Paragraph 44 was adopted on that understanding.*

Paragraphs 45 and 46

*Paragraphs 45 and 46 were adopted.*

Paragraph 47

81. Mr. BARSEGOV said that he would like paragraph 47 to reflect the views he had expressed in plenary (1999th meeting), when he had stated, for example, that in order to understand the concept of "complicity" account had to be taken of the Nürnberg Principles,<sup>5</sup> and in particular Principle VII, referring to "complicity in the commission of a crime against peace, a war crime or a crime against humanity".

82. Mr. THIAM (Special Rapporteur) said that account would be taken of that comment in the final version of the report.

*Paragraph 47 was adopted on that understanding.*

Paragraphs 48 to 51

*Paragraphs 48 to 51 were adopted.*

*The meeting rose at 1 p.m.*

## 2035th MEETING

*Tuesday, 14 July 1987, at 3 p.m.*

*Chairman: Mr. Stephen C. McCAFFREY.*

*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. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

### **Draft report of the Commission on the work of its thirty-ninth session (continued)**

#### **CHAPTER III. The law of the non-navigational uses of international watercourses (A/CN.4/L.415 and Add.1-3)**

##### **A. Introduction (A/CN.4/L.415)**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

Paragraph 6

1. Mr. EIRIKSSON proposed that the beginning of the first sentence of the English text should be amended to read: "Following the resignation from the Commission . . .".

2. After a brief discussion in which the CHAIRMAN, Mr. KOROMA and Mr. DÍAZ GONZÁLEZ took part, the CHAIRMAN said he would take it that the Commission agreed to that amendment.

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 to 12

*Paragraphs 7 to 12 were adopted.*

Paragraph 13

3. Mr. BARSEGOV said that he wondered what meaning was to be attached to the second sentence of the paragraph, which appeared to state that the Commission had rejected the concept of a "shared natural resource" but none the less considered that "effect could be given to the legal principles underlying the concept".

4. The CHAIRMAN pointed out that paragraph 13 was taken directly from the Commission's report on its thirty-eighth session.<sup>1</sup>

5. Mr. BARBOZA said that he was one of the members who, for the sake of consensus, had agreed at the thirty-eighth session that the expression "shared natural resource" should not be used in the draft articles, since it had appeared to pose difficulties for some

<sup>5</sup> See 1992nd meeting, footnote 12.

<sup>1</sup> Yearbook . . . 1986, vol. II (Part Two), p. 62, para. 237.

members. The Commission had not, therefore, rejected the concept: it had simply avoided using the expression, and paragraph 13 faithfully reflected that state of affairs.

6. Mr. KOROMA confirmed Mr. Barboza's recollection. The Commission had decided that it could use the principle underlying the "shared natural resource" concept without employing the expression itself.

7. Mr. BARSEGOV said that it was none the less difficult to endorse such an illogical sentence. If the "shared natural resource" concept had not been adopted by the Commission, how was it possible to give effect to the legal principles underlying it? In any event, the issue of "shared natural resources" had been discussed from a different standpoint at the present session and it would be only right to record the position adopted by various members in that regard.

8. The CHAIRMAN pointed out that paragraphs 11 to 16 related only to previous sessions. The opinions expressed at the present session would be mentioned in section B of chapter III.

9. Mr. DÍAZ GONZÁLEZ said that the ambiguity in the second sentence of paragraph 13 was yet another example of the anomalies produced by too much haste. At its thirty-eighth session, the Commission, so as to get out of an impasse for the time being, had decided to avoid using the expression "shared natural resource"—which called for further analysis—yet retain the underlying principle.

10. Mr. BARSEGOV said he supposed that some members of the Commission were opposed not only to the expression itself, but also to the concept involved. He asked for his reservations regarding paragraph 13 to be mentioned in the summary record of the meeting.

*Paragraph 13 was adopted.*

Paragraphs 14 to 16

*Paragraphs 14 to 16 were adopted.*

*Section A, as amended, was adopted.*

**CHAPTER IV. International liability for injurious consequences arising out of acts not prohibited by international law**  
(A/CN.4/L.416 and Add.1 and Add.1/Corr.1)

**A. Introduction** (A/CN.4/L.416)

Paragraph 1

11. Mr. BARSEGOV said that the title of agenda item 7 should be changed, for the subject-matter related to lawful acts, in other words acts authorized by international law, rather than acts that were not prohibited. The present title could convey the impression that the Commission was considering acts which were not yet prohibited—because of a gap in international law, for example.

12. The CHAIRMAN said that it was for the General Assembly to reformulate the topic it had assigned to the Commission. The discussion on that point was mentioned in section B of chapter IV.

13. Mr. KOROMA said that it was not within the Commission's power to alter the wording of the topics

on its agenda. Mr. Barsegov's reservations would be brought to the attention of the General Assembly inasmuch as they would be recorded in the report.

14. Mr. BARSEGOV said that for several years some members of the Commission had wanted to change the title. Apparently, session after session went by and nothing was done about it. The Commission would have to take a decision sooner or later.

15. Mr. BARBOZA (Special Rapporteur) confirmed that the Commission had often discussed the title of the topic. However, the matter had not been taken up at the present session precisely because it had been decided to allow time for further reflection. The Commission could consider the question again in plenary at its next session.

16. The CHAIRMAN pointed out that section A of chapter IV was simply a brief historical outline. The question raised by Mr. Barsegov could be discussed in the context of section B, entitled "Consideration of the topic at the present session".

*Paragraph 1 was adopted.*

Paragraphs 2 to 4

*Paragraphs 2 to 4 were adopted.*

17. Mr. CALERO RODRIGUES said that section A of chapter IV was remarkably brief, unlike the introductions to the other chapters. The reader could well wonder why there was such a difference. For reasons of logic and consistency, the Commission should adopt a single method and keep to it.

18. The CHAIRMAN said that that question could be considered by the Planning Group at the Commission's next session.

*Section A was adopted.*

**CHAPTER VI. Other decisions and conclusions of the Commission**  
(A/CN.4/L.418 and Add.1)

**H. International Law Seminar** (A/CN.4/L.418/Add.1)

Paragraph 1

19. Mr. RAZAFINDRALAMBO asked for the title "Ambassador" before his name in the last sentence to be amended to "Mr.".

20. Mr. REUTER said that the last sentence of the paragraph was obscure. It was difficult to determine whether the observer in question had participated in the Seminar as a member of the selection committee or as a student.

21. Mr. HAYES said that he, too, would like the passage to be reworded.

22. Mr. BARSEGOV said that a correction was also required in the Russian text, which spoke of "three observers".

23. The CHAIRMAN said that the "one" observer had participated in the Seminar as a student and had not been on the selection committee.



24. Mr. KOROMA said that the expression “junior professors”, in the second sentence of the English text, was clumsy.

25. After a discussion in which Mr. ROUCOUNAS, Mr. AL-BAHARNA, Mr. YANKOV, Mr. BARSEGOV, Mr. RAZAFINDRALAMBO and Mr. DÍAZ GONZÁLEZ took part, it was agreed that the expression “junior professors” would be replaced by “young professors”, in line with the other language versions.

26. Mr. TOMUSCHAT said that he would like the expression “advanced students”, in the same sentence, to be replaced by “postgraduate students”.

27. Mr. RAZAFINDRALAMBO and Mr. ARANGIO-RUIZ said that they, too, were not happy with the term “advanced students”.

28. The CHAIRMAN said he would take it that the Commission agreed to replace the expression “junior professors” by “young professors” and the expression “advanced students” by “postgraduate students”. In addition, the end of the last sentence would be clarified so as to explain the status of the observer who had participated in the Seminar.

*It was so agreed.*

*Paragraph 1, as amended, was adopted.*

Paragraph 2

*Paragraph 2 was adopted.*

Paragraph 3

29. Mr. PAWLAK (Rapporteur) said that, in the second sentence, “Human Rights Commission” should read “Human Rights Committee”.

30. Mr. KOROMA said that the two parts of the first sentence should be inverted, for the participants in the Seminar had attended a talk on the Commission’s activities before attending the Commission’s working meetings.

31. Generally speaking, it would be advisable in the future for the subjects of the lectures organized in connection with the Seminar to coincide with the topics under consideration by the Commission. At the present session, participants had sometimes attended meetings at which the Commission’s work on a topic had already been quite advanced, and that had required a great deal of adaptation on their part.

32. The CHAIRMAN said that the lectures given by members of the Commission should be listed in chronological order rather than in the alphabetical order of the names of the lecturers.

33. As to Mr. Koroma’s point, “The law of the non-navigational uses of international watercourses” had been the subject of a lecture at the time the Commission had been engaged in considering that topic.

34. Mr. AL-BAHARNA asked why the members of the Commission who had given lectures were not listed with their title of “Professor”.

35. The CHAIRMAN, supported by Mr. GRAEF-RATH, said that it was customary in the United Nations not to use personal titles.

*Paragraph 3, as amended, was adopted.*

Paragraph 4

*Paragraph 4 was adopted.*

Paragraph 5

36. Prince AJIBOLA said that, in the second sentence, it would be better to state that the countries in question had “awarded fellowships to participants”, rather than “made fellowships available to participants”.

37. Mr. CALERO RODRIGUES said that, at previous sessions, the Commission had always mentioned in its report the Seminar’s financial difficulties. No reference was made to that matter in paragraph 5 and it might thus be inferred that the situation had finally improved.

38. The CHAIRMAN confirmed that, in its report on its thirty-eighth session,<sup>2</sup> the Commission had stressed the importance attached to the sessions of the Seminar and drawn the attention of the General Assembly “to the fact that, due to a shortage of funds, if adequate contributions are not forthcoming, the holding of the twenty-third session of the International Law Seminar in 1987 may be in doubt”. It had therefore appealed “to all States to contribute, in order that the Seminar may continue”.

39. Mr. FRANCIS said that it was apparent from a note addressed to the Government of his country in April 1986 by its Mission to the United Nations that the financial situation of the Seminar had in no way improved, for the note had mentioned the Seminar’s precarious finances. In 1983, when he had presented the Commission’s report to the General Assembly, he had, at the request of the Secretariat, issued a special appeal to Member States. It might well be worth while reiterating that appeal to the General Assembly.

40. Mr. YANKOV said he, too, considered that it would be appropriate to add a passage based on paragraph 273 of the Commission’s report on its thirty-eighth session. Nevertheless, it might be advisable to tone down the dramatic side of that paragraph, which had mentioned the possibility that the Seminar might not be held as a result of a shortage of funds. Only nine States had awarded fellowships and, therefore, the first thing to do would be to consult the officials responsible for organizing the Seminar.

41. Mr. BENNOUNA said that he endorsed the suggestion made by Mr. Calero Rodrigues. The lectures arranged by the Commission were of great interest for developing countries and, with the fellowships awarded by some States, nationals from those countries who would otherwise have been unable to do so had taken part in the Seminar. It should therefore be emphasized that the Seminar should continue, particularly since it was an excellent means of acquainting practitioners and

<sup>2</sup> *Ibid.*, p. 67, para. 273.

theoreticians of international law with the Commission's work. Moreover, the same appeal could be issued to international organizations, which could also make a useful contribution. Lastly, he wondered whether the phrase "none of the costs being borne by the United Nations", in the first sentence of paragraph 5, was true: the United Nations did, after all, provide premises for the Seminar.

42. Mr. REUTER said that, in his opinion, the whole of the first sentence should be reconsidered. It was not correct to say that the Seminar was "funded by voluntary contributions of Member States". The Seminar was a voluntary activity in which not only members of the Commission, but also officials of the United Nations took part. Only the participants had their costs defrayed. The Rapporteur of the Commission could, together, with the secretariat, certainly find a satisfactory formulation.

43. Mr. HAYES said that, since the fellowships awarded by States were not the only form of contribution to the Seminar, the beginning of the second sentence could be amended to read: "The Commission noted with particular appreciation . . .", thereby making it clear that the Commission had other reasons for expressing gratitude.

*It was so agreed.*

44. Mr. RAZAFINDRALAMBO said that he had chaired the committee to select the participants and would point out that voluntary contributions by States had made it possible to finance the travel and living expenses of the nationals of some developing countries. The funding by Member States ended there. As Mr. Reuter had pointed out, it was incorrect to say that "the Seminar is funded by voluntary contributions of Member States".

45. The CHAIRMAN said he was in a position to confirm that the voluntary contributions made by Member States were used entirely for the travel and living expenses of some participants.

46. Mr. AL-BAHARNA said that the best course would be to use the same formulation as that employed at the beginning of paragraph 272 of the Commission's report on its thirty-eighth session: "None of the costs of the Seminar were borne by the United Nations, which is not asked to contribute to the travel or living expenses of the participants."

47. The CHAIRMAN said that the Seminar did none the less entail indirect costs for the United Nations, which supplied not only meeting rooms, but also the services of members of the Commission, something which deserved to be noted.

48. Mr. YANKOV said that the agenda of the Sixth Committee of the General Assembly traditionally included an item entitled "United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law" (agenda item 128 of the fortieth session of the Assembly). In that connection, all States Members of the United Nations were requested to make voluntary contributions to the Programme.

49. With reference more particularly to the Seminar organized by the Commission, there were two major forms of contribution. First, there were contributions paid directly into the General Fund, which was administered by the Commission and enabled it to award fellowships to students from developing countries. Secondly, in the case of participants—approximately 10 per cent—who did not receive a fellowship, travel and living expenses were paid directly by their own Government. In addition, as pointed out by Mr. Reuter, there was the indirect contribution by the United Nations. Those three points should be made clear in paragraph 5.

50. Mr. FRANCIS pointed out that there were, in addition, indirect contributions by Member States. For example, when the Government of his country paid a contribution to UNITAR, it stipulated that a certain amount was to be set aside for fellowships for participants in the Seminar. That form of support, perhaps less visible than express contributions to the General Fund, should also be noted.

51. The CHAIRMAN said he would take it that the Commission agreed to assign the Rapporteur and the secretariat the task of reformulating the part of paragraph 5 relating to contributions by Member States and United Nations costs, so as to reflect the views expressed during the discussion.

*It was so agreed.*

*Paragraph 5, as amended, was adopted on that understanding.*

New paragraph 5 bis

52. The CHAIRMAN proposed the insertion, after paragraph 5, of a new paragraph 5 bis based on paragraph 273 of the Commission's report on its thirty-eighth session.

*It was so agreed.*

Paragraph 6

53. The CHAIRMAN said that it would be more correct to say "attesting to his or her participation" than "testifying participation".

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

*Section H, as amended, was adopted.*

I. Gilberto Amado Memorial Lecture (A/CN.4/L.418/Add.1)

Paragraph 7

*Paragraph 7 was adopted.*

Paragraph 8

54. Mr. CALERO RODRIGUES proposed that the third sentence should be amended to read: "The eighth Gilberto Amado Memorial Lecture was accordingly arranged and took place on 16 June 1987, followed by a Gilberto Amado Memorial dinner." Furthermore, the last sentence should be recast so as to indicate that there had been two lectures, and not one. Lastly, in the same sentence, the correct spelling of the name of the Legal

Adviser of the Ministry of Foreign Affairs of Brazil was Mr. Cançado Trindade.

*It was so agreed.*

*Paragraph 8, as amended, was adopted.*

Paragraph 9

55. Mr. CALERO RODRIGUES said that, like paragraph 8, paragraph 9 again spoke of the "generous" contribution by the Government of Brazil. It would be better to delete that word.

*It was so agreed.*

*Paragraph 9, as amended, was adopted.*

*Section I, as amended, was adopted.*

56. The CHAIRMAN said that the meeting would rise to enable the Planning Group to meet.

*The meeting rose at 4.30 p.m.*

## 2036th MEETING

*Wednesday, 15 July 1987, at 10 a.m.*

*Chairman: Mr. Stephen C. McCaffrey*

*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. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

### **Draft report of the Commission on the work of its thirty-ninth session (continued)**

1. The CHAIRMAN announced that several chapters of the draft report had been issued. Some of the documents, however, such as those relating to the draft Code of Offences against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses, were available only in English, French and Spanish for the time being.

2. Mr. BARSEGOV said that he was prepared to examine the chapter of the draft report dealing with relations between States and international organizations (second part of the topic) even if it was not yet available in Russian.

3. Mr. SHI said that, in order not to delay the Commission's work, he could manage without the Chinese version.

4. Following a discussion concerning the order in which the various documents would be considered, and in which Prince AJIBOLA, Mr. BARBOZA, Mr.

PAWLAK and Mr. THIAM took part, it was agreed to allow the Planning Group time to complete its work.

