

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1993

Volume I

*Summary records
of the meetings
of the forty-fifth session
3 May-23 July 1993*

UNITED NATIONS



YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

1993

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UNITED NATIONS
New York and Geneva, 1995



NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1991*).

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

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

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

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

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

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This volume contains the summary records of the meetings of the forty-fourth session of the Commission (A/CN.4/SR.2295-A/CN.4/SR.2327), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/1993

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MEMBERS OF THE COMMISSION

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OFFICERS

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First Vice-Chairman: Mr. Gudmundur EIRIKSSON
Second Vice-Chairman: Mr. Kamil IDRIS
Chairman of the Drafting Committee: Mr. Vaclav MIKULKA
Rapporteur: Mr. John de SARAM

Mr. Ralph Zacklin, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Mrs. Jacqueline Dauchy, Acting Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.

AGENDA

The Commission adopted the following agenda at its 2295th meeting, held on 3 May 1993:

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

ABBREVIATIONS

CSCE	Conference on Security and Cooperation in Europe
ECE	Economic Commission for Europe
EC	European Community
ICJ	International Court of Justice
ICAO	International Civil Aviation Organization
ICRC	International Committee of the Red Cross
ILA	International Law Association
IMF	International Monetary Fund
IMO	International Maritime Organization
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research

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

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NOTE CONCERNING QUOTATIONS

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

MULTILATERAL INSTRUMENTS cited in the present volume

Source

HUMAN RIGHTS

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| Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) | United Nations, <i>Treaty Series</i> , vol. 78, p. 277. |
| Convention on the reduction of cases of Multiple Nationality and on Military Obligations in cases of Multiple Nationality (Strasbourg, 6 May 1963) | Ibid., vol. 634, p. 221. |
| International Covenant on Civil and Political Rights (New York, 16 December 1966) | Ibid., vol. 999, p. 171. |
| International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973) | Ibid., vol. 1015, p. 243. |
| Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) | Ibid., vol. 1249, p. 13. |
| Convention on the Rights of the Child (New York, 20 November 1989) | <i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49, resolution 44/25, annex.</i> |

PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS

- | | |
|---|---|
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) | United Nations, <i>Treaty Series</i> , 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. |

ENVIRONMENT AND NATURAL RESOURCES

- | | |
|--|--|
| Convention and Statutes relating to the development of the Chad Basin (Fort Lamy, 22 May 1964) | United Nations, <i>Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7)</i> , p. 8. |
|--|--|

- Agreement concerning the Niger River Commission and the Navigation and Transport on the River Niger (Niamey, 25 November 1964), superseded by the Convention creating the Niger Basin Authority (Faranah, 21 November 1980) United Nations, *Treaty Series*, vol. 587, p. 19.
United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 56.
- African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968) United Nations, *Treaty Series*, vol. 1001, p. 3.
- Convention on the Conservation of the Living Resources of the Southeast Atlantic (Rome, 1969) Ibid., vol. 801, p. 101.
- Convention relating to the Status of the Senegal River, and Convention establishing the Organization for the Development of the Senegal River (Nouakchott, 11 March 1972) United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 16.
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, 29 December 1972) United Nations, *Treaty Series*, vol. 1046, p. 120.
- Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa (Bamako, 30 January 1991) *International Legal Materials* (Washington, D.C.), vol. XXX, No. 3 (May 1992), p. 775.
- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991) Document E/ECE/1250, 1991.
- Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992) *International Legal Materials* (Washington, D.C.), vol. XXXI, No. 6 (November 1992), p. 1313.
- Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992) Ibid., p. 1335.
- United Nations Framework Convention on Climate Change (New York, 9 May 1992) Ibid., No. 4 (July 1992), p. 851.
- Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) Ibid., p. 822.

LAW OF THE SEA

- Convention on the Continental Shelf (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 499, p. 311.
- Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (Geneva, 29 April 1958) Ibid., vol. 450, p. 169.

United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (Sales No. E.84.V.3), p. 151, document A/CONF.62/122.
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LAW APPLICABLE IN ARMED CONFLICT

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, pp. 31 <i>et seq.</i>
and Additional Protocols I and II (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, pp. 3 <i>et seq.</i>

LAW OF TREATIES

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, p. 331.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	Document A/CONF. 129/15.

NARCOTIC DRUGS

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	Document E/CONF.82/15 and Corr.1 and 2.
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CIVIL AVIATION

Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, p. 295.
Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963)	<i>Ibid.</i> , vol. 704, p. 219.

LIABILITY

Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, 29 March 1972)	<i>Ibid.</i> , vol. 961, p. 187.
Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Geneva, 10 October 1989)	United Nations publication (Sales No. E.90.II.E.39).
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, <i>European Treaty Series</i> , No. 150.

DISARMAMENT

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Paris, 13 January 1993)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXXII, No. 3 (May 1993), p. 804.
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OUTER SPACE

Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Moscow, London and Washington, 27 January 1967)

United Nations, *Treaty Series*, vol. 610, p. 205.

TERRORISM

International Convention against the Taking of Hostages (New York, 17 December 1979)

Ibid., vol. 1316, p. 205.

CHECK-LIST OF DOCUMENTS OF THE FORTY-FIFTH SESSION

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/445	Provisional agenda	Mimeographed. For agenda as adopted, see p. vii above.
A/CN.4/446	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-seventh session of the General Assembly	Mimeographed.
A/CN.4/447 and Add.1-3	The law of the non-navigational uses of international watercourses: Comments and observations received from Governments	Reproduced in <i>Yearbook</i> . . . 1993, vol. II (Part One).
A/CN.4/448 and Add.1	Draft Code of Crimes against the Peace and Security of Mankind: Comments and observations received from Governments	<i>Idem.</i>
A/CN.4/449 [and Corr.1]	Eleventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem.</i>
A/CN.4/450	Ninth 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.4/451	First report on the law of the non-navigational uses of international watercourses, by Mr. Robert Rosenstock, Special Rapporteur	<i>Idem.</i>
A/CN.4/452 and Add.1-3	Comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction	<i>Idem.</i>
A/CN.4/453 and Add.1-3	Fifth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem.</i>
A/CN.4/454	Outlines prepared by members of the Commission on selected topics of international law	<i>Idem.</i>
A/CN.4/L.479	Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.480 and Add.1	Draft articles on State responsibility. Titles and texts of articles adopted by the Drafting Committee: Part 2	See summary record of the 2318th meeting (para. 3).
A/CN.4/L.481 [and Corr.1]	Draft report of the International Law Commission on the work of its forty-fifth session: chapter I (Organization of the session)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10)</i> . The final text appears in <i>Yearbook</i> . . . 1993, vol. II (Part Two).
A/CN.4/L.482 [and Corr.1] and Add.1 [and Corr.1] and Add.1/Rev.1	<i>Idem.</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.483	<i>Idem.</i> : chapter III (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.484 [and Corr.1] and Add.17	<i>Idem.</i> : chapter IV (State responsibility)	<i>Idem.</i>
A/CN.4/L.485	<i>Idem.</i> : chapter V (The law of the non-navigational uses of international watercourses)	<i>Idem.</i>
A/CN.4/L.486 [and Corr.1]	<i>Idem.</i> : chapter VI (Other decisions and conclusions of the Commission)	<i>Idem.</i>