5. The CHAIRMAN said that the meeting would rise to enable the Planning Group to meet.

*The meeting rose at 10.20 a.m.*

## 2037th MEETING

*Wednesday, 15 July 1987, at 3 p.m.*

*Chairman: Mr. Stephen C. McCaffrey*

*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. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

### **Draft report of the Commission on the work of its thirty-ninth session (continued)**

#### **CHAPTER V. Relations between States and international organizations (second part of the topic) (A/CN.4/L.417)**

##### **A. Introduction (A/CN.4/L.417)**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

1. The CHAIRMAN suggested that it should be made clear, as in paragraphs 4 and 7, that the Special Rapporteur referred to was the "former" Special Rapporteur.

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 21

*Paragraphs 6 to 21 were adopted.*

*Section A, as amended, was adopted.*

##### **B. Consideration of the topic at the present session (A/CN.4/L.417)**

Paragraphs 22 and 23

*Paragraphs 22 and 23 were adopted.*

Paragraph 24

2. In response to a question by Mr. TOMUSCHAT, the CHAIRMAN said that paragraphs 24 and 25 were intended to reflect the views expressed during the discussion on the topic.

*Paragraph 24 was adopted.*

## Paragraph 25

3. Mr. MAHIU said that he was normally inclined to favour concise reports. Paragraph 25, however, was perhaps a little too short. Certain aspects of the discussion should have been reported more fully, since the Commission had spent a fairly long time on the topic. Nevertheless, he would not insist on the paragraph being reworded.

4. The CHAIRMAN, speaking as a member of the Commission and referring to the second sentence, said he did not think that the Commission had taken a formal decision regarding the methodology to be followed. He therefore suggested that the first part of the sentence should be replaced by the following wording: "Regarding the methodology to be followed, the Special Rapporteur would be free to follow a combination of the approaches . . ."

5. Mr. GRAEFRATH asked whether paragraph 25 summarized the entire discussion on the topic, or whether the intention was to amplify it.

6. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that the amendment suggested by Mr. McCaffrey was acceptable. Paragraph 25 reflected the whole of the discussion and he did not think anything needed to be added regarding the adoption of the plan of work.

*Mr. McCaffrey's amendment was adopted.*

*Paragraph 25, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter V of the draft report, as amended, was adopted.*

7. Mr. RAZAFINDRALAMBO noted that, in the French text of certain parts of the draft report, the footnotes had been listed at the end of the document in question, which made it difficult to refer to them. Footnotes normally appeared at the bottom of the page to which they related, as was the case with other parts of the draft report. He therefore recommended that the format of the various chapters should be harmonized.

*The meeting rose at 3.25 p.m.*

## 2038th MEETING

*Thursday, 16 July 1987, at 10.05 a.m.*

*Chairman: Mr. Stephen C. McCaffrey*

*Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

### Draft report of the Commission on the work of its thirty-ninth session (*continued*)

#### CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (continued)\* (A/CN.4/L.414 and Add.1)

##### B. *Consideration of the topic at the present session* (concluded) (A/CN.4/L.414 and Add.1)

Paragraphs 52 to 55 (A/CN.4/L.414/Add.1)

*Paragraphs 52 to 55 were adopted.*

*Section B, as amended, was adopted.*

##### C. *Draft articles on the draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.414/Add.1)

Paragraph 56

*Paragraph 56 was adopted.*

*Commentary to article 1* (Definition)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

1. Mr. RAZAFINDRALAMBO proposed that the term "intention", in the fourth sentence, should be replaced by "motive".

2. Mr. BARSEGOV said that it seemed appropriate to retain the term "intention", for it was used specifically in the Convention on the Prevention and Punishment of the Crime of Genocide.

3. Mr. THIAM (Special Rapporteur) said that the amendment proposed by Mr. Razafindralambo was acceptable and could well be made.

*It was so agreed.*

4. The CHAIRMAN, speaking as a member of the Commission, proposed that, in the same sentence, "(genocide . . .)" should be replaced by "(for example, genocide)".

*It was so agreed.*

5. Mr. BARSEGOV criticized the use of the conjunction "or" in the same sentence to connect the three criteria mentioned with regard to the seriousness of the act, namely the nature of the act, the extent of its effects and the motive of the perpetrator. The conjunction "and" would be more appropriate.

6. Mr. THIAM (Special Rapporteur) suggested that the conjunction "or" should be retained, and that the words "or from several of these elements" should be added at the end of the sentence, so as to take account of Mr. Barsegov's point.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

*Paragraph (3) was approved.*

Paragraph (4)

7. Mr. PAWLAK thanked the Special Rapporteur for his efforts to give an account of the various views expressed on the subject mentioned in paragraph (4). His

\* Resumed from the 2034th meeting.

own view, however, was not fully reflected and he therefore proposed the addition at the end of the paragraph of a sentence along the following lines: "However, the Commission decided that it would revert at an appropriate stage to the question of the conceptual definition of crimes against the peace and security of mankind."

8. Mr. THIAM (Special Rapporteur) said that that proposal was acceptable, but the sentence should be placed at the end of paragraph (1) of the commentary.

*It was so agreed.*

9. Mr. SEPÚLVEDA GUTIÉRREZ pointed out that the penultimate sentence could be misleading. The reader might well infer that a list of crimes was included in the draft code.

10. Mr. THIAM (Special Rapporteur) said that the penultimate sentence had to be read in conjunction with the last sentence. Many members had stressed that no list of crimes would ever be final, since other crimes could be added later.

11. Mr. SOLARI TUDELA said that the problem might be solved by changing the tense of the verb in the penultimate sentence, so as to state that the enumeration of crimes in the draft code "will not be exhaustive".

12. Mr. REUTER suggested that the difficulty could be overcome by combining the last two sentences of the paragraph.

13. After a brief discussion in which Mr. FRANCIS, Mr. GRAEFRATH, Mr. BARSEGOV, Prince AJIBOLA, Mr. HAYES, Mr. AL-BAHARNA, Mr. PAWLAK and Mr. EIRIKSSON took part, Mr. THIAM (Special Rapporteur) proposed that the last two sentences should be combined so as to read: "The enumeration of crimes in the present draft code could be supplemented at any time by other legal instruments."

14. Mr. ARANGIO-RUIZ suggested that the words "other legal instruments" in the proposed new text should be replaced by "new instruments of the same legal nature".

*It was so agreed.*

*The Special Rapporteur's amendment was adopted.*

15. Mr. FRANCIS said that he could accept paragraph (4), but wished to place on record a reservation, namely that the provisional list of crimes against the peace and security of mankind must encompass aggression, as well as the right of the Security Council to define other forms of aggression. No new legal instrument was required for those crimes to be covered by the code.

*Paragraph (4), as amended, was approved.*

Paragraph (5)

16. Mr. CALERO RODRIGUES proposed that the word "nevertheless", in the seventh sentence, should be deleted, so as to convey more accurately the sense of the discussion.

17. Mr. MAHIOU said that he agreed with Mr. Calero Rodrigues's remarks, but the best course would be to delete the entire sentence.

*It was so agreed.*

18. Mr. BENNOUNA said that paragraph (5) of the commentary to article 1 was fundamental to the whole of the draft and should therefore reflect all the views expressed on the inclusion of a reference to international law. Some members maintained that such a reference was necessary because crimes against the peace and security of mankind were governed by the rules of general international law independently of any convention. They also thought it might be premature to take a decision on the inclusion of such a reference before a detailed list of the crimes to be covered by the code had been drawn up. At the 1993rd meeting, he had pointed out that a problem arose out of the relationship between the consensual nature of the future instrument and the universal character of the offence and had suggested that crimes against the peace and security of mankind could be regarded as a violation of a peremptory norm of international law. All such views should be reflected in the commentary in order to acquaint the General Assembly with the wide-ranging debate that had taken place. He therefore proposed that the last sentence of the paragraph should be replaced by wording along the following lines:

"It was also pointed out that the inclusion of such an expression raised the question whether crimes against the peace and security of mankind were governed by rules of general international law independently of the draft code. Another question was whether such rules were not in the nature of *ius cogens*. Lastly, it was held that the inclusion of such a reference was premature and that it was necessary to wait until the detailed list of the crimes concerned was known before a decision was reached on the matter."

19. Mr. MAHIOU said that he agreed with Mr. Bennouna's remarks, but considered that the proposed formulation should be reworded more concisely and be submitted in writing. The Commission could then revert to the matter at a later stage.

20. Mr. AL-BAHARNA proposed that, for the sake of consistency, the formula "the expression 'under international law'" should be used throughout the paragraph, instead of "the words 'under international law'".

*It was so agreed.*

21. Mr. TOMUSCHAT proposed that the words "under international law", in the last sentence, should be replaced by "under existing rules of international law", and that the words "or under a future convention binding States" should be deleted.

*It was so agreed.*

22. Prince AJIBOLA proposed that the word "conversion", in the penultimate sentence, should be replaced by "application".

23. After a brief discussion in which Mr. AL-BAHARNA, Mr. CALERO RODRIGUES and Mr. YANKOV took part, the CHAIRMAN proposed that

the words "conversion of international obligations into obligations under internal law", in the penultimate sentence, should be replaced by "incorporation of international obligations into the internal law of States".

*It was so agreed.*

24. Mr. BEESLEY said that paragraph (5) failed to reflect a view he had expressed formally (2031st meeting), namely that the words "under international law", in article 1, should be transferred to the latter part of the sentence, between the words "constitute crimes" and "against the peace and security of mankind".

25. Mr. THIAM (Special Rapporteur) said that a sentence could certainly be added to paragraph (5) in order to reflect Mr. Beesley's opinion.

*It was so agreed.*

26. The CHAIRMAN said that the Commission would revert to paragraph (5) when Mr. Bennouna's proposal (see para. 18 above) had been submitted in writing.

*Commentary to article 2 (Characterization)*

Paragraph (1)

27. Mr. ARANGIO-RUIZ said that he wished to enter a reservation. He was not opposed to approval of the commentary, or adoption of article 2 itself, but wished to reserve his position on both until such time as the question of the application of the code under the internal law of the States parties to the instrument that would embody the code was resolved to his satisfaction.

28. The Nürnberg trial, to which paragraph (1) of the commentary made reference, was extremely important for the development of the topic under consideration in that it constituted a leading historical and moral precedent in determining crimes against the peace and security of mankind. It was not, however, altogether a valid precedent for the determination of the respective roles of international law and internal law in the characterization of crimes against the peace and security of mankind and in the prosecution of those responsible for such crimes. In the case of the Nürnberg trial, the problem had been resolved by the special circumstances obtaining at that time, and in particular by the fact that the internal law of the State governing the persons on trial, as the nationals of that State, had been, as it were, *in manu* of the four occupying Powers. Thus there had been no independent and sovereign organization to exercise effective authority over the territory and raise objections under internal law to the application of the Four-Power London Agreement of 1945. Furthermore, that Agreement, which had always had his full support, had been binding only on the four Powers *inter se*.

29. Mr. BARSEGOV, speaking on a point of order, said that at the present stage it was not the task of members of the Commission to comment on the Nürnberg trial. Had it been, he too would have had something to say.

30. The CHAIRMAN said that Mr. Arangio-Ruiz was entitled to enter a reservation. He would, however, urge members to be as brief as possible so as to enable the Commission to complete its work on time.

31. Mr. ARANGIO-RUIZ, continuing his statement, said that the precedent set by the Nürnberg trial did not help the Commission to resolve the specific problem of determining the respective roles of international law and internal law in the arrest and, where applicable, extradition, prosecution and conviction of persons accused of crimes against the peace and security of mankind. If the code was to be an effective instrument for the prevention and prosecution of such crimes, adequate means for that purpose would have to be found: it was not enough simply to invoke the precedent of the Nürnberg trial.

32. Accordingly, each State party to the instrument that would embody the code should be required to incorporate the code into its internal law. Any State in breach of that obligation would then be responsible for having violated the code and any corresponding rules of general international law.

33. Mr. GRAEFRATH said that it was not necessary for everybody who disagreed with the reservation entered by Mr. Arangio-Ruiz to make that point. He asked for his remark to be reflected in the summary record.

34. Mr. PAWLAK said that he did not subscribe to Mr. Arangio-Ruiz's views regarding the Nürnberg trial and its importance for the Commission's work on the draft code. The precedent set by that trial might not be of assistance to Mr. Arangio-Ruiz, but it could be to other members.

35. Mr. ARANGIO-RUIZ said he had not maintained that the Nürnberg trial was of no help to the Commission. On the contrary, it was of great help; but it was one thing to say that it provided the historical and moral origins of the draft code and another to say that the legal framework within which the trial had been held could be used as a model for the framework upon which the code was to be built.

36. Mr. BARSEGOV said that, given the lack of time available to the Commission and the fact that the position of members, with the apparent exception of one, was well known, he would refrain from commenting on the true historical role of the Nürnberg trial.

37. Mr. YANKOV, speaking on a point of order, asked the Chairman to rule that any general statements reopening the discussion on points of substance were out of order. The Commission was operating under severe constraints and it would be appreciated if such statements could be avoided. The Commission should confine itself to the task in hand, which was the approval of the proposed commentary.

38. The CHAIRMAN said that, while members certainly had a right to enter reservations, he would appeal to them not to respond at the present stage to reservations entered by others.

39. Mr. REUTER said it was incorrect to say that all members but one were in agreement on the matter. Members should perhaps not voice their opinion at the present stage in the proceedings, but their silence should in no sense be interpreted as agreement. For his own part, he endorsed Mr. Arangio-Ruiz's views.

40. Mr. HAYES said he would not wish it to be assumed that he had any particular views on the Nürnberg trial until such time as it was appropriate for him to express an opinion in the matter.

*Paragraph (1) was approved.*

Paragraph (2)

*Paragraph (2) was approved.*

Paragraph (3)

41. Mr. TOMUSCHAT proposed that the penultimate sentence, which was closely linked to the *non bis in idem* principle, should be deleted. The Commission had yet to conclude its formulation of that principle and it would be inadvisable to prejudge the issue.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

*The commentary to article 2, as amended, was approved.*

*Commentary to article 3 (Responsibility and punishment)*

Paragraph (1)

42. Mr. THIAM (Special Rapporteur) pointed out that the word *celui-ci*, in the second sentence of the French text, should be replaced by *l'individu*.

*Paragraph (1), as amended in the French text, was approved.*

Paragraph (2)

43. Mr. GRAEFRATH said that there was some confusion in the first and second sentences of the second subparagraph between the notions of motive and intent. He proposed that, to avoid such confusion, the two sentences should be replaced by the following text:

“The motive answers the question what were the reasons animating a perpetrator. Motives generally characterizing a crime against humanity are based on racial or national hatred, religion or political opinion.”

*It was so agreed.*

44. Further to a comment by Mr. YANKOV, Mr. THIAM (Special Rapporteur) said that he would prefer not to delete the last sentence of the second subparagraph.

45. Mr. CALERO RODRIGUES said that Mr. Graefrath's amendment concerning the first two sentences of the second subparagraph had been very useful, for it was difficult to draw a distinction between the notions of motive and intent. In the last four sentences of the first subparagraph, another, even more subtle, distinction was drawn between notions that did not exist in all legal systems, namely the French terms *mobile* and *motif*, which were difficult to translate into English. Perhaps the best course would be simply to delete those four sentences.

46. Mr. BEESLEY said that the English text of the passage in question was not felicitous. Although the Special Rapporteur had dealt with the problem very skilfully and therefore wished to refer to it, the question

was somewhat delicate in English. There was no reason to give pride of place to one particular legal system and therefore it would be enough to say: “It should be noted that, in some systems of law, the motive is distinguished from the intention (*mens rea*).” He fully appreciated Mr. Calero Rodrigues's point, but wondered about the effects of deleting the four sentences. Perhaps it would be better to amend the text as he himself had suggested, since the original French posed no difficulties.

47. Mr. THIAM (Special Rapporteur) said that he had sought faithfully to summarize the debate, in which a distinction had been drawn between *mobile* (motive) and *motif* (incentive), but he could none the less agree to the deletion of the passage in question.

48. Mr. BEESLEY said that an individual could be motivated by all sorts of considerations, but the concern of the courts was whether he had intended to kill. Hence there was a major distinction between motive and intent, one which had been discussed in the Commission. It would be regrettable if the commentary were to remain silent on that point and become the subject of unwarranted criticism. Nevertheless, he would not press his proposal if it meant delaying the work in hand.

49. The CHAIRMAN said that the penultimate sentence of the second subparagraph might meet Mr. Beesley's concern.

50. Mr. BARSEGOV said he understood that the Special Rapporteur had wished to reflect in the commentary all the nuances of the debate, but it would be enough to indicate the distinction to be drawn between motive and intent and better to delete the last four sentences of the first subparagraph, since the second subparagraph was sufficiently detailed.

51. Mr. HAYES pointed out that, in paragraph (2) of the commentary to article 1, the Commission had replaced the term “intention” by “motive”, in connection with genocide. It now appeared to be using the term “motive” in an entirely different sense. Consequently, the word “purpose” could be used in paragraph (2) of the commentary to article 1, in order to avoid any confusion between that notion and the notion of motive developed in the present case.