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.487	International liability for injurious consequences arising out of acts not prohibited by international law. Titles and texts of articles adopted by the Drafting Committee: articles 1, 2, 11, 12 and 14	See summary record of the 2318th meeting (para. 58).
A/CN.4/L.488 and Add.1 [and Corr.1 and 2], 2, 3 and 4 [and Corr.1]	Report of the Working Group on a draft statute for an international criminal court	Mimeographed.
A/CN.4/L.489	The law of the non-navigational uses of international watercourses. Titles and texts of articles adopted by the Drafting Committee on second reading: articles 1-6 and 8-10	See summary record of the 2322nd meeting (para. 5).
A/CN.4/L.490 and Add.1	Revised report of the Working Group on a draft statute for an international criminal court	Reproduced in <i>Yearbook . . . 1993</i> , vol. II (Part Two), document A/48/10, annex.
A/CN.4/SR.2295- A/CN.4/SR.2327	Provisional summary records of the 2295th to 2327th meetings	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FORTY-FIFTH SESSION

Held at Geneva from 3 May to 23 July 1993

2295th MEETING

Monday, 3 May 1993, at 3.25 p.m.

Outgoing Chairman: Mr. Christian TOMUSCHAT

Chairman: Mr. Julio BARBOZA

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada.

Opening of the session

1. The OUTGOING CHAIRMAN declared open the forty-fifth session of the International Law Commission.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN, speaking on behalf of the Commission, presented his sincere condolences to Mr. de Saram following the assassination of the President of Sri Lanka, Mr. Ramasinghe Premadasa.

3. He welcomed the members of the Commission and the fact that so many of them were present at the opening of the session.

4. The most important development since the last session had undoubtedly been the discussion by the Sixth Committee of the General Assembly of the Commission's report on the work of its forty-fourth session.¹ The sections of the report on the possible establishment of an international criminal jurisdiction had, of course, aroused the greatest interest among delegations, some of which had been of the opinion that a draft statute could be completed within one year, while others had taken the more cautious view that Governments had to be able

to give in-depth consideration to all the implications of the establishment of such a court. A clear-cut majority had been in favour of not automatically linking an international criminal court and the Code of Crimes against the Peace and Security of Mankind, although it had been generally recognized that, once completed, the Code should be one of the instruments to be applied by the court. Because of the principle *nullum crimen sine lege—lex* being understood as written law—the court should not be called upon to base its decisions on rules of customary law. With regard to jurisdiction *ratione personae*, the proposition that the jurisdiction of the court should apply only to individuals, and not to States, had received unchallenged support. For further details, the topical summary (A/CN.4/446) faithfully reflected the Sixth Committee's debate.

5. The General Assembly, in its resolution 47/33, which was carefully drafted, had given the Commission a clear mandate. In paragraph 6 of that resolution, the General Assembly:

Requests the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

6. That mandate obviously involved an element of urgency, since the international community expected the Commission to come up with tangible results in the form of a progress report to be submitted to the General Assembly at its forty-eighth session, that is to say before the end of the year. As a rule, the Commission did not work under conditions of urgency and carefully weighed any suggestions before giving them the shape of draft articles, but, under the mandate entrusted to it, it had to establish mechanisms to fit into the time-frame determined by the General Assembly. The matter was of great political importance and the objective to be achieved was clear. The project for the statute of an international criminal court could not be dealt with by the Commission's traditional methods, whereby the time required for the completion of a draft had hardly ever been less than five years. In recent years, only the draft articles on the prevention and punishment of crimes against diplo-

¹ Reproduced in *Yearbook* . . . 1992, vol. II (Part Two).

matic agents and other internationally protected persons had been prepared more expeditiously, in only one session.²

7. The draft statute of an international criminal court was, of course, far more complex than the 1972 draft articles which had become the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. However, the Commission already had a sound basis for its work: (a) the excellent reports of Mr. Doudou Thiam, Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind, who would, if only because of the close relationship between the draft Code and the international criminal court, play a major role in drawing up the statute; (b) the draft prepared by the 1953 United Nations Committee on International Criminal Jurisdiction³ which was not totally outdated, even though the undertaking had increased in complexity; (c) in 1981, a statute of an international criminal court had been drawn up for the crime of apartheid;⁴ and (d) in connection with the decision of the Security Council to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,⁵ several drafts had been prepared, including the French and Italian proposals, the CSCE draft prepared by Mr. Corell, Mr. Türk and Mrs. Thune, and the suggestions of the United States contained in a non-paper, all of which had, moreover, been influenced by the work done in 1992 by the Working Group on the question of an international criminal jurisdiction.⁶ The task of preparing a draft statute of an international criminal court was thus feasible, even within a short period of time.

8. Referring briefly to the other items on the agenda for the current session, he said that, as far as the topic "State responsibility" was concerned, the General Assembly had not reached a consensus on two basic aspects of the work to be done by the Drafting Committee in the next two weeks, namely, the need to include provisions on countermeasures in the draft articles and the link between countermeasures and procedures for the peaceful settlement of disputes. If the Commission were to take account of all the views expressed by delegations, it would have to come up with constructive wording which, while not granting any privilege to the wrongdoer, would prevent any possible abuses and thereby safeguard peace.

9. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he said that, while most delega-

tions had expressed satisfaction with the decisions taken at the last session, a criticism made in nearly all statements had been that, although the Commission had been working for 14 years to solve the complex problems involved in the topic, it had not definitively adopted one single provision. Delegations had nevertheless stressed that it might be possible to make rapid progress in the context of the new orientation and the Commission could certainly make one of the best contributions to the United Nations Decade of International Law⁷ by completing a set of draft articles on transboundary harm during its members' current term of office.

10. All delegations but one had welcomed the Commission's decision not to continue the consideration of the topic "Relations between States and international organizations (second part of the topic)", since the international community's needs had changed in a way that could not have been foreseen at the time the topic had been included in its programme of work.

11. Much sympathy had also been expressed for the serious and constructive efforts the Commission was making to search for new topics.

12. The fact that the Commission's report had been well received by the General Assembly might be the result of the many promises of future action which it contained. The Commission now had to honour those commitments.

13. As part of its traditional policy of cooperation with other legal bodies, the Commission had been represented in the European Committee on Legal Cooperation in Strasbourg by Mr. Eiriksson, who had made a statement supported by a report distributed to all participants. He himself had gone to Kampala to represent the Commission at the annual meeting of the Asian-African Legal Consultative Committee, whose work had impressed him and to which he had described in detail the activities of the Commission at its forty-fourth session. Members of the Commission had also taken part in a number of conferences on the question of the establishment of an international criminal court, including the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights which had taken place from 2 to 5 December 1992 at the invitation of the International Institute of Higher Studies in Criminal Sciences at Syracuse, Italy. He himself had attended the International Meeting of Experts on the Establishment of an International Criminal Court, which had been held in Vancouver from 22 to 26 March 1993, at the invitation of the International Centre for Criminal Law Reform and Criminal Justice Policy, at which he had been accompanied by Mr. Crawford, Mr. Eiriksson, Mr. Sreenivasa Rao and Mr. Villagrán Kramer, but, unfortunately, not by Mr. Thiam. The final document of that Meeting might be useful to the Commission in its work.

14. He thanked all the members of the Commission for the confidence they had shown in him. He also expressed his gratitude to the members of the Bureau and the secretariat and explained that Mr. Kotliar had left the Commission to become the Secretary of the Commission of Experts to examine and analyse the information on

² See *Yearbook* . . . 1972, vol. II, document A/8710/Rev.1, pp. 312-323.

³ See *Report of the 1953 Committee on International Criminal Jurisdiction*, 27 July-20 August 1953 (*Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*), annex.

⁴ See United Nations draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes ("Study on ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention", document E/CN.4/1426, p. 21).

⁵ Security Council resolution 808 (1993) of 22 February 1993.

⁶ See footnote 1 above.

⁷ Proclaimed by the General Assembly in its resolution 44/23.

war crimes in the former Yugoslavia.⁸ He welcomed Mrs. Dauchy, who was now taking over from Mr. Kotliar.

15. Mr. de SARAM said that he appreciated the condolences presented by the Chairman and assured the Commission that he would transmit them to the authorities of his country.

16. Mr. THIAM, referring to his absence at the International Meeting in Vancouver, said that he had in fact received an official invitation and that, despite a very heavy schedule, he had also officially agreed to take part in that meeting. However, about two weeks before the Meeting, he had received another letter stating that what the Meeting would consider was not the statute of an international criminal court, but that of a court with jurisdiction to try the crimes being committed in the former Yugoslavia. In those circumstances, his presence had no longer seemed necessary.

Tribute to the memory of Mr. Motoo Ogiso

17. The OUTGOING CHAIRMAN informed the members of the Commission of the death of their former colleague, Mr. Motoo Ogiso, a few days before.

At the invitation of the outgoing Chairman, the Commission observed a minute of silence in tribute to the memory of Mr. Motoo Ogiso.

Election of officers

Mr. Barboza was elected Chairman by acclamation.

Mr. Barboza took the Chair.

18. The CHAIRMAN thanked the members of the Commission for the confidence they had shown in him by electing him Chairman of the International Law Commission at its forty-fifth session. Although its membership was fairly new, the Commission had displayed an excellent team spirit in 1992 which would, together with the eminent qualities of each of its members, make it possible to hope that the current session would be as fruitful as the preceding one.

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

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

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

Mr. de Saram was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/445)

19. The CHAIRMAN suggested that the provisional agenda (A/CN.4/445) should be adopted, on the understanding that the order in which the various items would be considered would depend on the way in which the

Commission organized its work. He also suggested that the requests made by the General Assembly in paragraph 9 of its resolution 47/33 should be considered under agenda item 6 (Programme, procedures and working methods of the Commission, and its documentation).

It was so decided.

20. The CHAIRMAN suggested that the meeting should be suspended so that the Enlarged Bureau might consider the organization of the Commission's work and so that the Chairman of the Drafting Committee might draw up the list of that Committee's members.

The meeting was suspended at 4.15 p.m. and resumed at 6 p.m.

Organization of work of the session

[Agenda item 1]

21. The CHAIRMAN, drawing the Commission's attention to the decisions taken by the Enlarged Bureau, said that, in accordance with paragraph 372 of the Commission's report on the work of its forty-fourth session,⁹ the first two weeks would be entirely devoted to the work of the Drafting Committee on the articles on State responsibility. On 7 and 14 May, however, the Commission would hold two plenary meetings at which it would be informed of the progress of that work. At the beginning of the third week, it would take up the item on the statute of an international criminal court, to which it would devote three or four plenary meetings and then possibly refer it to a working group. As of 25 May, it would go on to consider in plenary meeting the report of the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law. If he heard no objection, he would take it that the Commission adopted the programme of work proposed by the Enlarged Bureau.

It was so decided.

22. Mr. MIKULKA (Chairman of the Drafting Committee) said that, following the consultations he had just held and in accordance with the guidelines the Commission had adopted in paragraph 371 of the report on the work of its forty-fourth session,¹⁰ he had drawn up the following list of members of the Drafting Committee: Mr. Al-Baharna, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. Eiriksson, Mr. Kabatsi, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Vereshchetin and Mr. Villagrán Kramer. The other members of the Commission were invited to take part as observers in the Drafting Committee during its first two weeks of intensive work.

The meeting rose at 6.10 p.m.

⁹ See footnote 1 above.

¹⁰ Ibid.

⁸ The Commission of Experts was established by Security Council resolution 780 (1992) of 6 October 1992.

2296th MEETING*Friday, 7 May 1993, at 10.15 a.m.**Chairman: Mr. Julio BARBOZA*

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Organization of work of the session (continued)

[Agenda item 1]

1. The CHAIRMAN, referring to the schedule of work for the session prepared by the Enlarged Bureau and distributed to the members of the Commission, said it was understood that time saved during the consideration of a topic in plenary would be allocated to the Drafting Committee, the Planning Group of the Enlarged Bureau or another body. It was also understood that the schedule was flexible, that it could be changed subject to the progress of work and that, as was customary, representatives of the legal bodies with which the Commission maintained a working relationship would make their statements at dates to be decided on. He also intended to hold consultations as soon as possible with the Chairmen of the Drafting Committee, the Planning Group and any other group which might be established or re-established at the current session in order to reach agreement on the allocation between those groups of the four weekly afternoon meetings reserved for them. He would report the results of those consultations to the Commission in good time. If he heard no objection, he would take it that the Commission adopted the proposed schedule.

It was so decided.

2. The CHAIRMAN invited the Chairman of the Drafting Committee to inform the Commission of the progress of its work.

3. Mr. MIKULKA (Chairman of the Drafting Committee) said that the Drafting Committee had held six meetings at which it had considered article 11 (Countermeasures by an injured State) of the draft articles on State responsibility.¹ It had thus been able to solve a number of outstanding problems. The Drafting Committee's task was particularly difficult, since that article dealt with one of the most sensitive aspects of the topic. The Drafting Committee was of the opinion that the text

it had prepared would serve as a good basis for discussion and that it should be able to be adopted rapidly.