52. Mr. THIAM (Special Rapporteur) said that paragraph (2) of the commentary to article 1 had already been approved, but he endorsed the idea of deleting the last four sentences of the first subparagraph of paragraph (2) of the commentary to article 3, concerning the distinction between motive and incentive.

*It was so agreed.*

53. Mr. EIRIKSSON said that the phrase “that are not covered by the definition of the offence”, in article 3, paragraph 1, was not properly explained in the commentary and it was not easy to grasp its purpose. However, he had already consulted the Special Rapporteur on the matter.

54. Mr. CALERO RODRIGUES proposed that, in the fourth sentence of the first subparagraph, the expression “justifying fact” should be replaced by “exception”.

55. The CHAIRMAN suggested that it would be better to use the word "defence".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

*Paragraph (3) was approved.*

Paragraph (4)

56. Mr. THIAM (Special Rapporteur) said that the words "does not refer to the criminal responsibility of the State", in the first sentence, should be replaced by "refers to the criminal responsibility of the individual".

*Paragraph (4), as amended, was approved.*

Paragraph (5)

*Paragraph (5) was approved.*

*The commentary to article 3, as amended, was approved.*

*Commentary to article 5 (Non-applicability of statutory limitations)*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

*Paragraph (2) was approved with a drafting change.*

Paragraph (3)

57. Mr. RAZAFINDRALAMBO proposed that the words "concern themselves with statutory limitation", in the first sentence, should be replaced by "concern themselves with the rule of statutory limitation".

*It was so agreed.*

58. Mr. BARSEGOV said that the second sentence should refer to "recognition of the rule", and not "introduction of the rule", which conveyed the impression that the rule of the non-applicability of statutory limitations had emerged from nowhere, which had not been the case. It had always existed, even though it had not been properly recognized.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraphs (4) and (5)

59. Mr. TOMUSCHAT said that paragraph (4) was of little value, for article 5 applied to all crimes against the peace and security of mankind, without distinction. Why then draw a distinction between war crimes and crimes against humanity?

60. Mr. THIAM (Special Rapporteur) said that paragraph (4) was purely explanatory and could be deleted, but the Commission would later revert to the rule of the non-applicability of statutory limitations. It was not entirely obvious that the rule applied to all crimes against the peace and security of mankind, particularly war crimes.

61. Mr. PAWLAK said that the question had been discussed in the Commission and should be reflected in the report.

62. Mr. TOMUSCHAT said that he, among others, had reservations about the rule set out in article 5 and would point out that it might well have to be reviewed in the light of the list of crimes. Paragraph (4) ought therefore to come after paragraph (5) and begin with the sentence: "In particular, as far as war crimes are concerned, there may be a need to recognize statutory limitations." In its present form, paragraph (4) was not readily understandable.

63. Prince AJIBOLA said that paragraph (4) could be retained, whether or not it was combined with paragraph (5).

64. Mr. THIAM (Special Rapporteur) said that he had no objection to the idea of reversing the order of paragraphs (4) and (5), or even combining them.

65. The CHAIRMAN suggested that the Special Rapporteur should make arrangements with the secretariat for the presentation of paragraphs (4) and (5).

*It was so agreed.*

*Paragraphs (4) and (5) were approved on that understanding.*

*The commentary to article 5, as amended, was approved.*

*The meeting rose at 1.05 p.m.*

## 2039th MEETING

*Thursday, 16 July 1987, at 3 p.m.*

*Chairman: Mr. Stephen C. McCaffrey*

*Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Arango-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.*

### **Draft report of the Commission on the work of its thirty-ninth session (continued)**

**CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (continued) (A/CN.4/L.414 and Add.1)**

**C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (concluded) (A/CN.4/L.414/Add.1)**

*Article 6 (Judicial guarantees)*

1. Mr. MAHIOU, referring to the French text, said he noted that, although article 6 had been amended by the Commission, it now appeared in its original version.



Paragraphs 1 and 2 should be inverted, and paragraph 3 incorporated in the new paragraph 2.

2. Mr. THIAM (Special Rapporteur) confirmed that the French text of article 6, as it appeared in document A/CN.4/L.414/Add.1, should be replaced by the revised text adopted by the Commission (see 2032nd meeting, para. 39, and 2033rd meeting, para. 26).

3. The CHAIRMAN suggested that the phrase “In the determination of any charge against him”, in paragraph 2 (a), should be transferred to the introductory clause of paragraph 2, which would then read: “2. He shall have the right, in the determination of any charge against him:”. The guarantees listed in the subsequent subparagraphs were all related to the situation covered by that phrase.

4. Mr. EIRIKSSON said that the Chairman’s suggestion would give rise to difficulties of translation because the words “in the determination of any charge against him”, which had been taken from article 14 of the International Covenant on Civil and Political Rights, had not been translated into French word for word. As the Commission had decided not to depart from the Covenant, it would be better to leave those words in paragraph 2 (a).

5. Mr. MAHIOU said that, while the Chairman’s remark was justified, it would suffice to delete the sequential letters in paragraph 2 and, in the English text, to add the words “in particular” after “He shall have the right”. It was, however, only a question of format and he would not press the point.

6. Mr. CALERO RODRIGUES said that, in his view, it was not the time to be making changes in article 6.

7. The CHAIRMAN said he would take it that the Commission agreed to retain article 6 as adopted at its 2033rd meeting (para. 26).

*It was so agreed.*

*Commentary to article 6 (Judicial guarantees)*

Paragraph (1)

8. Mr. PAWLAK, referring to the third sentence, said that it would be preferable to refer to “multilateral” rather than “plurilateral” instruments.

9. Mr. MAHIOU said that the word “plurilateral” could be explained by the list that followed. The Charter of the Nürnberg Tribunal and the Charter of the Tokyo Tribunal were neither universal nor regional instruments signed by States from different regions. He suggested, however, that the phrase “universal, regional and plurilateral instruments” should be replaced by “international instruments”, which encompassed the idea of “universal, regional and plurilateral”.

*It was so agreed.*

10. Mr. ROUCOUNAS proposed that the European Convention on Human Rights and the American Convention on Human Rights should be added to the human rights conventions mentioned in paragraph (1).

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

11. Mr. BENNOUNA, referring to the French text, proposed that the word *universaliste*, in the first sentence, should be replaced by *universelle*. In addition, to make the sentence less cumbersome, the phrase “a multilateral instrument adopted under the auspices of the United Nations, namely” should be deleted in all languages.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

12. Ms. DAUCHY (Deputy Secretary to the Commission), referring to the French text, said that the following sentence was missing from paragraph (3): *S’agissant de l’expression “tant en ce qui concerne le droit qu’en ce qui concerne les faits”, contenue également dans le chapeau, elle doit être interprétée comme se référant au “droit applicable” et à “l’établissement des faits”.*

13. Mr. OGISO said that article 14 of the International Covenant on Civil and Political Rights differed from article 6 with respect to the meaning of the expression “minimum guarantees”, since the list of guarantees in article 6, unlike that set forth in the Covenant, was not exhaustive. An explanation should be given as to why the Commission had consciously departed from the Covenant, and he therefore proposed that the following text should be added at the end of the first sentence: “although the list in article 14 of the Covenant is exhaustive”. The purpose was to make it clear that the Commission had deliberately changed the meaning given to the expression “minimum guarantees”.

14. Mr. TOMUSCHAT said that he was not convinced of the merits of a restrictive interpretation of the Covenant. It would be more prudent for the Commission to refrain from interpreting that instrument.

15. Mr. BENNOUNA said that the reference to “minimum guarantees” in the introductory clause did not mean that article 6 covered all guarantees; indeed, because of the words “In particular”, it did not even cover all minimum guarantees. Paragraph (3) of the commentary was not sufficiently clear on that point.

16. Mr. GRAEFRATH said he was fairly certain that the enumeration of guarantees in article 14 of the Covenant was not exhaustive.

17. Mr. THIAM (Special Rapporteur) said that, in his view, the French text of paragraph 3 of article 14 of the Covenant was clear, since it stated that: *Toute personne . . . a droit . . . au moins aux garanties suivantes.* Hence the list of guarantees in the Covenant was not exhaustive.

18. Mr. OGISO said that he would not insist on his proposal in view of the differences of opinion on the matter. However, it seemed to him from the phrase “the following minimum guarantees”, in paragraph 3 of article 14 of the Covenant, that the list of guarantees was exhaustive.

19. Mr. BEESLEY said that the first part of the first sentence of paragraph (3) of the commentary was clear, but the words "but contains the essential guarantees" could be misread and seemed to be a contradiction. While he agreed with the sense as intended by the Special Rapporteur, he wondered whether those words were necessary and therefore suggested that they should be deleted.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

20. Mr. BENNOUNA, referring to the last sentence, said that the question of an international criminal court had been discussed at length, and he himself had suggested that, in addition to that solution, the possibility of regional or specialized courts to try certain crimes provided for under specific treaties could be envisaged. He therefore suggested that the last sentence should be replaced by the following: "And the draft code reserves this possibility."

21. Mr. BARSEGOV said that, in approving the expression "established by law or by treaty", in article 6, paragraph 2 (a), the Commission had had in mind agreements concluded between States which had the right to pass judgment on a crime committed in their territory. He was afraid that the Commission had departed from that position. In his view, the last sentence of paragraph (4) of the commentary should be so worded as to make it clear that the question of the establishment of an international criminal court had not yet been finally settled, and that it had not been prejudged one way or the other. The lack of precision in the last sentence was regrettable for it could give rise to all kinds of interpretations: in the Russian text, it was wrongly stated that the establishment of an international criminal court was envisaged in the draft code.

22. Mr. OGISO said that a number of members, including himself (1997th meeting), had spoken on the question of the establishment of an international criminal court and therefore it would not be correct to state that the question had never been discussed. In his view, the last sentence was a correct interpretation of the discussion.

23. Mr. THIAM (Special Rapporteur) agreed that, as now worded, the last part of the paragraph could suggest that the Commission envisaged in the draft the establishment of an international criminal court. He therefore suggested that it should be replaced by the following wording: "If an international criminal court was to be established, it could only be established by treaty." That would explain the inclusion of the word "treaty" in the article itself.

24. Mr. BARSEGOV said that he could not agree with Mr. Ogiso and the Special Rapporteur. Many views had been expressed on the issue, and the Commission had arrived at the conclusion that the question should not be decided or prejudged in any way. If the Commission wished to reflect the different views in its report, it should not disregard any of them. The Commission was, however, currently engaged in the consideration of

something very specific, namely the commentary to article 6, and the expression "established by law or by treaty" called for a very specific commentary. The words "by treaty" had always been understood to mean an agreement concluded between States on whose territory a crime had been committed, and they certainly did not refer to the establishment of an international criminal court. In his view, the rules of the game called for a gentlemen's agreement. An agreement had been reached and it was necessary to abide by it. If the Commission subsequently decided that an international criminal court should be established, matters would be different, but that was not the case for the time being. As now worded, paragraph (4) seemed to link the establishment of an international criminal court to the words "or by treaty", which, at present, did not allow for that possibility. Some wording should be found to show that, for the moment, there was no question of establishing such a body.

25. Mr. ARANGIO-RUIZ said that an international criminal court, which some members regarded as an essential and others as a non-essential yet important condition for the implementation of the code, was one thing; the right of two or more States to come to an agreement, within the context of a universal system of jurisdiction, and exercise jointly the powers they were authorized to exercise individually was another. He did not wish to amend article 6, but if the commentary allowed any doubt to subsist in that connection, in other words if it meant that a court composed of only two, three, four or five States would be classified as international—in the sense of an international criminal court—he would have to enter a reservation.

26. Mr. THIAM (Special Rapporteur) pointed out that the Commission had adopted as the basis for its work the International Covenant on Civil and Political Rights, which referred only to a court "established by law" (art. 14, para. 1). As the Commission had modified that expression by adding the words "or by treaty", an explanation had had to be given. During the discussion, however, Mr. Reuter (1993rd meeting) had drawn attention to the distinction to be made between "the" international criminal court and a tribunal common to a few States. Paragraph (4) of the commentary did not refer expressly to the case of a common tribunal but he (the Special Rapporteur) had deliberately used the indefinite article. The body in question could thus be a regional tribunal or a court of universal jurisdiction. To meet Mr. Barsegov's point, he would suggest the following wording: "If an international criminal court or a court common to several States was to be established, it could only be established by treaty." That would cover all possibilities.

27. Mr. MAHIOU said that the question of an international criminal court was an important one, which remained open. Renewed substantive discussion on the matter should be avoided. In the light of the Special Rapporteur's further suggestion, which he was prepared to accept, he would refrain from making any proposals himself.

28. Mr. FRANCIS suggested, in the light of the Special Rapporteur's proposal, that the last sentence of

paragraph (4) should be replaced by the following: "And the Commission leaves open the question of the establishment of such a body."

29. Mr. BENNOUNA said that two things should be explained in the commentary: first, why the Commission had added the words "or by treaty"; and secondly, why it had left aside the question of an international criminal court. He therefore suggested that the following sentence should be added after the first sentence of paragraph (4): "The object is to cover at one and the same time the internal law of a given State which establishes its own tribunal, and a treaty concluded between two or more States establishing a tribunal having jurisdiction over those States." A reference should then be made to the article which dealt with criminal jurisdiction, and it should be indicated that the sentence was to be understood as being without prejudice to the provisions of the relevant article, as would be explained in the commentary.

30. Mr. THIAM (Special Rapporteur) said that he maintained his proposal, but to respond to Mr. Bennouna's concern would suggest that the following words should be added: "But this question has not yet been decided by the Commission."

31. Mr. BARSEGOV said he considered that Mr. Bennouna's proposal reflected the situation more accurately, since it noted that several States could establish a court if they wished.

32. Mr. PAWLAK said that he agreed with the Special Rapporteur's proposals but would prefer a clear statement that an international criminal court could be established only by treaty.

33. Mr. GRAEFRATH said that, while he could accept the Special Rapporteur's proposal, he considered that the additional sentence suggested by the Special Rapporteur was unnecessary as the Commission could not settle the question: it was for States to do so.

34. Mr. ARANGIO-RUIZ said that his comment could be regarded either as a suggestion addressed to the Special Rapporteur or as a reservation. Three situations could be envisaged: the establishment of an international criminal court; the exercise by every State of universal jurisdiction; and the possibility of the joint exercise by two or more States of their universal jurisdiction. Accordingly, while it was certainly not his wish to amend article 6 or the commentary, he would merely draw a very sharp distinction between the first possibility, which involved an international criminal court in the strict sense of the term, and the third, which did not concern the same type of body.

35. Mr. BEESLEY said that the Commission was discussing two interrelated questions: the possible establishment of an international tribunal and the acceptance of universal jurisdiction exercised by a recognized entity having competence. He cautioned the Commission against the danger of confusing the two. There were a number of ways of reaching agreement on a tribunal and accepting its jurisdiction, and the Commission, in referring to a "treaty", was perhaps ignoring the other possibilities. He had in mind, for example, a situation in which an existing institution would ac-

quire jurisdiction in criminal matters with, where necessary, unilateral declarations of acceptance of such jurisdiction by States, and the use of national tribunals to which various judges would be added.

36. Mr. BENNOUNA said that he was prepared to accept the Special Rapporteur's proposals but did not understand which "question" was referred to in his last sentence. In any event it was not for the Commission to take a decision on the question of tribunals that were common to two or more States. To avoid any ambiguity, therefore, that last sentence should be replaced by the following wording: "This is without prejudice to the question of the establishment of an international criminal court under the present code, which has not yet been decided."

37. Mr. TOMUSCHAT, speaking on a point of order, proposed that the Special Rapporteur's first proposal (para. 26 above) should be adopted and that his second proposal should be dropped in the light of the comment made by Mr. Graefrath.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

Paragraph (5)

38. Ms. DAUCHY (Deputy Secretary to the Commission), referring to the French text, said that the following phrase should be added at the end of paragraph (5): *vu l'extrême gravité des crimes visés dans le projet de code et la gravité probable de la sanction.*

*Paragraph (5) was approved.*

Paragraphs (6) to (8)

39. Ms. DAUCHY (Deputy Secretary to the Commission) said that there were a number of errors in the references made in the French text: the Secretariat would circulate a revised version.

*Paragraphs (6) to (8) were approved.*

*The commentary to article 6, as amended, was approved.*

*Commentary to article 1 (Definition) (concluded)*

Paragraph (5) (concluded)

40. The CHAIRMAN recalled that the Commission had decided to revert to paragraph (5) of the commentary to article 1 when the text proposed by Mr. Bennouna to replace the last sentence (see 2038th meeting, para. 18) had been submitted in writing. That proposed text read:

"It was also pointed out that the inclusion of the expression raised the question whether crimes against the peace and security of mankind were governed by rules of general international law, even outside the draft code. Some members also wondered whether such rules did not have a *jus cogens* character. Finally, it was maintained that the inclusion of this expression was premature and that it was necessary, before deciding the matter, to wait until the list of crimes in question was known in detail."