4. The CHAIRMAN thanked the Drafting Committee and its Chairman for the efforts they were making to perform a particularly arduous task.

*The meeting rose at 10.25 a.m.***2297th MEETING***Friday, 14 May 1993, at 10.05 a.m.**Chairman: Mr. Julio BARBOZA*

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Organization of work of the session (continued)

[Agenda item 1]

1. The CHAIRMAN invited the Chairman of the Drafting Committee to report to the Commission on the progress of the Committee's work.

2. Mr. MIKULKA (Chairman of the Drafting Committee) said that the Drafting Committee had held 14 meetings at which it had considered articles 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures) of the draft articles on State responsibility. The Committee had reached an agreement on most of the text of those articles, which it had, however, not yet adopted, since some questions were still pending. It had also begun its consideration of article 12 (Conditions of resort to countermeasures).¹

3. In view of the progress made, he thought that the Drafting Committee would be able to adopt draft articles 11 to 14 quite rapidly.

4. The CHAIRMAN thanked the Drafting Committee and its Chairman for their efforts to find generally acceptable solutions to difficult problems.

5. The Gilberto Amado Memorial Lecture would take place on Wednesday, 2 June, at 5.30 p.m. and would be

¹ For the text of draft article 11 proposed by the Special Rapporteur, see *Yearbook*... 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3; and *Ibid.*, vol. I, 2273rd meeting, para. 18.

¹ For the text of draft articles 11 to 14, see *Yearbook*... 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3; and *Ibid.*, vol. I, 2273rd and 2275th meetings, paras. 18 and 1, respectively.

given by Mr. Caflisch, Legal Adviser of the Swiss Federal Department of Foreign Affairs, on the subject: "Peaceful settlement of international disputes: new trends".

The meeting rose at 10.20 a.m.

2298th MEETING

Monday, 17 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Statement by the Deputy Legal Counsel

1. Mr. ZACKLIN (Deputy Legal Counsel) said that he was addressing the Commission on behalf of the Legal Counsel, who was unfortunately detained in New York on business in connection with the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991¹ (hereinafter referred to as the international tribunal). Mr. Fleischhauer, the Legal Counsel, greatly regretted not being able to attend the Commission's deliberations on the highly important topic under consideration and hoped to reschedule his programme in such a way as to be present at the Commission's meetings later in the session.

Draft Code of Crimes against the Peace and Security of Mankind² (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,³ A/CN.4/449,⁴ A/CN.4/452 and Add.1-3,⁵ A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR

2. The CHAIRMAN reminded members that the General Assembly, in its resolution 47/33, had taken note

¹ See Security Council resolution 808 (1993) of 22 February 1993.

² For the text of the draft articles provisionally adopted on first reading, see *Yearbook*... 1991, vol. II (Part Two), pp. 94 *et seq.*

³ Reproduced in *Yearbook*... 1993, vol. II (Part One).

⁴ Ibid.

⁵ Ibid.

with appreciation of chapter II of the report of the Commission,⁶ entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; had invited States to submit to the Secretary-General, if possible before the forty-fifth session of the Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and had requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

3. In that connection, he drew attention to the eleventh report of the Special Rapporteur for the topic (A/CN.4/449), which contained the draft statute of an international criminal court, and to the written comments received from Member States submitted further to General Assembly resolution 47/33 (A/CN.4/452 and Add.1-3). Relevant material was also to be found in the comments and observations of Governments on the draft Code of Crimes against the Peace and Security of Mankind adopted on first reading by the Commission at its forty-third session (A/CN.4/448 and Add.1). In addition members might wish to refer to the documents distributed further to Security Council resolution 808 (1993) and, in particular, to the report of the Secretary-General.⁷

4. Mr. THIAM (Special Rapporteur) introducing his eleventh report, said that certain corrections were required. In the first place, the text of article 8 should be amended to read:

"Although the jurisdiction of the court is permanent, not all of its organs shall function on a full-time basis; the court shall be convened only to consider a case submitted to it."

Secondly, in alternative B of article 9 the word [*Seuls*], in the French text, should be amended to read [*Seul*]. In article 13, the words [*le ou*], in the French text of paragraph 1, should be added before [*les*] and, in the first paragraph of the commentary to that article, the words *et le*, should be added before the words *ou les* in the third line. Again in the French text, the words *une cour inter-Etat*, in the second paragraph, should be amended to read *une cour entre Etats*. The title of article 27 should be amended to read "Unacceptability of proceedings by default" and the body of the text should be amended to read "(No defendant may be tried by default)".

5. He had already submitted at least three reports on specific aspects of the question of an international criminal court, but they had been of an exploratory nature and had been designed to keep interest in the matter alive.

⁶ Reproduced in *Yearbook*... 1992, vol. II (Part Two).

⁷ Document S/25704 and Corr.1 and Add.1.

There were those who felt he should have submitted a draft statute of an international criminal court to the General Assembly much earlier. However, the Commission should not submit such a draft before the General Assembly requested it to do so. Fortunately, the Commission had now been provided, in General Assembly resolution 47/33, with a firm mandate to prepare a draft statute. As the draft statute had been distributed well in advance, members would have had ample time to take full cognizance of it. In view of the urgency of the matter, therefore, he would focus on certain general points.

6. The main characteristics of the draft were: (a) its realism, in that it took account of the existence of other bodies, that would undoubtedly meet with the approval of those of his colleagues who had always maintained that it was not possible to disregard, in particular, State sovereignty; (b) its flexibility, for it did not make the jurisdiction of the proposed court mandatory but left it to the discretion of States; and (c) the court would be a body of modest proportions, adaptable and inexpensive to run. These are the features the Commission had always wanted to see incorporated in a draft statute.

7. The draft was divided into three main parts, a general part, one part dealing with organization and functioning and another on procedure. The general part addressed two questions: the jurisdiction of the court and applicable law. Under the draft statute, the court would not have exclusive jurisdiction. The idea of such jurisdiction had not received unanimous support and he had therefore acceded to the wish of the majority. The court's jurisdiction would also be subject to the agreement of the States most directly concerned: the State on whose territory the alleged crime had been committed, and the State of which the perpetrator of the alleged crime was a national. Those two States were the most important, but the possibility that the agreement of other States might be required could also be considered. Jurisdiction would also be limited to individuals: in other words, the court could not try international organizations or States.

8. He had confined the States whose agreement would be required to two broad groups because, under internal law, jurisdiction in criminal proceedings was governed by two principles. The principles in question were the territoriality and the personality of criminal law. No one questioned the former. The latter was designed for instances in which, as sometimes happened, a State, deeming that its fundamental interests or those of its nationals were at issue, in a given case, decided that it should try the case. Jurisdiction *ratione personae* would allow it to do so.

9. So far as the applicable law was concerned, he had followed the recommendations of the Working Group, whose view it was that such a law could derive only from international conventions and agreements. The proposed court, therefore, would try only such crimes as were defined in those instruments. The matter had given rise to lengthy debate in the Commission, but the prevailing—and, in his opinion, the realistic—view was that the applicable law should be limited to international conventions and agreements. Some members, however, felt that both custom and general principles of law could in certain cases also constitute a source of applicable law. Accordingly, he had placed those notions between

brackets in the draft articles to enable the Working Group to review the matter. Nor, incidentally, was case-law to be disregarded, for it was difficult to see how a court could be prevented from applying its own case-law.

10. The organization and functioning of the court was governed by two principles: (a) the permanence of the court as an institution for which two factors had to be reconciled: the court must be permanent but it should not operate on a full-time basis; and (b) the actual composition of the court: the judges would not be elected, as was the general rule in international organizations, but would be appointed by their respective States of origin. The Secretary-General of the United Nations would then prepare a list in alphabetical order of the judges so appointed. They would not work full-time.

11. As for the composition of a chamber of the court, obviously it was not feasible for all the judges appointed by States parties to sit in a chamber of the court at the same time. He had therefore proposed that a chamber should be composed of nine judges, though the number could, of course, be greater or smaller. Such judges would be selected by the President of the court from the list prepared by the Secretary-General whenever a case was referred to the court.

12. In making his selection the President would have to take account of certain criteria in order to guarantee objectivity in the composition of the chamber. Thus, a judge who was a national of a State from which the alleged perpetrator of the crime came could not be selected, nor could a judge from a State on whose territory the crime was committed. The President himself would be elected either by all the judges sitting in plenary or by a committee of States, or by the General Assembly.

13. The court's procedure would follow various stages, including referral of a case to the court, investigation, and the trial stage. A case could be brought before the court only by means of a complaint made by a State. Members might wish to refer to the draft articles for the form of the complaint.

14. There were two systems of investigation: (a) the inquisitorial system, in which the investigation was entrusted to one person, the examining magistrate, who had excessive powers and whose investigation was surrounded by secrecy; and (b) the adversarial system, in which the investigation was carried out openly and publicly by the court itself. Though he came from a country which had adopted mainly the inquisitorial system, he preferred the adversarial system. That did not mean that, where circumstances required or in complex cases, the court could not form a commission of investigation. As a general rule, however, the investigation procedure should be conducted by the trial court.

15. The trial stage could commence only when the indictment had been drawn up. Under some legal systems, after the investigation, the Procurator General in charge of the prosecution drew up an indictment which was then notified to the accused and any interested parties and, on the basis of the indictment, the trial process took place. For the international criminal court he had none the less proposed a more flexible system—the majority in the Commission favouring a small and adaptable body—whereby the State bringing a complaint before the court

would assume responsibility for conducting the prosecution. That procedure would preclude the need for a Prosecution Department, with all the attendant legal staff. He knew from experience what a lengthy procedure that could entail. If responsibility for the prosecution were placed on the State bringing the complaint, and that State had to assemble the evidence and produce it before the court, the result, in the final analysis, would be virtually the same. What mattered was for the court to arrive at the truth by whatever means it could be established.

16. He had not mentioned such other issues as the drafting of the judgement, appeals and the execution of sentences, since the report would enlighten members on that score. In his view, the draft statute conformed with the Commission's desire for an adaptable and light body of moderate cost.

17. Mr. de SARAM said that the Special Rapporteur's eleventh report was extremely useful and he looked forward to the Special Rapporteur's advice on the various points that would have to be determined as the work of the present session progressed. The Commission would, of course, proceed with that work on the basis of the recommendations of the Working Group contained in the annex to the report of the Commission on the work of its forty-fourth session.⁸

18. All members were well aware that, in putting together the various provisions of a draft statute for an international criminal court it would be necessary to identify and resolve a multitude of points, some of them much more difficult than others. The Commission should therefore make plain from the outset what it saw as the overall objective at the current session. A great deal would be achieved if the Commission could report to the General Assembly that it had agreed on three main points: first, the possible overall structure of a statute for an international criminal court in terms of its principal chapters and subchapters; secondly, the appropriate draft articles for the chapters on matters of an essentially technical nature—administrative, institutional and organizational matters, for example—on which consensus should be relatively easy to reach; and, thirdly, the more difficult questions that might take more time to solve, and within the context of each question, the particular points still to be agreed on and the options available on each point. By reporting to the General Assembly in such a way, the Commission would begin to make it clear to the Sixth Committee exactly what it had in mind as the draft statute started to take shape.

19. As to the overall structure of the draft statute, the Commission could gain much useful guidance from the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993),⁹ notwithstanding the substantial differences between the legal basis for the establishment of the international tribunal referred to in the Secretary-General's report and the legal bases on which the Commission's draft statute for an international criminal court would be prepared. Agreement should be relatively simple to achieve on those chapters of the draft statute that concerned matters of an essentially technical nature. To judge from the numerous draft

statutes already in existence, such provisions would account for 70 to 80 per cent of the provisions of the draft statute under consideration, while the remainder were the difficult residual questions on which much work would still have to be done.

20. Lastly, at the current session it would be necessary for the Commission, especially at the Working Group stage and in the inevitable informal consultations, to make choices as to how particular draft articles should best be handled or formulated. The provisions proposed by the Special Rapporteur were extremely helpful and would, of course, be kept continuously in view and consulted. In addition, it might be useful for some members to begin preparing, as each particular question came under consideration, a comparative table of provisions from some of the principal draft statutes in existence. There again, the provisions of the statute proposed to the Security Council by the Secretary-General would be of invaluable assistance.

21. Mr. IDRIS said that the Special Rapporteur was to be congratulated on an excellent report, prepared in a relatively short time, and on a brilliant oral introduction. Recent developments on the international scene had undoubtedly made the task more difficult, and the Special Rapporteur's tireless efforts were worthy of the Commission's praise and support.

22. Three important points emerged from paragraph 6 of General Assembly resolution 47/33. First, the question of an international criminal jurisdiction was a matter of priority in the eyes of the international community. Secondly, the Commission was expected to proceed with the actual elaboration of a draft statute for an international criminal court, rather than merely continue to deliberate the question. Thirdly, the Commission was requested to submit a progress report to the General Assembly in time for its forty-eighth session. By taking up that challenge in a spirit of cooperation and realism, it would do much to justify its role within the United Nations system.

23. The Special Rapporteur's eleventh report took account not only of the work of the Working Group set up at the previous session but also of views expressed at the forty-seventh session of the General Assembly. As Mr. de Saram had pointed out, a number of drafts prepared by other bodies were also in existence and could be consulted to good purpose. Governments were becoming aware of large lacunae in existing international law and of the need to set up an international criminal court that eschewed restrictive interpretations based on subjective and prejudiced views.