*Mr. Bennouna's amendment was adopted.*

*Paragraph (5), as amended, was approved.*

*The commentary to article 1, as amended, was approved.*

*Section C, as amended, was adopted.*

**CHAPTER III. The law of the non-navigational uses of international watercourses** (continued)\* (A/CN.4/L.415 and Add.1-3)

**C. Draft articles on the law of the non-navigational uses of international watercourses** (A/CN.4/L.415/Add.2 and 3)

TEXTS OF DRAFT ARTICLES 2 TO 7, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-NINTH SESSION

ARTICLE 1 [Use of terms]

41. The CHAIRMAN recalled that the Commission had decided to leave aside for the time being the question of article 1 (Use of terms) (see 2028th meeting, para. 16), as explained in the footnote to the title of that article.

42. Prince AJIBOLA said that the Commission had properly explained why the word "system(s)" had been placed between square brackets. Hence there was no reason, wherever the word "watercourse" appeared, for not considering that it implicitly meant "watercourse system". A reference to that effect in article 1 would preclude the need to refer to "system(s)" between square brackets in the commentaries to the various articles.

43. The CHAIRMAN said that that was a sensitive issue with a long history, and he doubted whether it could be settled easily. In his view, it would be preferable at the present stage to leave the texts of the commentaries as they were.

*Commentary to article 2* (Scope of the present articles)

Paragraph (1)

44. Mr. CALERO RODRIGUES said that paragraph 1 of article 2 seemed to draw a distinction between "uses" and "measures of conservation related to the uses". Consequently, there seemed to be a slight contradiction between the article and the explanation given in paragraph (1) of the commentary, according to which the word "uses" should be interpreted in its broad sense to cover the protection and development of the watercourse.

45. The CHAIRMAN, speaking as Special Rapporteur, said that article 2 dealt with the scope of the draft articles and that, since article 6 dealt, *inter alia*, with protection and development, it should be made clear that measures of that kind were not excluded from the scope of the draft. The question to be determined was the circumstances in which such measures fell within the framework of the draft. Strictly speaking, as was clear from the commentary to article 1 on the scope of the draft provisionally adopted by the Commission in 1980,<sup>1</sup> the term "conservation" did not cover the idea of development: hence the need to speak of protection and development in the commentary. Moreover, it was more logical to say that the uses could take various forms, including measures for the protection of the

watercourse and works and measures to develop the watercourse.

46. Mr. BEESLEY said that, while he understood the Special Rapporteur's purpose, he shared Mr. Calero Rodrigues's hesitation at the idea of giving certain terms a meaning that would depart from the meaning attributed to them under various international instruments and in State practice based on those instruments. He also had serious reservations regarding paragraph (1). If the commentary was supposed to reflect the Special Rapporteur's view, he could accept it; if, however, it was the Commission's commentary, he could not. He suggested, as a solution, that the words "as well as the protection and development thereof", at the end of the second sentence, should be deleted.

47. Mr. CALERO RODRIGUES said he still believed that it was difficult to apply the word "uses" to the protection and development of a watercourse, as stated in the commentary, when paragraph 1 of article 2 made reference to "measures of conservation" as distinct from "uses". Actually, he was more inclined to favour the text of the commentary, and feared that the Commission had made a mistake in adopting the article. It would probably have been better if paragraph 1 of the article had read: "The present articles apply to uses . . . including measures of conservation"; the commentary would then be correct. In the circumstances, however, the best thing would be to delete from paragraph (1) of the commentary the phrase "as well as the protection and development thereof". If the Commission wished to retain that wording, however, he would not insist.

48. The CHAIRMAN, speaking as Special Rapporteur, said that he recognized the problem and could agree to the deletion of the last phrase of paragraph (1).

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

*Paragraph (2) was approved.*

Paragraph (3)

49. Mr. CALERO RODRIGUES, supported by Mr. BEESLEY, proposed that the last sentence should be amended to read: "Finally, the present articles would apply to uses not only of waters . . . but also of those . . ."

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

50. Mr. BEESLEY said that he had already drawn attention to the legal concept of "conservation", which was always interpreted as including the conservation of living resources. He wondered why that example did not appear among those given in paragraph (4).

51. The CHAIRMAN, speaking as Special Rapporteur, said the explanation was that that part of the commentary was taken virtually word for word from the commentary to article 1 provisionally adopted by the Commission in 1980. He suggested that the second

\* Resumed from the 2035th meeting.

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 111, para. (11) of the commentary.

part of the first sentence should be amended to read: “. . . but also those aimed at solving other watercourse problems, such as those relating to living resources, flood control . . .”.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

Paragraph (5)

*Paragraph (5) was approved.*

*The commentary to article 2, as amended, was approved.*

*Commentary to article 3 (Watercourse States)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

*The commentary to article 3 was approved.*

*Commentary to article 4 ([Watercourse] [System] agreements)*

52. Mr. EIRIKSSON said he thought that the number of examples and cases cited was excessive and more suggestive of a report by a Special Rapporteur than a commentary approved by the Commission.

53. The CHAIRMAN, speaking as Special Rapporteur, said that, under the terms of its statute, the Commission was required to submit articles to the General Assembly together with commentaries containing adequate presentation of precedents and other relevant data. It was therefore not unusual for the commentary to an article to include an indication of authorities that supported the article. That was true, for example, of the commentaries to the draft articles on jurisdictional immunities of States and their property and to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, submitted to the General Assembly in 1986.

54. Mr. BEESLEY urged Mr. Eiriksson not to press his point, since many members of the Commission valued the commentaries as sources of international law. It was better to provide the relevant information regarding a particular notion of international law than simply to summarize the Commission's debate.

55. Mr. BARBOZA, endorsing Mr. Beesley's remarks, said that the information contained in the commentaries was extremely valuable for those who interpreted treaties and also for lawyers. In addition, the more the Commission cited State practice, judicial decisions, arbitral awards and declarations by specialized international associations in support of an article, the greater the justification for its decision to adopt the article.

56. Mr. EIRIKSSON said that he fully agreed with the two previous speakers. However, precisely because the commentaries should be a source of international law or provide justification for the articles adopted, the Commission should be able to determine their relevance. When such lengthy commentaries were received the day before they were to be considered, it was difficult to say whether they met that criterion. As to the Commission's

statute, he wondered whether article 4 of the draft should be understood as codifying international law.

57. The CHAIRMAN said that traditionally the Commission did not specify whether any particular article codified or progressively developed international law. It had tended to adopt a combined approach to all its work, which was why he saw no need to characterize article 4 as an example of codification or of progressive development.

58. Mr. CALERO RODRIGUES said that, while he agreed with Mr. Beesley, Mr. Barboza and the Chairman, he also shared Mr. Eiriksson's views to some extent. Admittedly, the Commission should include in its commentaries material that could strengthen the interpretation of the articles it adopted. But he would have the same problem as Mr. Eiriksson unless it were possible to check that the references to all the precedents, agreements and decisions cited were warranted. As he had at times questioned some of the elements invoked by the Special Rapporteur to justify certain positions, he wished to enter the same general reservation to that type of commentary as did Mr. Eiriksson.

59. The CHAIRMAN said he took it that Mr. Calero Rodrigues's comments were essentially concerned with the Commission's methods of work. Unfortunately, it had been impossible to refer the commentaries to the Commission earlier because of the late date on which the articles had been adopted. The immediate question was whether some parts of the commentary should be deleted. Much of the material cited was taken from the commentaries to the articles adopted in 1980, which were very similar, except for paragraph 3 of the new article 4 and the commentary thereto. Nothing new, therefore, had been cited. The commentaries could perhaps be examined on second reading and the material to be included in them determined then. The fact that the Commission was only at first-reading stage should be of some consolation to those who had reservations.

60. Mr. EIRIKSSON stressed that the clause in the statute to which the Chairman had referred related only to codification, which was the reason for his earlier question. In certain cases—but less so in the case of the commentary to article 4 than in that of the commentary to article 6—some of the material could be incorporated in footnotes.

61. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Eiriksson's suggestion would indeed be the best solution. He would, however, point out that article 16 (g) of the Commission's statute, relating to the progressive development of international law, provided that articles should be accompanied by such explanations and supporting material as the Commission considered appropriate.

62. Mr. BENNOUNA said that he shared Mr. Calero Rodrigues's views and, like him, considered that some parts of the commentary were not altogether what a commentary ought to be. A special rapporteur's report, which explained an issue for the purpose of presenting an article and was situated upstream, so to speak, should be distinguished from a commentary, which was

situated downstream and was intended to facilitate an understanding of the article or amplify it or remove certain ambiguities. The commentary had a specific function to fulfil and should be based on the discussion on the article rather than on theory, doctrine or practice in the matter.

63. Mr. CALERO RODRIGUES said that the problem was actually one of method, relating more particularly to the dates selected for the adoption of decisions, and the Commission should attend to the matter in the future. For the time being, his reservations were not to the articles themselves but to the commentaries.

64. Mr. AL-KHASAWNEH said that he, too, wished to reserve his position on the commentaries to the articles.

65. Mr. BEESLEY thanked Mr. Eiriksson for his suggestion that certain parts of the commentaries should be incorporated in footnotes, which would solve one aspect of the problem. He was also grateful to those members who, like Mr. Calero Rodrigues, were willing to enter reservations for the benefits of other members who, like himself, wished to retain the material referred to in the commentaries.

66. Mr. EIRIKSSON said that he was not opposed to the idea of giving explanations in commentaries: his main concern was that the Commission did not have time to ensure that the information in the commentaries gave the correct reasons for the arguments adduced.

67. Mr. ARANGIO-RUIZ said that, at first sight, the commentaries appeared to be satisfactory but he had not been able to study them adequately. He would therefore listen to the reservations and remarks of other members and state his opinion afterwards. For the time being, the commentaries as proposed by the Special Rapporteur met with his approval.

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

68. Mr. GRAEFRATH, referring to the first sentence, proposed that, for the sake of clarity, the words "for the States parties" should be added after "will provide" and that the words "absent agreement" should be replaced by "absent specific agreement".

*It was so agreed.*

69. Mr. HAYES proposed that the word "absent", in the English text, should be replaced by "in the absence of".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

70. Mr. GRAEFRATH, referring to footnote 8, said that it would be useful to indicate which States had ratified the Treaty of the River Plate Basin, since there were cases of treaties being signed but never ratified.

71. The CHAIRMAN, speaking as Special Rapporteur, said that he did not have that information at his immediate disposal, but Mr. Graefrath was right and his remark would be taken into account in the final version of the report.

*Paragraph (3) was approved on that understanding.*

Paragraphs (4) to (14)

*Paragraphs (4) to (14) were approved.*

Paragraph (15)

72. Mr. CALERO RODRIGUES said that, while the references to the *Lake Lanoux* case were pertinent, paragraph (15) could end with the words "at no time suffer a diminution", at the end of the quotation in the fourth sentence. The passage that would thus be deleted was not directly relevant to the general principles adopted in the arbitral award. He would not, however, press the point if the Special Rapporteur considered that the passage was useful.

73. The CHAIRMAN, speaking as Special Rapporteur, said that the purpose of the quotation in that passage, which had also appeared in the commentary to article 4 provisionally adopted in 1980,<sup>2</sup> was to illustrate what was meant by the words "to an appreciable extent". As was clear from the commentary, the French proposal had been made only after a long-drawn-out series of negotiations and, as the Commission wished to encourage talks, he had thought that that example would serve to support the terms of article 4.

74. Prince AJIBOLA said that, in the interests of reconciling the views of members regarding the presentation of commentaries, it would be better to place a part of a commentary in a footnote than to delete it.

75. Mr. BEESLEY said that the Commission would perhaps not lose very much if the passage in question were deleted, but he would like the sixth sentence, starting with the words "In the absence of any assertion that Spanish interests . . .", to be retained. Another solution would be to incorporate that sentence in a footnote.

76. Mr. ARANGIO-RUIZ said that he was in favour of retaining paragraph (15) as it stood.

77. The CHAIRMAN, noting that Mr. Calero Rodrigues had not insisted on his proposal, suggested that paragraph (15) should be retained in its present form.

*It was so agreed.*

78. Mr. EIRIKSSON pointed out that paragraph (15) contained a number of references to the *Lake Lanoux* case and that the first time it was mentioned a cross-reference could be made to paragraph (20), which contained more details on the arbitration.

79. The CHAIRMAN suggested that the words "(see paras. (20)-(21) below)" should be added after "involved in the *Lake Lanoux* case" in the third sentence.

*It was so agreed.*

*Paragraph (15), as amended, was approved.*

<sup>2</sup> *Ibid.*, p. 119, para. (11) of the commentary.

## Paragraph (16)

80. Mr. CALERO RODRIGUES said that he did not find the distinction between “appreciable” and “substantial” very clear, nor the reference to uses “which have an adverse effect”. He therefore proposed that the last sentence of the paragraph should be deleted.

*It was so agreed.*

*Paragraph (16), as amended, was approved.*

## Paragraph (17)

81. Mr. RAZAFINDRALAMBO said that the words “the first State”, in the second sentence, apparently referred to the State which considered that adjustment or application of the provisions of the present articles was necessary. He therefore proposed that those words should be replaced by “the State or States in question”.

*It was so agreed.*

*Paragraph (17), as amended, was approved.*

## Paragraph (18)

82. Mr. RAZAFINDRALAMBO proposed that, in the light of the Commission’s decision concerning paragraph (15) (see para. 79 above), the words “discussed below”, in the last sentence, should be deleted.

*It was so agreed.*

*Paragraph (18), as amended, was approved.*

## Paragraph (19)

*Paragraph (19) was approved.*

## Paragraph (20)

83. Mr. CALERO RODRIGUES, referring to the fifth sentence, said that he wondered whether, in the *Lake Lanoux* case, it was not more by virtue of the Treaty of Bayonne than by virtue of the Arbitration Treaty that Spain had claimed that the works could not be undertaken.

84. The CHAIRMAN said that that point would be checked and the paragraph amended if necessary.

*It was so agreed.*

*Paragraph (20) was approved on that understanding.*

## Paragraph (21)

85. Mr. EIRIKSSON said that it would be preferable if the long quotation in the paragraph were incorporated in a footnote.

86. Mr. REUTER said that he wished to enter a reservation regarding all the interpretations of the *Lake Lanoux* case in the Commission’s draft report, and in particular the interpretation in the first sentence of paragraph (21) to the effect that “that obligation of States to negotiate the apportionment of the waters of an international watercourse was uncontested, and was acknowledged by France”. His reservation applied both to the arbitration itself and to the very existence of a general rule of that kind in international law.

87. The CHAIRMAN, speaking as Special Rapporteur, said that the sentence in question was taken from the commentary to article 3 provisionally adopted in 1980.<sup>3</sup>

88. Mr. BENNOUNA said that he wondered whether all the material presented in the subsequent paragraphs, which was taken from the law of the sea, had a place in the commentary to article 4. He saw no need to substantiate the obligation to negotiate when article 4 did not deal with such an obligation, one to which the Commission had decided to revert in connection with draft articles 10 to 15, on procedure, submitted at the present session. Furthermore, while he agreed that reference could be made to the *Lake Lanoux* case because it concerned a watercourse, he had reservations about drawing an analogy with the law of the sea, where the problems posed were entirely different, even if the reasoning sometimes followed a similar path. Paragraphs (21) *et seq.* therefore seemed to be superfluous.

89. The CHAIRMAN, speaking as Special Rapporteur, said that he had endeavoured to provide some support for the obligation to consult as stated in paragraph 3 of article 4. However, the decisions of international tribunals that were likely to be invoked related only to the obligation of negotiation, which was stricter than that of consultation. He had therefore taken the view that, if the obligation to negotiate existed in respect of watercourses, as the *Lake Lanoux* case seemed to suggest, and also in respect of the apportionment of certain maritime resources, it was even less possible to rule out an obligation to consult. Moreover, the first sentence of paragraph (22) spoke of the obligation to “enter into discussions”, while the last sentence of paragraph (26) spoke of “an obligation to consult”, and no reference was made to an obligation to negotiate.

90. Mr. BARSEGOV said that he wished to reserve his position on the commentary as a whole, but would not stand in the way of its approval if the other members considered that it should be retained in its existing form. His conception of the commentary differed from that of the Special Rapporteur. He could not be answerable either for the content of the commentary or for the Special Rapporteur’s interpretation of the *Lake Lanoux* case, particularly since he had studied that case and had arrived at different conclusions. The cases on the law of the sea, as he had already had occasion to point out, fell within an entirely different legal context from that of watercourses. Also, if they were examined in detail, a number of the cases cited in the commentary went against the propositions put forward by the Special Rapporteur. The commentary should relate specifically to the matters covered in the article and make it possible to determine the meaning, content and intent of the article. He was convinced, for example, that paragraph (22) had nothing to do with article 4 and proposed that all the commentaries, which ought in his view to be pruned, should form the subject of a critical review.