24. Although the report did not set out to offer definitive solutions, it could provide a sound basis for future work and it successfully reflected the general view that the structures to be established should be adaptable and of modest cost. There was, in principle, general agreement on that score. A number of problems would, none the less, need to be considered more closely. First, as regards the composition of the judgement organ, its non-permanent nature must on no account be permitted to detract from the organ's impartiality or independence. The court must be completely beyond the reach of political influence, an issue that required very careful and realistic consideration. Secondly, with regard to jurisdiction, arti-

⁸ See footnote 6 above.

⁹ See footnote 7 above.

cle 5, paragraph 3 of the draft statute, provided that, pending the adoption of a relevant criminal code, offences within the jurisdiction of the court were to be defined in special treaties between States parties, or in a unilateral instrument of a State. The question that arose in that connection was why any State should yield to the jurisdiction of an international court in matters in which its national courts were competent to deal. The issue of national sovereignty was involved. If the Commission wanted the court to succeed, it must limit the court's jurisdiction to exceptionally serious crimes of a morally reprehensible nature.

25. He supported Mr. de Saram's proposals concerning arrangements for work on the topic within the Working Group and, in particular, the suggestion that a comparative table of provisions from some existing statutes should be prepared for the purpose of comparison.

26. Mr. CALERO RODRIGUES said that the three parts of the draft statute set out in the eleventh report of the Special Rapporteur would assist the Working Group in organizing its proceedings in two or possibly three separate parts.

27. While not in agreement with the statement that it was difficult to imagine the United Nations requesting the Commission, by a resolution, to elaborate the statute of a court that would not be an organ of the United Nations, he none the less thought it normal that the court should be an organ of the United Nations at a time when international crimes were, unfortunately, once again in the forefront of events. In that connection, he wondered whether, in view of the procedure for the appointment of judges proposed in draft article 12 which would mean that the proposed organ would have over a hundred members, it was appropriate to refer to "the court", as the Special Rapporteur frequently did in his eleventh report, or whether it would be preferable to speak of "organs of the court" as the Secretary-General did in his report.¹⁰ The point was perhaps only a technical one, but should nevertheless be considered with care.

28. On the question of jurisdiction *ratione personae*, the fact that the court would try only individuals was not in dispute. The same was not true, however, of article 5, paragraph 2, which introduced the principles of territoriality and nationality. If it was decided that the court could judge an individual only if its jurisdiction was accepted by the State of which that individual was a national and the State in whose territory the crime was presumed to have been committed, the effectiveness of the court would be greatly reduced; indeed, the action of the court might be blocked altogether because of the refusal of one of those States to accept jurisdiction. The question of the national sovereignty of States had been mentioned earlier. When a State entered into a treaty it might relinquish some of its sovereignty. If a State agreed to the establishment of the court, it should at the same time be expected to accept the court's jurisdiction, ceding its rights of sovereignty, in that particular case, to the international community. Unless that principle was recognized, the importance of the court would be very limited.

29. Article 5, paragraph 3, was somewhat confusing because it dealt both with jurisdiction *ratione personae* and with jurisdiction *ratione materiae*. It was difficult to accept that States could, by special treaties or unilateral instruments, indicate what offences should be included within the jurisdiction of the court. Surely, the court must have a clearly established jurisdiction that did not depend on acceptance or non-acceptance by particular States. The problem which had haunted the Commission for a long time, and would doubtless continue to do so, was that the effectiveness of the court depended on the existence of substantive criminal law, without which it would be very difficult indeed for the court to function at all. In that connection, he recalled that a proposal for an international criminal court had been raised within the Committee which was preparing the establishment of the Permanent Court of International Justice at the time of the League of Nations, but had been withdrawn in the absence of clear substantive law in the matter. The same problem had arisen in connection with the Nürnberg and Tokyo Tribunals and was again creating serious difficulties in connection with the case of the former Yugoslavia. He hoped that, while working on the priority issue of the establishment of an international criminal court, the Commission would not forget how essential it was to resolve the problem of substantive law without too much delay. In the absence of a clear definition of the crimes to be tried, a court, however well organized, would be but an imperfect instrument.

30. As to article 7, paragraph 2, fifth subparagraph, it was not possible to agree that everyone should be entitled to be tried only in his presence. Many legal systems admitted trial in the absence of the accused, provided the accused knew that he had been indicted and was being tried. If the accused chose not to attend the trial, that did not necessarily constitute a denial of a basic right.

31. He, too, was of the opinion that the matters dealt with in Part 2 of the proposed draft statute were mostly of an administrative nature and were unlikely to give rise to many problems. The Commission should stand by its own recommendations as contained in its report on the work of its forty-fourth session,¹¹ approved by the General Assembly. The court should not sit permanently; it should only function when necessary, and the chambers system was undoubtedly the most satisfactory.

32. With reference to Part 3, on procedure, it was important to distinguish between bringing a case to the attention of the court and the actual beginning of proceedings. It was normal for a State to submit complaints, and any State could do so. The Special Rapporteur was suggesting that the State on whose territory the offence was committed and the State of which the accused was a national were to be informed. He hoped that that did not imply States could object to proceedings being instituted against a particular individual. In the matter of article 25, he believed that States should indeed be allowed to be present at the proceedings, but prosecution should be in the hands of a separate organ of the court.

33. Article 26 suggested that the court should decide whether a complaint was admissible. Surely that did not mean the 100 or so members were to be asked whether

¹⁰ Ibid.

¹¹ See footnote 6 above.

proceedings should be initiated; perhaps the bureau of the court could take such a decision. The same article went on to say that the court would decide whether or not to institute an investigation. But which chamber or individual would carry out that task? A preliminary investigation was certainly necessary, yet the draft statute did not make a clear distinction between such an investigation and the proceedings in the case itself. Those should be two separate phases.

34. It was gratifying to find that article 28 spoke not of "extradition", but rather of "handing over". It seemed strange, however, to admit that States could assert that a decision of the court had been taken on political, racial, social, cultural or religious grounds. He also wondered what would happen if a State refused to hand over an individual. Clearly the court should have the final say. In his opinion, penalties, which were the subject of article 34, should be set forth in the instruments of substantive law that were to be applied, but since there were currently few, if any, international instruments which, when defining crimes, indicated penalties, it was to be hoped that the court would do so. Moreover, he asked whether the court would apply the penalties provided for by the criminal law in the order that appeared in the article, namely: (a) the State of which the perpetrator of the crime was a national; (b) the State which lodged the complaint; and (c) the State on whose territory the crime was committed. One advantage of a permanent court was that it would provide a clear legal framework. Penalties, he wished to reiterate, should be established by international law, which might incorporate elements of national law, but did not necessarily have to apply penalties imposed by the latter. The case of the proposed international tribunal was unusual, because such a body would refer to the laws of the former Yugoslavia. The purpose of the court was not to deal with a given conflict, and provisions of general validity had to be established.

35. In the case of article 35, the Special Rapporteur would have the Commission choose between revision and appeal. Actually, a principle of human rights law was that it should always be possible to appeal against a judgement pronounced by a court. Clearly, revision was not sufficient.