<sup>3</sup> *Ibid.*, p. 117, para. (34) of the commentary.

91. Prince AJIBOLA said that the problems which had arisen could be solved by incorporating the material that was in dispute in footnotes.

92. Mr. BEESLEY suggested that the Special Rapporteur should submit a revised version of the commentary, dealing solely with the obligation to consult, at the next meeting. In addition, the Commission should perhaps confine itself to precedents relating only to watercourses.

93. The CHAIRMAN, speaking as Special Rapporteur, thanked Mr. Beesley for his constructive proposal and pointed out that the precedents relating to the law of the sea which had been cited represented only a fraction of those contained in the 1980 commentary. A comparison of article 3 provisionally adopted in 1980 with the present article 4 would reveal that the Commission had merely replaced the obligation to negotiate by the obligation to consult. Hence the authorities which supported the obligation to negotiate should, *a fortiori*, support an obligation to consult. However, he was prepared to modify the commentary to take account of the concern expressed.

94. Speaking as Chairman, he said that the Commission would revert to paragraph (21) of the commentary to article 4 at the next meeting.

95. Mr. CALERO RODRIGUES, speaking on a general point, said that the General Assembly had requested the Commission to indicate in its annual report the subjects and issues on which views expressed by Governments, either in the Sixth Committee or in writing, would be of particular interest for the continuation of its work.<sup>4</sup> The Commission could respond to that request either by providing appropriate indications in the various chapters of its report or by setting aside a separate part of the report for that purpose. The chapters considered thus far did not contain any such indications and he feared that any failure by the Commission to respond to the request would attract criticism from the Sixth Committee.

96. The CHAIRMAN said that, having consulted the Rapporteur of the Commission, he considered that the best course would be to give the requisite indications at the end of the chapters on the various topics the Commission had discussed during the session.

97. Mr. THIAM, speaking as Special Rapporteur for the topic of the draft Code of Offences against the Peace and Security of Mankind, said that he would like to have further details regarding the questions to be put to the General Assembly. He did not think it was possible at the present stage to examine in plenary a series of questions prepared by each Special Rapporteur.

98. The CHAIRMAN said that, in his view, each special rapporteur should specify which questions should be put to the General Assembly. Since the sections in which the questions would appear formed part of the Commission's report, they would naturally have to be approved by the Commission, hence the need to be concise. In the case of the draft Code of Offences

against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses, it would suffice to question the General Assembly more particularly about the draft articles adopted during the session.

*It was so agreed.*

*The meeting rose at 6.10 p.m.*

## 2040th MEETING

*Friday, 17 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*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. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its thirty-ninth session (*continued*)

CHAPTER III. *The law of the non-navigational uses of international watercourses* (*continued*) (A/CN.4/L.415 and Add.1-3)

C. *Draft articles on the law of the non-navigational uses of international watercourses* (*concluded*) (A/CN.4/L.415/Add.2 and 3)

TEXTS OF DRAFT ARTICLES 2 TO 7, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-NINTH SESSION (*concluded*)

*Commentary to article 4* ([Watercourse] [System] agreements) (*concluded*)

Paragraphs (21) to (26)

1. The CHAIRMAN, speaking as Special Rapporteur, said that, further to consultations, he wished to propose certain changes to the commentary.

2. Paragraph (21), which dealt with the *Lake Lanoux* case, would remain unchanged, but it would be indicated in footnote 21 that the ICJ had also dealt with the obligation to negotiate in cases involving the apportionment of maritime resources. Reference would then be made to the cases cited in paragraphs (22) to (26), and those paragraphs would be deleted.

3. A new paragraph (22) would be added, paraphrasing paragraph 3 of article 4 and reading:

“For these reasons, paragraph 3 of article 4 requires watercourse States to enter into consultations, at the instance of one or more of them, with a view to negotiating, in good faith, one or more agreements which would apply or adjust the provisions of the present articles to the characteristics and uses of the international watercourse in question.”

<sup>4</sup> General Assembly resolution 41/81 of 3 December 1986, para. 5 (b).



4. The law of the sea cases cited in the present paragraphs (22) to (26) could, of course, be mentioned again in connection with a future article providing for the obligation to negotiate. With regard to that particular point, the ICJ had laid down a very general principle which should be borne in mind even if it were dropped from the commentary to article 4.

5. Mr. EIRIKSSON said that he supported the Special Rapporteur's proposed amendments.

6. Mr. BARSEGOV said that he, too, supported the amendments. Apportionment of natural resources, however, to which the Special Rapporteur had referred, was a notion which, notwithstanding its practical content, had no existence in law. From the legal standpoint, the disputes to be resolved related, for instance, to the delimitation of boundaries or exclusive zones. Care should be taken to ensure that the Commission did not embark on the wrong path because of wording that was wrong in law.

7. The CHAIRMAN, speaking as Special Rapporteur, explained that the main purpose of the addition he had proposed to footnote 21 was to avoid having to determine whether or not the decisions of the ICJ established the existence of an obligation to negotiate. To dispel the ambiguity pointed out by Mr. Barsegov, he proposed that the words "apportionment of maritime resources" should be replaced by "fisheries and maritime delimitation".

8. Mr. BARSEGOV said that that wording was acceptable.

9. Mr. REUTER said that he agreed with the amendments proposed by the Special Rapporteur, and also with the way in which he had dealt with the *Lake Lanoux* case in paragraph (21).

10. Prince AJIBOLA said that the inclusion in a footnote of examples relating to the law of the sea and taken from the case-law of the ICJ seemed to be an appropriate solution. It was simply a question of analogies, which should be dealt with in the same way as those which the Commission had drawn, in another context, with the Nürnberg trial.

*The Special Rapporteur's amendments were adopted.*

*Paragraph (21) and new paragraph (22) were approved.*

*The commentary to article 4, as amended, was approved.*

*Commentary to article 5 (Parties to [watercourse] [system] agreements)*

Paragraph (1)

11. Mr. REUTER said that, as he understood the purpose of article 5, it laid down the principle whereby a watercourse State whose interests might be affected by the use of the watercourse was entitled to participate in negotiations with a view to the conclusion of an agreement. In practice, however, the principle was by no means easy to apply. It was a relatively easy matter where only two States were involved, but the problem acquired another dimension in the case of multilateral agreements. New procedures and mechanisms, in other words the whole machinery of implementation, had to

be introduced. He therefore remained sceptical about a provision whose implementation he found difficult to envisage.

12. Mr. BARSEGOV and Mr. AL-KHASAWNEH said that they agreed with Mr. Reuter.

*Paragraph (1) was approved.*

Paragraph (2)

13. The CHAIRMAN, speaking as Special Rapporteur, said that, in the third sentence, the words "It is true that there are likely to be" should be replaced by "It is true that there may be".

*Paragraph (2), as amended, was approved.*

Paragraphs (3) to (9)

*Paragraphs (3) to (9) were approved.*

*The commentary to article 5, as amended, was approved.*

*Commentary to article 6 (Equitable and reasonable utilization and participation)*

Paragraph (1)

14. Mr. AL-KHASAWNEH proposed that the words "The most", at the beginning of the second sentence, should be replaced by "One of the most".

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraphs (2) to (10)

*Paragraphs (2) to (10) were approved.*

Paragraph (11)

15. Mr. CALERO RODRIGUES said that he wondered whether contiguous watercourses and successive watercourses could be placed on the same footing, as was the case in the last two sentences of paragraph (11). It seemed to him that the Act of Asunción, which was referred to in paragraph (16), made a very definite distinction, unlike paragraph (11), and that the two kinds of watercourse could not be the subject of régimes that were completely interchangeable.

16. The CHAIRMAN, speaking as Special Rapporteur, said it had not been his intention to deny that there could be differences between contiguous and successive watercourses and he would therefore propose that the last sentence of the paragraph should be incorporated in a footnote. He was in favour of retaining the penultimate sentence, since it was the conclusion he had arrived at on the basis of his examination of a very large number of treaties.

17. Mr. MAHIU said that footnote 6, which consisted almost entirely of quotations from the works of various legal writers, was very long. If those works had already been mentioned in the Special Rapporteur's reports, it was perhaps pointless to repeat them. The same applied to the works cited in footnote 10.

18. The CHAIRMAN, speaking as Special Rapporteur, confirmed that the authors quoted in both footnotes were also referred to in his second report

(A/CN.4/399 and Add.1 and 2, *passim*): he therefore agreed that the footnotes could be shortened.

*It was so agreed.*

19. Mr. BARSEGOV said he, too, considered that anything already covered by the Special Rapporteur's reports should be omitted from the commentary.

20. The second sentence of paragraph (11) spoke of "the recognition of the equal . . . rights", which did not seem to be a felicitous expression. A State might have only 10 kilometres of a river on its territory, and its neighbour more than a thousand kilometres: could they be said to have equal rights?

21. As to the distinction between contiguous and successive watercourses, he would like matters to be clear. If the articles were to apply to all watercourses without distinction, it was necessary to say so. If, on the other hand, they covered only certain categories of watercourse, the distinction should be made explicit.

22. The CHAIRMAN, speaking as Special Rapporteur, said that the expression "recognition of the equal . . . rights" did not mean that all watercourse States were entitled to, for instance, an equal amount of water: that was the whole basis of the doctrine of "equitable utilization". Theoretically, however, States could be said to have correlative rights to the equitable utilization of a watercourse.

23. Mr. AL-KHASAWNEH said that the concept of "equal rights to the use and benefits" of an international watercourse did not take account of the balance of power between riparian States. Sooner or later account would have to be taken of the problem of disparities in power, which varied according to whether the States concerned were situated on successive watercourses or contiguous watercourses.

24. Mr. GRAEFRATH said that the concept of equal rights, which seemed to cause problems, could well be deleted, provided the concept of correlative rights, which he regarded as essential, was retained.

25. Mr. REUTER said he, too, considered that it was the idea of correlation that should be emphasized. In his view, the relevant part of the second sentence should be amended to read ". . . their unifying theme is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application".

26. The CHAIRMAN, speaking as Special Rapporteur, said that that wording was acceptable.

*Mr. Reuter's amendment was adopted.*

27. Mr. REUTER said that, if the words "the same", in the last sentence, were replaced by "comparable", that sentence could perhaps be retained.

28. Mr. CALERO RODRIGUES said that, while Mr. Reuter's suggested amendment had merit, he still thought that the last sentence should be deleted, as it could weaken the paragraph.

29. The CHAIRMAN said he would take it that the Commission agreed to delete the last sentence of paragraph (11), along with footnote 10.

*It was so agreed.*

*Paragraph (11), as amended, was approved.*

Paragraph (12)

*Paragraph (12) was approved.*

Paragraph (13)

30. Mr. BARSEGOV said that he wished to enter a reservation concerning the paragraph, which referred to sovereignty in somewhat simplistic terms.

*Paragraph (13) was approved.*

Paragraph (14)

31. Mr. EIRIKSSON, referring to the earlier suggestion that certain references cited in the commentary should be incorporated in footnotes, said that he would prefer paragraphs (15) to (22) to take the form of footnotes to paragraph (14), in which case the wording of paragraphs (23) and (24) would have to be re-examined. He also suggested that the words "additional and unwavering", in the second sentence of paragraph (14), should be deleted.

32. Mr. BARSEGOV said that he supported Mr. Eiriksson's proposal regarding paragraph (14).

33. Mr. CALERO RODRIGUES, supported by Mr. TOMUSCHAT, said that a report with too many footnotes made for difficult reading. He would therefore prefer not to change the format. However, he supported Mr. Eiriksson's proposal with regard to the second sentence of paragraph (14).

*Mr. Eiriksson's amendment concerning the second sentence of paragraph (14) was adopted.*

*Paragraph (14), as amended, was approved.*

Paragraph (15)

*Paragraph (15) was approved.*

Paragraph (16)

34. Mr. REUTER said that paragraph 1 of the Declaration of Asunción could in no sense be regarded as stating a general rule of international law. Indeed, the arbitral award in the *Lake Lanoux* case had specifically rejected any suggestion that there was a general rule whereby the conclusion of a bilateral agreement was a prerequisite for the utilization of waters. International law imposed a fairly strict obligation of negotiation in such cases, but no one could claim that it amounted to a general rule. Luckily, countries were sufficiently in unison to have adopted that rule in inter-State relations, but the Commission could not contend that such an absolute rule had to be strictly applied. However desirable such agreements might be, it would be going too far to hinder the use of waters by a State in the event of a breakdown of negotiations. He therefore wished to enter a reservation to paragraph (16).

35. Mr. BARSEGOV said that he shared Mr. Reuter's view. It was true that neighbouring States or States from

the same region often had special political relations, as a result of which they became bound by certain rules, but those rules did not on that account become general rules of international law. What other reason was there for the distinction made between contiguous international watercourses and successive international watercourses for the purposes of paragraph (16)?

36. The CHAIRMAN, speaking as Special Rapporteur, explained that the purpose of the paragraphs quoted from the Declaration of Asunción was to show that in both cases—that of contiguous watercourses and that of successive watercourses—States enjoyed certain rights. Paragraph (16) could, however, perhaps be deleted in view of the comments to which it had given rise and since the preceding paragraph had already referred to a Latin-American instrument.

37. Mr. TOMUSCHAT said that, if paragraph (16) were retained, an explanation should be given as to what kind of instrument the Act of Asunción was. Despite its regional character, the Act showed that, in some instances, States were prepared to engage in very close co-operation. If, in the case in point, the Commission had embarked on the course of progressive development of international law, it would not be very far from a path that was now acceptable to States in all regions of the world. That would be an indication that the Commission had not strayed too far from the general trends of international law, although it could not show that there was an obligatory principle of international consultation. As the Act of Asunción was one of the elements on which the Commission had based its work, he favoured the retention of paragraph (16), accompanied by sufficient information concerning the nature of that instrument.

38. The CHAIRMAN, speaking as Special Rapporteur, said that the Declaration of Montevideo and the Act of Asunción were not treaties but could be classified among declarations of international conferences or interministerial meetings.

39. Mr. CALERO RODRIGUES said that the example given in paragraph (16) should be read in the light of paragraph (14), which stated: "These instruments provide support for the rules contained in article 6." Since the instruments in question had been adopted by States, it could be inferred that States would accept the rules laid down by the Commission in article 6. He therefore had no objection to retaining those examples in the commentary and thought it preferable to quote paragraphs 1 and 2 of the Declaration of Asunción, which give an idea of the difference between the treatment of contiguous watercourses and that of successive watercourses.

40. Prince AJIBOLA said that paragraph (16) should be retained, but that it should be stated that another Latin-American instrument, containing the Declaration of Asunción, provided a further example in support of the rules stated in article 6. Since it could not invoke the example of a watercourse which flowed across the whole world, the Commission had to take its examples from instruments concluded in various parts of the world.

41. Mr. PAWLAK said that the Commission could delete the references to examples in paragraph (15)

("An early example") and paragraph (16) ("Another Latin-American instrument"). Irrespective of whether it was a declaration or a treaty, the Act of Asunción was an interesting part of the Special Rapporteur's reasoning. Like Mr. Reuter, however, he would have a reservation to enter concerning paragraph 1 of the Declaration of Asunción, but would not insist that the reference should be deleted.

42. Mr. REUTER proposed that the beginning of paragraph (16) should be replaced by the following wording: "Another instrument offers a particularly constructive development of the principles set out in article 6 . . ."

43. The CHAIRMAN, supported by Mr. BARSEGOV, said that, as Special Rapporteur, he would be inclined to avoid characterizing the various instruments referred to in the commentary; he would also be hesitant about claiming that one instrument was more constructive than another.

44. He suggested that the Commission should approve paragraph (16) in its present formulation, on the understanding that the comments thereon would be reflected in the summary record.

*It was so agreed.*

*Paragraph (16) was approved.*

Paragraph (17)

45. Mr. BARSEGOV said that he wondered what the nature was of the instrument referred to in paragraph (17). If Principle 21 of the Stockholm Declaration was recommendatory, then it would be better to say so.

46. The CHAIRMAN, speaking as Special Rapporteur, said that the Stockholm Declaration in itself had no binding normative value.

47. Mr. BEESLEY said that a whole series of recommendations had emanated from the United Nations Conference on the Human Environment, Recommendation 51 being one example. The principles, some of which were of a legal nature, merely formed part of the Declaration. It had never been made clear whether the principles were declaratory of customary international law, but in his view that was not an issue the Commission needed to address.

48. Mr. MAHIOU said that paragraph (14), by referring to "declarations, statements of principles, and recommendations concerning the non-navigational uses of international watercourses", clarified the subsequent paragraphs, which merely listed examples.

49. Mr. GRAEFRATH said that, while he understood members' concern regarding reference to instruments of different legal value, he would point out that paragraph (24) of the commentary stated that "all authorities referred to are not of the same legal value".

*Paragraph (17) was approved.*

Paragraphs (18) to (22)

*Paragraphs (18) to (22) were approved.*

## Paragraph (23)

50. Mr. BARSEGOV said that he saw no point in speaking, as did the last sentence, of decisions handed down in "cases involving competing claims of quasi-sovereign political subdivisions of federal States", for such decisions were not relevant to the concerns of the Commission and could not be regarded as sources of international law.

51. The CHAIRMAN, speaking as Special Rapporteur, said some international lawyers maintained that judicial decisions of municipal courts were a subsidiary means for the determination of rules of law, in accordance with Article 38, paragraph 1 (d), of the Statute of the ICJ.

52. Mr. BEESLEY suggested that the reference to decisions of municipal courts should be retained, but that it should be made clear that such decisions did not stand on an equal footing with other sources of international law.

53. The CHAIRMAN, speaking as Special Rapporteur, suggested that the sentence in question should be incorporated in a footnote, followed by footnote 30, to make it clear that the decisions in question were not on a par with the decisions of international courts.

54. Mr. BARSEGOV said that he did not agree with such a broad interpretation of the decisions of municipal courts. In his view, their decisions were certainly not to be treated as sources of international law.

55. Mr. GRAEFRATH said that the question was not whether to recognize the importance of decisions of municipal courts, something nobody denied, but to decide whether a decision concerning the political subdivisions of a federal State could be compared with decisions handed down in the context of inter-State relations. The problem was that two entirely different legal systems were involved. He therefore suggested that a footnote should be added to make it clear that the reference was to an example which concerned a legal situation that differed from international law.

56. Mr. MAHIU proposed that the last sentence should be amended to read: "This principle has also been enshrined in the decisions of municipal courts, particularly in cases involving competing claims in federal States."

57. Mr. AL-KHASAWNEH said that Mr. Mahiou's formulation was an improvement on the sentence in question, which should not be relegated to a footnote. It was well known that the value of decisions handed down in cases involving competing claims of subdivisions of a federal State was based on analogy. Those cases provided such a wealth of material that it would be a mistake to mention them only in a footnote.

58. Mr. CALERO RODRIGUES said he wondered whether the difficulties did not stem from the fact that the principle in question prohibited States from allowing their territory to be used in a manner that was harmful to other States, a principle that bore no relationship to internal law or the decisions of national courts. Perhaps the solution would be to delete the reference to "principle".

59. The CHAIRMAN, speaking as Special Rapporteur, said it could not be concluded from footnote 30 that decisions relating to the principle of equitable utilization were involved. Many courts used both the principles embodied in article 6, sometimes without specifying the one on which they relied. The two principles could not, therefore, always be separated.

60. Mr. BEESLEY suggested that a reference to article 6 should be made in the last sentence of the paragraph. He supported Mr. Mahiou's proposed amendment, whether the text was incorporated in a footnote or included in the paragraph itself.

61. Mr. TOMUSCHAT said that there had been cases in his country in which the courts had relied on rules of international law in order to resolve internal disputes. He therefore suggested that the last sentence should be deleted and the following new paragraph be added:

"An instructive parallel can also be found in decisions of municipal courts under domestic law, particularly in cases involving competing claims of political subdivisions of federal States."

62. The CHAIRMAN, speaking as Special Rapporteur, suggested that a reference to article 6 should be inserted in the text proposed by Mr. Tomuschat, which would then read:

"An instructive parallel may be found in decisions of municipal courts under domestic law which have enshrined the principles contained in article 6 in cases involving competing claims of political subdivisions of federal States."

He would, however, like the sentence to remain in paragraph (23).

63. Mr. GRAEFRATH said he, too, considered that the sentence should remain in paragraph (23), but would propose that it should be simplified to read: "An instructive parallel can be found in the decisions of municipal courts in cases involving competing claims in federal States."

*It was so agreed.*

*Paragraph (23), as amended, was approved.*

## Paragraph (24)

64. Mr. REUTER said that the first sentence was not satisfactory, particularly the French text. The expression "representative authorities" seemed particularly defective.

65. After a brief discussion in which Mr. BARSEGOV, Mr. AL-BAHARNA and Mr. BEESLEY took part, the CHAIRMAN, speaking as Special Rapporteur, suggested that the first sentence should be replaced by the following text: "The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value."

*It was so agreed.*

66. Mr. GRAEFRATH said that the use of the adjective "unshakeable", in the third sentence, was excessive.

67. Mr. AL-BAHARNA proposed that the adjective “consistent” before “support”, in the second sentence, should be deleted; the survey referred to included such items as resolutions of learned bodies, which did not provide a firm guide to the doctrine and practice in the matter.

68. Mr. BARSEGOV said that he agreed with Mr. Al-Baharna’s remark. The survey in question covered a great variety of sources and there was an obvious discrepancy between the character of those sources and the strong conclusion embodied in the commentary.

69. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the sources in question included hundreds of international treaties of indisputable legal value. It was therefore quite appropriate to say that there was a solid basis for the rules contained in article 6. It would give a wrong impression if the word “consistent” were deleted. He knew of no other practice and certainly of no contrary practice.

70. Mr. YANKOV proposed that, in the third sentence, the words “unshakeable foundations” should be replaced by “sound foundations” and that the adjective “solid” before “basis” should be deleted.

*It was so agreed.*

*Paragraph (24), as amended, was approved.*

*The commentary to article 6, as amended, was approved.*

*Commentary to article 7 (Factors relevant to equitable and reasonable utilization)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were approved.*

Paragraph (4)

71. Mr. BEESLEY asked whether the part of the commentary dealing with paragraph 1 (a) of article 7 was regarded as adequately covering the maintenance and optimum utilization of biological resources.

72. Mr. BARSEGOV said that, as he understood it, the term “conservation” as used in connection with paragraph 1 (e) of article 7 related to the protection of nature in the ecological sense; it did not refer to such questions as fishing quotas in a country’s own waters.

73. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the term “conservation” was defined in the commentary to article 2 and the term “protection” in the commentary to article 6. Nowhere was anything said about a State’s right to fish in its own waters.

74. Mr. BARSEGOV pointed out that both fish and water were resources, although of a different character. The issue of the quantity that a State was entitled to catch lay outside the present topic and was regulated by agreements between States. He could accept the term “conservation” only in the ecological sense.

75. Mr. AL-KHASAWNEH proposed that the words “such as quantity of water”, in the second sentence, should be expanded to read “such as quantity and qual-

ity of water”. Quality of water was an extremely important question in the arid parts of the world.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

Paragraph (5)

76. Mr. OGISO proposed that the word “discussions”, in the fifth sentence, should be replaced by “consultations”, which was used everywhere else in the paragraph.

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

Paragraphs (6) to (9)

77. Mr. GRAEFRATH proposed that the lists of factors in paragraphs (6) to (9) should be transferred to a footnote with the appropriate cross-references.

78. The CHAIRMAN, speaking as Special Rapporteur, said that the purpose of the passages in question was to give the sources of the relevant factors mentioned in paragraph 1 (a) to (f) of article 7.

79. Mr. RAZAFINDRALAMBO proposed that only the list in paragraph (6) should be retained and that the material in paragraphs (7), (8) and (9) should be presented in a footnote in the form of references.

80. Mr. AL-KHASAWNEH pointed out that it would be useful for members of the Sixth Committee of the General Assembly to see the lists in full in the commentary itself. Cross-references were not convenient.

81. Mr. TOMUSCHAT proposed that the list in paragraph (6) should be deleted, since it was the list adopted by the International Law Association in 1956, and had presumably been superseded by the Helsinki Rules of 1966, referred to in paragraph (8) of the commentary. The other lists should be retained, since they were not all of the same character. There could be no question of choosing between them. Indeed, he found it interesting that instruments so different as the Helsinki Rules of the International Law Association, the 1958 United States Department of State Memorandum and the 1973 draft of the Asian-African Legal Consultative Committee should run on parallel lines.

82. Mr. CALERO RODRIGUES said that it would be better to retain the lists in the commentary itself. Relegating them to a footnote would make for more difficult reading.

83. Mr. BEESLEY said that it was desirable to retain the lists as a kind of bibliography useful to the reader.

84. The CHAIRMAN, speaking as Special Rapporteur, proposed that the list in paragraph (6) should be deleted. The content of paragraph (8), dealing with the Helsinki Rules, would be transferred to paragraph (6). Paragraphs (7) and (9) would follow, the latter being renumbered.

*It was so agreed.*

*Paragraphs (6) to (9), as amended, were approved.*

Paragraph (10)

*Paragraph (10) (now paragraph (9)) was approved.*

*The commentary to article 7, as amended, was approved.*

*Section C, as amended, was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.415/Add.1)**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

Paragraph 6

85. Mr. BEESLEY proposed that the reference in the second sentence to newly elected members should be deleted.

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 to 10

*Paragraphs 7 to 10 were adopted.*

Paragraph 11

86. Mr. GRAEFRATH proposed that the words "certain members", in the first sentence, should be replaced by "some members".

*It was so agreed.*

87. Mr. SEPÚLVEDA GUTIÉRREZ noted that both the first and the third sentences of the Spanish text began with the words *Por otra parte* and suggested that some other expression should be used in the third sentence.

88. Mr. BARSEGOV proposed that the words "According to this view", at the beginning of the second sentence, should be replaced by "According to some members of the Commission".

*It was so agreed.*

*Paragraph 11, as amended, was adopted.*

Paragraph 12

89. Mr. YANKOV proposed the addition of the word "members" after "Some", at the beginning of the fourth sentence.

*It was so agreed.*

*Paragraph 12, as amended, was adopted.*

Paragraph 13

90. Prince AJIBOLA, supported by Mr. GRAEFRATH, proposed that the words "certain members", in the first sentence, should be replaced by "some members".

*It was so agreed.*

91. Mr. PAWLAK proposed that, in the last sentence, the word "established" should be added before "legal foundation".

*It was so agreed.*

*Paragraph 13, as amended, was adopted.*

Paragraphs 14 to 16

*Paragraphs 14 to 16 were adopted.*

Paragraph 17

92. Mr. OGISO proposed the addition, after the first sentence, of the following text: "Some members wondered whether it would not be better for the provisions concerning procedural rules to be of a recommendatory nature", which would reflect the idea he had expressed during the discussion (2010th meeting).

93. The CHAIRMAN, speaking as Special Rapporteur, said that that opinion had been expressed by only one member and it would be inaccurate to speak of "Some members".

94. Mr. OGISO said he believed that one other member had raised the same point. He would not, however, insist on the words "Some members".

95. Mr. BENNOUNA said that he did not agree that the provisions concerning procedural rules should be of a recommendatory nature, for it was difficult to incorporate recommendations in a treaty. He would, however, propose that a sentence be added to the effect that such provisions should provide for a maximum of flexibility, should be less constraining, and should leave States the widest possible freedom of action in their relations.

96. The CHAIRMAN suggested that Mr. Bennouna and Mr. Ogiso should consult with the secretariat and the Special Rapporteur on the exact wording of their proposals.

*Paragraph 17 was adopted on that understanding.*

Paragraphs 18 and 19

*Paragraphs 18 and 19 were adopted.*

Paragraph 20

97. Mr. BENNOUNA said it had been recognized during the discussion that there was a need to establish a relationship between the provision on appreciable harm and the one on equitable utilization, and the Special Rapporteur had agreed that the matter should be considered later. He would like to know whether that point was reflected in the report.

98. The CHAIRMAN, speaking as Special Rapporteur, said that that point had not been taken into account in paragraph 20, but it could be mentioned at the beginning of section B, in the part on the general discussion. He suggested that Mr. Bennouna should consult with him with a view to drafting a sentence on the relationship between articles 6 and 9.

*Paragraph 20 was adopted on that understanding.*

Paragraphs 21 and 22

*Paragraphs 21 and 22 were adopted.*

Paragraph 23

99. Prince AJIBOLA proposed that the words "would be likely to result", in the second sentence, should be replaced by "would likely result".

*Paragraph 23 was adopted.*

Paragraphs 24 to 29

*Paragraphs 24 to 29 were adopted.*

Paragraph 30

100. Mr. SEPÚLVEDA GUTIÉRREZ, referring to the first sentence of the Spanish text, said that some other word should be found for *desequilibrado*.

101. The CHAIRMAN asked Mr. Sepúlveda Gutiérrez to consult with the secretariat on a suitable word.

*Paragraph 30 was adopted on that understanding.*

Paragraphs 31 to 33

*Paragraphs 31 to 33 were adopted.*

*Section B, as amended, was adopted.*

102. Mr. BARSEGOV said that the text of chapter III of the draft report had often been available in Russian too late for him to be able to use it. In addition, the Commission had had to work so quickly that it had not always had time to enter into detail. If, therefore, it subsequently transpired that he had participated in the adoption of any provisions which were in contradiction with his statements in plenary, he reserved the right to defend his position at a later stage.

103. The CHAIRMAN said that Mr. Barsegov was, of course, fully entitled to reserve his position.

104. The Commission still had to adopt a final section for chapter III of the report to indicate the points on which comments by Governments were invited. He suggested the following wording:

“The Commission would welcome comment in the General Assembly, in particular on the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted during the present session.”

105. Mr. TOMUSCHAT said that that proposal was acceptable. Chapter III contained a detailed account of the discussion on the topic in plenary. He only regretted that all parts of the debate had not been fully reported, something which created an obvious imbalance.

106. The CHAIRMAN said that that point would be taken up by the Commission at its next session.

107. Mr. GRAEFRATH, associating himself with Mr. Tomuschat's remarks, said that, while he appreciated that the Commission was extremely short of time, he did not think it sufficed merely to draw the General Assembly's attention to certain draft articles. It would be more useful to direct its attention to specific points.

108. The CHAIRMAN said that he would consult members informally to see whether a suitable form of wording could be found. A final decision in the matter could then be taken at the next meeting.

*The meeting rose at 1.10 p.m.*

## 2041st MEETING

*Friday, 17 July 1987, at 3 p.m.*

*Chairman:* Mr. Stephen C. McCaffrey

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

### **Draft report of the Commission on the work of its thirty-ninth session (concluded)**

**CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law* (concluded)\* (A/CN.4/L.416 and Add.1 and Add.1/Corr.1)**

**B. *Consideration of the topic at the present session* (A/CN.4/L.416/Add.1 and Corr.1)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

1. Mr. BARBOZA (Special Rapporteur) said that the last three sentences should be replaced by the following text:

“Thirdly, those physical events had to have social repercussions, in keeping with the arbitral award in the *Lake Lanoux* case. It then had to be shown that the physical consequences ‘adversely’ affected persons, objects or the use or enjoyment of areas within the territory or control of another State. The inclusion of the word ‘adversely’ was necessary, for without it a State might argue that, although the effect was beneficial, it was not to its liking and it would rather have an unchanged *status quo ante*.”

*Paragraph 4, as amended, was adopted.*

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

2. Mr. AL-KHASAWNEH said he did not think that the expression *travaux préparatoires*, in the fifth sentence, was apposite in the context, for it normally referred to work done at a plenipotentiary conference of States.

3. The CHAIRMAN said that, as paragraph 6 reflected the Special Rapporteur's views, it should perhaps not be changed. Mr. Al-Khasawneh's point would, however, be reflected in the summary record.

*Paragraph 6 was adopted.*

Paragraphs 7 to 11

*Paragraphs 7 to 11 were adopted.*

\* Resumed from the 2035th meeting.

## Paragraph 12

4. Mr. TOMUSCHAT proposed the addition, at the beginning of the first sentence, of the words: "Many members of the Commission pointed out that".

*It was so agreed.*

5. Mr. AL-KHASAWNEH proposed that, in the first sentence, the word "was" should be replaced by "is".

*Paragraph 12, as amended, was adopted.*

## Paragraph 13

6. Mr. ARANGIO-RUIZ said that the first sentence of the English text, and in particular the words "some international legal way", sounded very strange.

7. The CHAIRMAN, agreeing with Mr. Arangio-Ruiz, suggested that it should be left to the secretariat to bring the first two sentences of the English text more closely into line with the Spanish.

*Paragraph 13 was adopted on that understanding.*

## Paragraph 14

8. Mr. BARSEGOV said that the paragraph smacked of hyperbole. He, for one, would never have equated pollution with the threat of aggression or the use of force. It would therefore be advisable to add the words "some members" or "one member", to indicate who, if anybody, held such views.

9. Mr. BARBOZA (Special Rapporteur) said that he would have no objection to adding such a form of words. It had not been his intention to suggest that the use of force did not pose a threat, but at least three members had expressed the views reflected in the paragraph.

10. The CHAIRMAN suggested that, to meet Mr. Barsegov's point, the words "It was observed", at the beginning of the first sentence, should be replaced by "Some members observed".

*It was so agreed.*

*Paragraph 14, as amended, was adopted.*

## Paragraph 15

*Paragraph 15 was adopted.*

## Paragraph 16

11. The CHAIRMAN suggested that, at the beginning of the first sentence, the word "members" should be inserted after "Some".