36. The wording of article 37 was vague. He inquired whether the State in charge of executing the sentence had the initiative for granting pardon and conditional release and whether it was obliged to follow the advice offered in consultation with the other States concerned. He did not believe that special privileges should be given to the State on whose territory the crime was committed, the victim State or the State whose nationals had been the victims. All the States of the international community were concerned.

37. He agreed with other members that the remaining problems were very complex and should be dealt with not in plenary, but rather in the Working Group. The Commission should aim to produce a final draft in 1994. The Working Group could well split up into subgroups in order to focus on the various parts of the draft separately.

38. Mr. CRAWFORD said he saw no real need for a general debate. It was the task of the Working Group to take into account the Special Rapporteur's useful work,

the report of the Secretary-General¹² and the Working Group's report of 1992. The question should not be debated in plenary. The Working Group should be allowed to decide on its own working methods. It might indeed want to create subgroups, but it should not be instructed to do so. Then, on particular issues, a given subgroup might be asked to produce a text, but the Working Group as a whole should begin its work without delay.

39. Mr. KOROMA did not agree with the view expressed by Mr. Calero Rodrigues that no clear substantive law had emerged at Nürnberg. The Nürnberg trials had been conducted under an ample body of law. To deny that was to imply that injustice had been done to the accused—a serious statement when it came from the Commission. Nor did he want to leave unchallenged the assertion that the crimes had not been clearly defined. Once again, that suggested that invalid verdicts had been reached, a view he did not share.

40. Mr. Calero Rodrigues was right to say that an international criminal court's jurisdiction must be clearly established and it should not depend on the will of States. However, the Special Rapporteur was attempting to respond to the fact that some members of the international community were in favour of a flexible international court. Although most members of the Working Group would have preferred an international criminal court with clearly established jurisdiction, a number had considered that national prerogatives should be retained in the matter of which cases should be referred to such a body. That, too, would seem to be the position of most of the permanent members of the Security Council.

41. He agreed with Mr. Crawford that, for the time being, the Working Group should meet to discuss the topic as a whole and that subgroups could then be established to focus on any particular difficulties that might arise. It was not in the interest of the Commission to reopen the general debate. The matter had been fully discussed and the Sixth Committee would not be pleased to find from the Commission's report that the question had been raised in plenary yet again.

42. Mr. Sreenivasa RAO said that he reserved his comments on the international criminal court for later, but considered that a number of other points should be made. The Commission was a deliberating body and should be under no pressure to show results by the end of the current session. He did not share the sense of urgency experienced by some members. If the Commission allowed itself to be rushed into reaching conclusions without giving due consideration to the issues which were essential to be considered, it would be criticized for not discharging its mandate properly. The establishment of an international criminal jurisdiction, as pointed out by Mr. Calero Rodrigues, was a question that dated back to the League of Nations and had also been relevant in connection with the Nürnberg trials. Too much time had now been spent on general debate. It was for the Working Group to take up the remaining questions, such as jurisdiction and applicable law, the relationship between national and international jurisdictions, obligations under other treaties and the jurisdiction of an international criminal court, the relationship be-

¹² See footnote 7 above.

tween the court and the United Nations and between the court and the Security Council, and the role of prosecution. Subordinate issues must also be resolved. Thus, thorough analysis was still needed; hence, although the political climate was ripe, the Commission should not act in a hurry and must proceed with deliberate speed.

Organization of work of the session (*continued*)

[Agenda item 1]

43. The CHAIRMAN said it had been agreed that the Drafting Committee would meet that afternoon and also in the afternoon of the following day. However, in the absence of the Special Rapporteur, the Drafting Group was having difficulty continuing its work on State responsibility. As a consequence, the Enlarged Bureau had decided to recommend that the Commission should re-establish during the course of the current session the Working Group on the question of an international criminal jurisdiction under the chairmanship of Mr. Koroma. It was further recommended that no plenary meeting should be held on Wednesday and that the Working Group should meet instead. If he heard no objection, he would take it that the Commission agreed to those recommendations.

It was so agreed.

44. The CHAIRMAN, further to a comment by Mr. ROSENSTOCK, said that, in view of the number of speakers on the list for the plenary, it would not be possible to fit in an additional meeting for the Working Group, which could none the less meet three times in the course of the week.

45. Mr. BENNOUNA said he agreed about the need to cut the discussion in plenary at the current session to a minimum and to enable the Working Group to move ahead as much as possible. The general lines of the statute of the court had already been amply discussed. The need now was to focus on specific ways in which a court could be set up, and on the wording of the statute. Once the Working Group had accomplished those tasks, a discussion in plenary would be profitable.

46. Mr. CRAWFORD said a general practice should be established whereby, whenever a plenary meeting to discuss the international criminal court finished early, the remaining time would be given over to the Working Group. He urged that any statements made in plenary on the subject should be as brief as possible.

47. The CHAIRMAN said he wished to echo that appeal for brevity. At the end of its deliberations, the Working Group would submit a report to enable the Committee to take stock of the progress made.

48. Mr. KOROMA (Chairman of the Working Group) said that, after consultations, it had been decided that the Working Group would consist of Messrs. Al-Baharna, Arangio-Ruiz, Crawford, de Saram, Güney, Pellet, Razafindralambo, Robinson, Rosenstock, Thiam, Tomuschat, Vereshchetin, Villagrán Kramer, Yankov and himself. All members of the Commission were welcome to contribute to the efforts of the Working Group and could participate in the proceedings as observers, as was the practice in the Drafting Group.

49. Mr. Sreenivasa RAO expressed a desire to serve as a member of the Working Group and urged that Mr. Al-Khasawneh also be designated a member.

50. Mr. KOROMA said that they would be welcome and valuable additions to the Working Group's membership, as would Mr. Idris, who had indicated his interest in participating.

51. The CHAIRMAN said that, with the membership now established, the Group should adopt whatever working methods it considered appropriate, taking into account the comments about establishing subgroups. Its mandate was set out in General Assembly resolution 47/33, paragraph 6.

52. Mr. EIRIKSSON (First Vice-Chairman) announced the membership of the Planning Group: Messrs. Al-Khasawneh, Calero Rodrigues, Fomba, Güney, Kusuma-Atmadja, Mahiou, Pambou-Tchivounda, Sreenivasa Rao, Razafindralambo, Robinson, Rosenstock, Vargas Carreño, Vereshchetin and Yankov. Messrs. Bowett and Pellet would be ex officio members, as coordinators for their respective Groups. The first meeting of the Planning Group would be held as soon as it could be arranged for Mr. Fleischhauer, the Legal Counsel, to be present.

53. Mr. TOMUSCHAT said he believed that the Special Rapporteur's report should be discussed fully in plenary. It was a useful document that presented a philosophical background and concrete proposals for debate. As issues of principle had been fully explored during the previous session, however, he agreed that the task now should be to concentrate on drafting.