*It was so agreed.*

12. Mr. BARSEGOV proposed that, to take account of a point he had made during the discussion (2020th meeting), the following new sentence should be added after the third sentence: "In the absence of established, scientifically substantiated international standards for the determination of adverse transboundary effects in various spheres, the elaboration of general principles could contribute to the emergence of disputes, while the lack of such standards would impede their settlement."

*It was so agreed.*

13. The CHAIRMAN suggested that the words "In their opinion", at the beginning of the fourth sentence, should be replaced by "In the opinion of some members".

*It was so agreed.*

14. Mr. GRAEFRATH proposed that the words "relating to very specific subjects" should be added at the end of the fourth sentence.

15. Mr. BARBOZA (Special Rapporteur) said that he would prefer not to use the word "very".

16. Mr. MAHIU said that, if Mr. Graefrath's amendment were adopted, the last sentence of the paragraph would be unnecessary.

17. Mr. GRAEFRATH said that he did not agree: the last sentence spoke of what States should do, whereas his proposed amendment was concerned with the situation as it actually obtained in international law. However, he would further propose that the last sentence should be amended to read: "It might therefore be better for States to focus on particular types of activity and to avoid drafting a general treaty."

18. The CHAIRMAN suggested that the Commission should adopt Mr. Graefrath's proposal concerning the fourth sentence, as further amended by the Special Rapporteur, and also Mr. Graefrath's amendment to the last sentence.

*It was so agreed.*

*Paragraph 16, as amended, was adopted.*

## Paragraph 17

19. Mr. BENNOUNA proposed that, to make the text clearer, the last two sentences should be amended to read: "It was said that the treatment of the topic consisted in drawing logical conclusions from certain premises, but that a line of reasoning, however logical, could not substitute for agreement between States or constitute binding rules."

*It was so agreed.*

20. Mr. ARANGIO-RUIZ said that the first sentence, and in particular the reference to a general convention on liability, was obscure and ambiguous. He would not insist on an amendment, but would like his views to be reflected in the summary record.

21. Mr. BEESLEY said he agreed with that remark.

22. Mr. BARBOZA (Special Rapporteur) suggested that the words "convention on" should be replaced by "régime of".

*It was so agreed.*

23. Mr. AL-KHASAWNEH said that the statement he had made during the general discussion (2019th and 2020th meetings) did not appear to have been reflected in the report. In view of the lack of time, he would not propose an amendment, but would like to enter a reservation regarding his position on paragraph 17.

*Paragraph 17, as amended, was adopted.*

## Paragraph 18

*Paragraph 18 was adopted.*



## Paragraph 19

24. Mr. SEPÚLVEDA GUTIÉRREZ said that the first sentence of the Spanish text did not reflect very well on the Commission. It might be preferable to say that whether or not there was a solid basis for the topic in international law or customary law was *de menor importancia*.

25. The CHAIRMAN suggested that the Special Rapporteur should agree on a suitable form of wording with Mr. Sepúlveda Gutiérrez.

*It was so agreed.*

26. Mr. SEPÚLVEDA GUTIÉRREZ proposed that, at the end of the second sentence, the word "international" should be added before "law".

*It was so agreed.*

27. Following a point raised by Mr. AL-BAHARNA, Mr. BARBOZA (Special Rapporteur) suggested that the words "in international law or customary law", in the first sentence, should be replaced by "in general international law".

*It was so agreed.*

*Paragraph 19, as amended, was adopted.*

## Paragraph 20

28. Mr. SEPÚLVEDA GUTIÉRREZ said that the first sentence was not clear and should be redrafted. In the Spanish text, the words *se señaló* recurred at several points throughout the report: possibly the secretariat could find some suitable alternatives.

29. Mr. BEESLEY proposed that the first sentence should be amended to read: "A few members referred to various other concepts of law, some in domestic systems, to find a basis for the present topic." In addition, the concept of inherently dangerous activities should be added to the concepts mentioned in the second sentence.

*It was so agreed.*

30. Mr. ROUCOUNAS, referring to the French text, noted that a number of expressions used throughout the report did not conform to normal legal usage; in particular, the concept of "nuisance", in paragraph 20, should be clarified.

31. The CHAIRMAN suggested that Mr. Reuter and Mr. Roucounas should consult with the secretariat on that point.

*Paragraph 20, as amended, was adopted on that understanding.*

## Paragraph 21

*Paragraph 21 was adopted.*

## Paragraph 22

32. Mr. SHI said that, during the debate (2020th meeting), he had made alternative proposals concerning the course of action to be taken by the Commission. To reflect his ideas, he proposed that the following text should be added at the end of either paragraph 22 or paragraph 72:

"However, one member suggested that, in view of the slow progress of the Commission's work on the topic since it began in 1978 due to a wide divergence of views among members on basic theoretical issues, the Commission should take a decision either to request the General Assembly to defer consideration of the topic until a later date so as to pave the way for a speedy conclusion of some topics outstanding on the Commission's agenda, or to adopt a working hypothesis on the basis of the three principles mentioned in paragraph 72 (4) below so as to facilitate the formulation of draft articles on the topic, leaving aside all theoretical issues at the present stage."

33. Mr. BARBOZA (Special Rapporteur) said that he had no objection to the inclusion of the general idea underlying that proposal, but would like to make the actual wording a little more concise.

34. The CHAIRMAN suggested that Mr. Shi and the Special Rapporteur should consult on the precise wording to be included in the report.

*It was so agreed.*

35. Mr. BEESLEY said that, during the discussion (2021st meeting), he had made the point that the field of law with which the Commission was concerned was not entirely new and that there were precedents in terms of arbitration, some of which dated back 50 years. He wondered whether that point had been adequately reflected in the draft report.

36. Mr. BARBOZA (Special Rapporteur) said that Mr. Beesley's point had been reflected to some extent in paragraph 63 and had been referred to in more detail in his summing-up of the Commission's discussion on the topic.

37. Mr. BEESLEY said that he would like it to be placed on record that, in his view, the point might usefully have been included in the report, for example in paragraph 19.

*Paragraph 22, as amended, was adopted.*

## Paragraph 23

38. Mr. BENNOUNA proposed that the following text should be added at the end of the paragraph:

"In particular, some members noted that, by dealing simultaneously with prevention and compensation, the topic necessarily concerned the injurious consequences of failure to observe obligations in respect of prevention, and hence wrongful acts. Consequently, they took the view that the present title of the topic was inappropriate and would have to be reformulated so as to cover simply the transboundary injurious consequences of dangerous activities."

39. Mr. BARBOZA (Special Rapporteur) said that the first sentence of the proposed text was to some extent covered in paragraphs 53 and 54 of section B. He would have difficulty in accepting the second sentence, in which it was proposed that the title be changed, as no other member had asked for such a change.

40. The CHAIRMAN suggested that the second sentence of the proposed text could be prefaced by the words "one member" and that the first sentence should

be dealt with when the Commission came to paragraph 53.

41. Mr. BENNOUNA said that, as his idea was linked more closely to paragraph 23 than to paragraph 53, he had to insist that it should be reflected in paragraph 23. He would, however, have no objection to a reference to "one member" being inserted in the second sentence of his proposal.

42. The CHAIRMAN suggested, in the light of the discussion, that Mr. Bennouna's proposal should be included in paragraph 23 as the view of one member.

*It was so agreed.*

*Paragraph 23, as amended, was adopted.*

Paragraph 24

43. Mr. CALERO RODRIGUES said that the Spanish word *daño* had been incorrectly rendered as "injury" throughout the English version of the report. It was a particularly important point, since a difference between State responsibility and liability was involved. Some alternative English term should therefore be found.

44. Mr. BARBOZA (Special Rapporteur), agreeing with Mr. Calero Rodrigues, said that a lexicon of terms should perhaps be provided in 1988. He suggested that the word "injury", in the tenth, eleventh and twelfth sentences of paragraph 24, should be replaced by "harm".

*It was so agreed.*

45. Mr. BARSEGOV asked whose views the paragraph was meant to reflect.

46. Mr. BARBOZA (Special Rapporteur) said that the views reflected in the paragraph were his own, but they had had the express support of certain members, including Mr. Beesley and Mr. Hayes.

47. The CHAIRMAN suggested that the words "In the view of these members" should be added at the beginning of the ninth sentence, before "Under the régime of this topic".

*It was so agreed.*

48. Mr. TOMUSCHAT, referring to the ninth sentence, said that he did not think any member had said that the State liable would have to pay "in all circumstances".

49. Mr. BARBOZA (Special Rapporteur) suggested that the words "in all circumstances" should be replaced by "as a general rule".

*It was so agreed.*

50. Mr. ROUCOUNAS proposed that the word "pay", in the ninth sentence should be replaced by "compensate".

*It was so agreed.*

51. Mr. BENNOUNA proposed that, in the thirteenth sentence, the words "in principle" should be added before "to restore".

*It was so agreed.*

52. Mr. BARBOZA (Special Rapporteur) said that the word "compensation", in the first part of the thirteenth sentence, should be replaced by "reparation" and that the word "legal" should be added before "condition".

53. Mr. BEESLEY said that the phrase "did not constitute a breach of an obligation", in the seventh sentence, seemed to be a contradiction in terms. It would be better to speak of "an unlawful activity".

54. Mr. BARBOZA (Special Rapporteur) said that, while Mr. Beesley's proposal was acceptable, "breach of an obligation" was an accepted term in the context of State responsibility.

*Paragraph 24, as amended, was adopted.*

Paragraphs 25 to 28

*Paragraphs 25 to 28 were adopted.*

Paragraph 29

55. Mr. BARSEGOV said that he had expressed the opinion reflected in paragraph 28, but he did not agree with that set out in paragraph 29. The word "also", in the first sentence, should therefore be deleted.

56. Mr. BARBOZA (Special Rapporteur) suggested that it would be better if the words "In a similar vein, it was also" were replaced by "Other members".

*It was so agreed.*

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 33

*Paragraphs 30 to 33 were adopted.*

Paragraph 34

57. Mr. TOMUSCHAT suggested that the words "by a group of experts", in the last sentence, should be replaced by "in a simplified procedure".

58. Mr. BARSEGOV said that an important point was at issue, since any modification of the list of activities to be covered would broaden the scope of the topic.

59. Mr. BEESLEY suggested that the words "at intervals by a group of experts" should be replaced by "by the parties at intervals in consultation with a group of experts".

60. After a further exchange of views in which Mr. BARSEGOV, Mr. GRAEFRATH, Mr. MAHIOU and Mr. TOMUSCHAT took part, Mr. BARBOZA (Special Rapporteur) suggested that the last sentence should be amended to read: "One member suggested that such a list could be updated at intervals in a simplified procedure, in consultation with a group of experts."

*It was so agreed.*

*Paragraph 34, as amended, was adopted.*

Paragraph 35

61. Mr. MAHIOU suggested that, for the sake of consistency with paragraph 34, the words "by a group of experts", in the fifth sentence, should be deleted.

*It was so agreed.*

*Paragraph 35, as amended, was adopted.*

Paragraphs 36 and 37

*Paragraphs 36 and 37 were adopted.*

Paragraph 38

62. Mr. ROUCOUNAS, supported by Mr. YANKOV, proposed that the words “was not sufficiently clear”, in the first sentence, should be replaced by “should be examined carefully”.

*It was so agreed.*

*Paragraph 38, as amended, was adopted.*

Paragraph 39

*Paragraph 39 was adopted.*

Paragraph 40

63. Following a point raised by Mr. BARSEGOV, the CHAIRMAN suggested that the words “In the opinion of the Special Rapporteur” should be added at the beginning of the first sentence.

*It was so agreed.*

*Paragraph 40, as amended, was adopted.*

Paragraph 41

64. Mr. BENNOUNA said that, in his view, paragraph 41 contained inaccurate and even dangerous statements and he took exception, in particular, to the third and fourth sentences. While he was prepared to allow the paragraph to stand, he did not think that those sentences reflected the view of the international community.

65. The CHAIRMAN said that Mr. Bennouna’s view would be reflected in the summary record.

66. Mr. ROUCOUNAS said that the notion of “control” did not apply solely to cases where there was an unlawful presence, as in the *Namibia* case. He therefore proposed that the first sentence should be replaced by a short sentence stating simply that the question of control had also been raised.

67. The CHAIRMAN suggested that Mr. Roucounas and the Special Rapporteur should work out a suitable form of wording to replace the first sentence.

*It was so agreed.*

68. Mr. CALERO RODRIGUES proposed that the words “for policy reasons”, in the third sentence, should be replaced by “for reasons of principle”.

*It was so agreed.*

*Paragraph 41, as amended, was adopted.*

Paragraph 42

69. Mr. MAHIOU said that some logic was required in paragraph 42, which stated that there were two situations to be covered, but mentioned only one. To confound matters further, paragraph 43 then referred to a “fourth” situation.

70. Mr. BEESLEY said that he could accept the paragraph, but there was a distinction between jurisdiction and sovereignty on the one hand, and, on the other, such concepts as “sovereign rights”, which embraced

jurisdiction but fell short of sovereignty. He proposed that the words “on the sea-bed beyond national jurisdiction” should be inserted after “on the high seas”, in the last sentence.

*It was so agreed.*

*Paragraph 42, as amended, was adopted.*

Paragraph 43

71. Mr. YANKOV proposed that, in the interests of greater accuracy, the last sentence should be amended to read: “An example of such an area was the exclusive economic zone, where the coastal States exercised such sovereign rights and jurisdiction, while other States had been given rights such as freedom of navigation and overflight and freedom to lay submarine cables and pipelines.”

*It was so agreed.*

*Paragraph 43, as amended, was adopted.*

Paragraph 44

72. Mr. ROUCOUNAS, supported by Mr. BARSEGOV, proposed that the word “common”, in the first sentence, should be deleted.

*It was so agreed.*

73. Mr. BEESLEY, also referring to the first sentence, proposed that, for the purposes of consistency, the words “the sea-bed beyond national jurisdiction” should be added after “the high seas”.

*It was so agreed.*

74. Mr. BENNOUNA proposed that the words “Mixed zones, such as”, at the beginning of the fourth sentence, should be deleted.

*It was so agreed.*

*Paragraph 44, as amended, was adopted.*

Paragraphs 45 to 48

*Paragraphs 45 to 48 were adopted.*

Paragraph 49

75. Mr. BENNOUNA said that, while paragraph 49 made it quite clear that the views expressed were those of the Special Rapporteur, as opposed to those of members, other paragraphs did not do so. The Secretariat could therefore perhaps make the necessary drafting changes in order to remove any ambiguity.

*Paragraph 49 was adopted.*

Paragraphs 50 to 54

*Paragraphs 50 to 54 were adopted.*

Paragraph 55

76. Mr. YANKOV proposed that the paragraph should be amended to read:

“Some members, on the other hand, believed that the question of liability and reparation should be properly dealt with either under a conventional framework or through international co-operation and negotiation among interested States. In their view, the topic should instead concentrate at the present stage

on preventive rules, as supported by current State practice.”

*It was so agreed.*

*Paragraph 55, as amended, was adopted.*

Paragraphs 56 to 59

*Paragraphs 56 to 59 were adopted.*

Paragraph 60

*Paragraph 60 was adopted with a drafting change.*

Paragraph 61

77. Mr. GRAEFRATH proposed that the following sentence should be added at the end of the paragraph: “In that connection, attention was drawn to the conclusion reached by the previous Special Rapporteur, R. Q. Quentin-Baxter, that there were two boundary lines for the topic, and that one could not, on the one hand, establish the principle of strict liability for lawful activities and, on the other hand, exclude economic activities.”

*It was so agreed.*

*Paragraph 61, as amended, was adopted.*

Paragraph 62

*Paragraph 62 was adopted.*

Paragraph 63

78. Following a point raised by Mr. BENNOUNA, the CHAIRMAN said that the first two sentences would be redrafted to bring them into line with the Spanish text.

*Paragraph 63 was adopted on that understanding.*

Paragraphs 64 to 68

*Paragraphs 64 to 68 were adopted.*

Paragraph 69

79. Mr. AL-BAHARNA proposed that the word “were”, in the first sentence, should be replaced by “was”.

*Paragraph 69 was adopted.*

Paragraphs 70 to 72

*Paragraphs 70 to 72 were adopted.*

*Section B, as amended, was adopted.*

*Chapter IV of the draft report, as amended, was adopted.*

**CHAPTER VI. Other decisions and conclusions of the Commission (concluded)\* (A/CN.4/L.418 and Add.1)**

**A. State responsibility (A/CN.4/L.418)**

Paragraph 1

*Paragraph 1 was adopted.*

*Section A was adopted.*

**B. Jurisdictional immunities of States and their property (A/CN.4/L.418)**

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

*Section B was adopted.*

**C. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.418)**

Paragraph 4

*Paragraph 4 was adopted.*

*Section C was adopted.*

**D. Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.418)**

Paragraphs 5 to 7

*Paragraphs 5 to 7 were adopted.*

Paragraph 8

80. Mr. EIRIKSSON proposed that the second and third sentences should be replaced by the following text: “At its 2041st meeting, on 17 July 1987, the Commission adopted the following views on the basis of recommendations of the Enlarged Bureau and discussions in the Planning Group.”

*It was so agreed.*

81. The CHAIRMAN suggested that the words “and discussions” in that amendment should be replaced by “resulting from the discussions”.

*It was so agreed.*

*Paragraph 8, as amended, was adopted.*

Paragraphs 9 to 13

*Paragraphs 9 to 13 were adopted.*

Paragraph 14

82. Mr. KALINKIN (Secretary to the Commission), referring members to footnote 3 of the annex to document A/CN.4/L.418, said he wished to state for the record that the assistance requested by the Special Rapporteur for the topic of State responsibility, as mentioned in paragraph 14, would not be rendered.

83. The CHAIRMAN asked whether the reason was lack of available resources.

84. Mr. KALINKIN (Secretary to the Commission) said he would like to explain that the Secretariat implemented the decisions of the deliberative bodies subject to the financial implications of those decisions. In the present case, the Commission had not taken any decision in the matter, but it had before it a request from a member. It was clear from the Commission’s statute, and also from the Secretary-General’s Bulletin ST/SGB/Organization, Section H/Rev.2, of 18 April 1983, defining the functions of the Codification Division (sect. II.5), that the Secretariat was under no obligation to engage in substantive research and studies on behalf of special rapporteurs.

85. The situation of the Codification Division in practical terms was gloomy. As the Legal Counsel had himself pointed out at an earlier meeting, the number of bodies which the Codification Division serviced had remained unchanged and, since priority had to be given to

\* Resumed from the 2035th meeting.

the preparation of the documentation of those bodies, the Division's skeleton staff had virtually no time left to engage in long-term research projects.

86. Furthermore, it seemed from a letter addressed by the Special Rapporteur, Mr. Arangio-Ruiz, to him as Secretary to the Commission that, to carry out the research request, a person would be required for up to six years, although in discussions with him the Special Rapporteur had mentioned a period of eight months. In any event, as soon as it had the necessary financial and human resources, the Codification Division's first task would be to update the "Survey of international law" initially prepared by the Secretary-General in 1971.<sup>1</sup> That would be in line with the general wishes of the Commission and, he believed, also of the Sixth Committee of the General Assembly.

87. For all those reasons, and bearing in mind the recruitment freeze and the serious understaffing of the Codification Division, he was obliged, as Director of the Division—which was responsible for providing the Commission with substantive secretariat services—to state once again that the Division was not in a position to comply with the request made in paragraph 14.

88. Mr. ARANGIO-RUIZ said that his own understanding of the position, from meetings held in the Planning Group and from private conversations, was simply that the assistance he had requested could not be guaranteed. In any event, he had not asked for a six-year research project, but for urgent research to be conducted over a period of six to eight months for the purposes of his report to be submitted in 1988. He had not made any particular reference to research work to be done in 1989 or thereafter. Moreover, he would refer members to the Commission's report on its thirty-fifth session (1983), in which it had requested the Secretariat to provide the special rapporteurs with such assistance as they might need.<sup>2</sup> If the Secretariat was really unable to help, he would not insist. He would, however, echo the request made by the Commission in its report on its thirty-fifth session and once again appeal to the Commission for the assistance he urgently needed, particularly during his first year as Special Rapporteur.

89. The CHAIRMAN said that the statement in the second sentence of paragraph 29 of chapter VI of the draft report might help to respond to the concern expressed.

*Paragraph 14 was adopted subject to the reservation entered by the Secretary to the Commission.*

Paragraphs 15 to 17

*Paragraphs 15 to 17 were adopted.*

Paragraph 18

90. The CHAIRMAN suggested that the words "is anxious" should be replaced by "strongly desires".

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

<sup>1</sup> *Yearbook* . . . 1971, vol. II (Part Two), p. 1, document A/CN.4/245.

<sup>2</sup> *Yearbook* . . . 1983, vol. II (Part Two), pp. 87-88, para. 308.

Paragraph 19

91. Mr. EIRIKSSON proposed that the following sentence should be added at the end of the paragraph: "A proposal was also discussed that the Drafting Committee should have a flexible composition depending on the questions before it, the number of members for any given topic varying from 12 to 16."

*It was so agreed.*

92. Following a point raised by Mr. TOMUSCHAT, the CHAIRMAN suggested that the words "all legal systems", in the first sentence, should be replaced by "the principal legal systems".

*It was so agreed.*

*Paragraph 19, as amended, was adopted.*

Paragraphs 20 and 21

*Paragraphs 20 and 21 were adopted.*

Paragraph 22

93. Mr. CALERO RODRIGUES said that paragraph 22 gave the impression that the General Assembly's request to the Commission in paragraph 5 (b) of its resolution 41/81 was pointless. It would, however, be a simple enough matter to comply with the request and there was nothing to be gained from disregarding it. Paragraph 22 should therefore be deleted.

94. Mr. BARBOZA said he agreed that paragraph 22 was not appropriate and that the Commission should endeavour to comply with the General Assembly's request. At the same time, its response should not become a routine and take the form of a list of questions to be submitted to the General Assembly year in, year out.

95. Mr. CALERO RODRIGUES said that the Commission had not been asked to put questions to the General Assembly but to indicate subjects and issues on which views expressed by Governments would be of particular interest to the Commission.

96. Mr. BENNOUNA said that he fully agreed with Mr. Calero Rodrigues, and therefore proposed that paragraph 22 should be replaced by the following text:

"As regards the request in paragraph 5 (b) of General Assembly resolution 41/81, the Commission decided to take it duly into account, while bearing in mind the practice of the Commission in that regard."

97. Mr. GRAEFRATH said that he could accept Mr. Bennouna's proposed wording.

98. Mr. FRANCIS said that it would be advisable to adopt a more positive tone and indicate that the Commission had taken up the matter and hoped to be able to respond in the near future.

99. Mr. HAYES said that he also agreed with Mr. Calero Rodrigues, but considered that the Commission could perhaps be a little more positive. The following sentence should therefore be added to Mr. Bennouna's proposal: "The Commission also wishes to draw attention to its previous practice in the matter."

100. Mr. CALERO RODRIGUES said that he was somewhat hesitant about Mr. Hayes's proposal, since it might strike the General Assembly as a little pro-

vocative. Mr. Bennouna's neutral form of wording was sufficient and should not be expanded.

101. Mr. EIRIKSSON proposed that the following sentence should be added after the text proposed by Mr. Bennouna: "The request of the General Assembly was discussed in particular in connection with the consideration of the topics 'Draft Code of Offences against the Peace and Security of Mankind' (see para. . . . above) and 'The law of the non-navigational uses of international watercourses' (see para. . . . above)."

102. Mr. TOMUSCHAT proposed that the following text should be inserted between Mr. Bennouna's proposal and Mr. Eiriksson's proposal: "The Commission, at the present session, has already attempted to improve the existing ways and means for a constructive dialogue with the General Assembly. It will continue to look for a suitable method in order to satisfy the wishes of the General Assembly."

103. Mr. ROUCOUNAS said that the expression "constructive dialogue" seemed somewhat inappropriate in the context of relations between the Commission and the General Assembly. "Further co-operation" or some similar expression would be more appropriate.

104. The CHAIRMAN suggested that Mr. Roucounas should agree on a precise formulation with Mr. Tomuschat, and that that text should be adopted along with the proposals by Mr. Bennouna and Mr. Eiriksson.

*It was so agreed.*

*Paragraph 22, as amended, was adopted.*

Paragraph 23

*Paragraph 23 was adopted.*

Paragraph 24

105. Mr. TOMUSCHAT proposed that the words "at least", in the second sentence, should be deleted.

*It was so agreed.*

*Paragraph 24, as amended, was adopted.*

Paragraphs 25 and 26

*Paragraphs 25 and 26 were adopted.*

Paragraph 27

106. Mr. EIRIKSSON proposed that the following sentence should be inserted after the first sentence: "Those proposals included: (a) that the report should open with a brief topical summary of its content; (b) that an introduction to the report by the Chairman of the Commission along the lines of his oral presentation to the Sixth Committee of the General Assembly be circulated to Governments immediately following the conclusion of the Commission's session."

107. Mr. YANKOV proposed that the words "Those proposals included", in that text, should be replaced by "Those proposals were, *inter alia*".

108. The CHAIRMAN suggested that the Commission should adopt Mr. Eiriksson's proposal, as amended by Mr. Yankov.

*It was so agreed.*

*Paragraph 27, as amended, was adopted.*

Paragraph 28

*Paragraph 28 was adopted.*

Paragraph 29

109. Mr. BENNOUNA, supported by Mr. REUTER, proposed that, in order to take account of the comments concerning assistance to special rapporteurs made by the Secretary to the Commission in connection with paragraph 14 (see paras. 82-87 above), the following phrase should be added after the words "Codification Division", in the last sentence: "can perform its functions properly, particularly by providing the requisite assistance to special rapporteurs and".

*It was so agreed.*

110. Mr. BEESLEY said that, if the Special Rapporteur for the topic of State responsibility was to obtain satisfaction, it was essential to make specific reference to the inadequate staffing of the Codification Division. The Codification Division had lost two senior officers, one at the D-1 and one at the P-5 level, to the Office of the Legal Counsel, and there was little likelihood of their being replaced. In the circumstances, he did not see how the Codification Division could possibly do its basic work, let alone give the kind of assistance requested by the Special Rapporteur for State responsibility. Unless the Division's staff were retained and indeed increased, the situation would become more and more difficult.

111. Mr. KALINKIN (Secretary to the Commission) said that the Codification Division had had a specialist on State responsibility, but the person in question had been transferred on 1 January 1987 to the Office of the Legal Counsel. Moreover, another highly experienced staff member was now to be transferred, without any replacement. It was very difficult to find experienced people to work in the Codification Division, particularly at a time when there was a freeze on recruitment.

112. The CHAIRMAN suggested that, to take account of Mr. Beesley's point, the following phrase should be added in the second sentence after the word "understaffed": "—due in part to the non-replacement of two senior staff members who have been transferred—".

*It was so agreed.*

113. Mr. ARANGIO-RUIZ suggested that a cross-reference to paragraph 14 should be made in paragraph 29.

114. The CHAIRMAN suggested that the cross-reference should be incorporated in Mr. Bennouna's amendment.

*It was so agreed.*

*Paragraph 29, as amended, was adopted.*

Paragraph 30

*Paragraph 30 was adopted.*

*Section D, as amended, was adopted.*

E. Co-operation with other bodies (A/CN.4/L.418)

Paragraphs 31 to 33

*Paragraphs 31 to 33 were adopted.*

*Section E was adopted.*

F. Date and place of the fortieth session (A/CN.4/L.418)

Paragraph 34

*Paragraph 34 was adopted.*

*Section F was adopted.*

G. Representation at the forty-second session of the General Assembly (A/CN.4/L.418)

Paragraph 35

*Paragraph 35 was adopted.*

*Section G was adopted.*

*Chapter VI of the draft report, as amended, was adopted.*

ANNEX (A/CN.4/L.418)

*The annex to the draft report was adopted.*

CHAPTER III. *The law of the non-navigational uses of international watercourses* (concluded) (A/CN.4/L.415 and Add.1-3)

115. The CHAIRMAN, recalling that the Commission had agreed to indicate in its report the points on which it wished to have the views of Governments (see 2039th meeting, paras. 95-98), suggested that the following new section D should be included at the end of chapter III:

**“D. Points on which comments are invited**

“The Commission would welcome the views of Governments, in particular on the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted at the present session.”

*It was so agreed.*

*Chapter III of the draft report, as amended, was adopted.*

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (concluded)\* (A/CN.4/L.414 and Add.1)

116. The CHAIRMAN drew attention to the text of the additional paragraph proposed by the Special Rapporteur to be included, as agreed (see 2039th meeting, paras. 95-98), at the end of chapter II, requesting the views of Governments.

117. Mr. BARSEGOV noted that the proposed paragraph asked for the views of Governments on the *non bis in idem* principle set out in draft article 7, but made no reference to the fundamental issue of whether or not crimes against the peace and security of mankind constituted crimes under international law, or to the

complex question of jurisdiction. Admittedly, the Commission had decided to defer the consideration of jurisdiction. Hence it seemed pointless to address only one question to the General Assembly.

118. Mr. CALERO RODRIGUES, supported by Mr. BENNOUNA, Mr. EIRIKSSON, Mr. BEESLEY and Mr. OGISO, said that the proposed paragraph was very useful and was the type of indication the Commission should give to the General Assembly. Mr. Barsegov's first point was covered to some extent by the fact that the expression “under international law” had been placed in square brackets in article 1. His second point was met by the reiteration of the request made by the Commission in 1983 for the views of the General Assembly on a competent international criminal jurisdiction.

119. Mr. BARSEGOV said that he failed to see any logic in the proposed paragraph. However, he would not press the matter, for he fully respected the views of the Special Rapporteur, who was unable to be present at the meeting.

120. After a discussion in which Mr. YANKOV, Mr. REUTER, Mr. EIRIKSSON, Mr. GRAEFRATH, Mr. CALERO RODRIGUES, Mr. BEESLEY and Mr. BARSEGOV took part, the CHAIRMAN suggested that the following new section D should be included at the end of chapter II:

**“D. Points on which comments are invited**

“The Commission would attach great importance to the views of Governments regarding the following:

“(a) draft articles 1 to 3, 5 and 6, provisionally adopted by the Commission at its present session (see sect. C above);<sup>a</sup>

“(b) the scope and conditions of application of the *non bis in idem* principle contained in draft article 7 as submitted by the Special Rapporteur (see paras. . . . to . . . and . . . above);

“(c) the conclusion set out in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session, in 1983.<sup>b</sup>

<sup>a</sup> Attention is drawn to the fact that the expression ‘under international law’ has been placed between square brackets in article 1.

<sup>b</sup> Paragraph 69 (c) (i) of the Commission's report on its thirty-fifth session reads:

“(c) With regard to the implementation of the code:

“(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;’

“(Yearbook . . . 1983, vol. II (Part Two), p. 16.)”

*It was so agreed.*

*Chapter II of the draft report, as amended, was adopted.*

*The draft report of the Commission on the work of its thirty-ninth session as a whole, as amended, was adopted.*

\* Resumed from the 2039th meeting.

### Tribute to Mr. Larry Johnson

121. The CHAIRMAN said that there remained one more task for the Commission to perform at its present session, and that was to bid farewell to Mr. Larry Johnson, who was leaving the Codification Division to take up a new assignment in the Office of the Legal Counsel.

122. Larry Johnson had joined the Codification Division in 1971 after completing brilliant studies at Harvard University. Almost immediately he had been associated with the Commission, where he had served first as Assistant Secretary and later as Senior Assistant Secretary and Secretary to the Drafting Committee. From the very outset, his capabilities and dedication had made him an enormous asset to the Commission and its secretariat and, over the years, he had acquired a profound knowledge of the spirit of the Commission and a unique experience of its methods of work. He had not only played a major part in servicing 15 sessions of the Commission, but had also participated actively in the preparation and servicing of a number of codification conferences, at which he had been of great assistance to all the participants, and in particular to the chairmen of the various drafting committees. Last, but not least, and especially during the difficult period being experienced by the United Nations, he had followed with unfailing attention developments of interest to the Commission, both in the General Assembly and elsewhere, and had thereby helped to preserve the unique characteristics of the Commission by providing it with the means to fulfil its task.

123. On behalf of the Commission, he wished Mr. Johnson every success in his further career and expressed the hope that he and his family would remember

the Commission as fondly as its members would remember them.

124. Mr. AL-KHASAWNEH said that he had known Larry Johnson for a number of years and could attest to his intelligence, abilities and charm. He wished him and his family the best of luck for the future.

125. Mr. BARBOZA said that Larry Johnson would be missed in the Commission and in the Drafting Committee, both for his personal and for his professional qualities. He wished him all the best in his new assignment.

126. Mr. BENNOUNA said that Larry Johnson was part of a disappearing breed. He was also living proof of that sense of public service and dedication so often found in international civil servants and by which he would no doubt be guided in his new assignment. He wished him and his family every success in the future.

127. Mr. YANKOV said that, as a former Chairman of the Commission and Chairman of the Planning Group, as a Special Rapporteur and as a member of the Drafting Committee, he had known Larry Johnson for 10 years. Throughout that time Mr. Johnson had provided a fine example of confidence and friendship, and would be sorely missed. He congratulated him on his new assignment and wished him every success in his new endeavour.

### Closure of the session

128. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-ninth session of the International Law Commission closed.

*The meeting rose at 7.45 p.m.*









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