54. Unlike Mr. Sreenivasa Rao, he thought there should be a sense of urgency in dealing with the topic. The international community expected visible results from the Commission, and completion of the work by the end of the next session should therefore be the goal. Admittedly, assigning certain tasks to subgroups could be profitable, but that was something for the Working Group itself to decide.

55. One thing that might speed the Working Group in its efforts, and which the secretariat might be able to provide, would be a comparison of recent efforts to draft similar statutes, including, of course, the statute of the international tribunal.

56. Mr. VERESHCHETIN said it was true that much had been accomplished at the previous session. The General Assembly had acknowledged as much in requesting the Commission to continue its work and, at its current session, to prepare a draft statute on a priority basis.

57. The progress made at the previous session could to a large extent be explained by the method of work chosen: the formation of a Working Group had made it possible to unravel a number of complex matters that had resisted resolution for many years. One such matter was the interrelationship of the court's statute and the draft Code of Crimes against the Peace and Security of Mankind. Due credit should be given to the Special Rapporteur, Mr. Thiam, and to the Chairman of the Working Group, Mr. Koroma; a creative contribution had also been made by Mr. Crawford.

58. He fully endorsed the proposal to re-establish the Working Group and hoped its efforts would be equally

successful. The Group should devise its own working methods and decide whether to break into subgroups for specific purposes. It should, of course, concentrate on those issues that remained unresolved, or for which a number of alternatives had been put forward at the previous session, but at the same time, it could work on formulating individual articles of the statute. It was precisely in the course of that drafting work that the merits or disadvantages of various approaches could best be discerned. He did not wish to imply that work on the statute should proceed at a forced pace but it should not be artificially slowed down either.

59. He agreed with Mr. Tomuschat that the goal should be to complete work on the statute by no later than the end of the forty-sixth session. Regrettably, the slow pace of that work had resulted in the task of drafting the statute for an international tribunal being done elsewhere than in the Commission. He hoped, however, that the work on the statute of an international criminal court would be useful in the efforts to set up an international tribunal. The time had now come to concentrate on the wording of specific articles. It would be possible to work with the useful proposals already put forward by Mr. de Saram and others. As much time as possible should be allocated to the Working Group so that true progress could be made in fulfilling the mandate entrusted to the Commission by the General Assembly.

60. Mr. EIRIKSSON said he agreed that the basic issues surrounding the statute had been adequately debated, and that the drafting of the statute was the task at hand. The fact that other institutions had accomplished similar tasks, with fewer resources and less time available than the Commission, should inspire it to achieve its goal. He would have favoured completing the work by the end of the current session, but could accept the goal of finishing it by the end of the next session.

61. The CHAIRMAN said it was apparent from the discussion that comments in the plenary on the Working Group's progress at the end of the session should not take the form of a general debate but should focus on the wording of the draft statute.

Expression of appreciation to Mr. Vladimir Kotliar, former Secretary to the Commission

62. The CHAIRMAN, speaking on behalf of all members, thanked Mr. Kotliar for his many years of devotion and assistance to the Commission and wished him all the very best for the future.

63. Mr. KOTLIAR thanked the Chairman for his kind words.

The meeting rose at 12.55 p.m.

2299th MEETING

Friday, 21 May 1993, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,² A/CN.4/449,³ A/CN.4/452 and Add.1-3,⁴ A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPporteur (continued)

1. The CHAIRMAN announced that Mr. Yamada, who had been called away from Geneva, had asked that his views on the subject under discussion be circulated. The secretariat would take the necessary steps.

2. Mr. FOMBA said that in resolution 47/33, the General Assembly had given the Commission a clear mandate: to draft a statute, taking into account the views expressed in the Sixth Committee and the written comments received from Governments and to submit a progress report to the Assembly at its forty-eighth session. With the submission of the Special Rapporteur's eleventh report (A/CN.4/449), the Commission had a draft statute to work with. It now had to determine whether the draft adequately reflected the views expressed in the Sixth Committee and by States in their written comments.

3. One could agree or disagree with the Special Rapporteur's approach in various instances, but there was no disputing the fact that he had accomplished the task assigned to him. He deserved thanks for the high degree of professionalism with which he had tackled a sensitive issue that had major implications for mankind in the future. The members of the Commission needed to work constructively in order to achieve the broadest possible consensus on certain important matters as rapidly as possible, so that cohesive material could be incorporated into the progress report and the expectations of the General Assembly could be fulfilled.

4. He had had a number of specific proposals to make concerning the best way the Commission could operate

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook... 1993*, vol. II (Part One).

³ *Ibid.*

⁴ *Ibid.*

in order to fulfil its mandate, one of them being the establishment of a working group. He accordingly welcomed the Commission's decision along those lines and hoped the Working Group would have sufficient leeway to determine its own working methods.

5. Two things must be borne in mind. First, it was most important to establish a permanent body—to set something in motion, even at the risk of its being imperfect, for imperfection was inevitable in human justice. Secondly, the essential point in criminal matters was to avoid devising rules that were technically well made but inapplicable in practice. There was precious little jurisprudence in the area, for the experiences of Nürnberg, Tokyo and, just recently, the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991⁵ (hereinafter referred to as the international tribunal), were the only precedents.

6. He agreed with Mr. Bennouna and others that a general debate was to be avoided at the present stage, but a few remarks were called for on the general institutional framework for the international criminal court, and specifically, whether it should be part of the United Nations system.

7. In the commentary to article 2 of the draft statute, the Special Rapporteur gave two reasons for his conviction that the court should be an organ of the United Nations. First, the coexistence of an international criminal court and ICJ would not be contrary to the Charter of the United Nations, and secondly, the Security Council's establishment of an international tribunal proved that there was room for a judicial organ, other than ICJ, with jurisdiction in criminal matters. Actually, there were a number of other precedents. The report of the 1953 Committee on International Criminal Jurisdiction⁶ showed that all members of the Committee had agreed that there should be some degree of sponsorship by the United Nations for the creation of an international criminal court. Some members had felt that the court should be an organ of the United Nations, or at least a body set up and functioning within its framework.

8. The community of which the United Nations constituted the organized form needed a criminal court in order to pronounce upon acts considered crimes within that community. The establishment of the court within the United Nations would clearly express recognition of the principles of individual criminal responsibility towards the world community, grant the court the desired authority, open the road to universal acceptance of its jurisdiction and guarantee its functioning for the common good. He shared those views.

9. Again, in a report by the European Parliament dated 26 March 1992 on the establishment of an international criminal court for war crimes, the idea that such a court must be a United Nations body was upheld, with emphasis being placed on the need to move towards universality. A number of other texts could be cited such as article 1 of the London International Assembly's draft

convention of 1943⁷ and article 13 of the draft statute prepared by Mr. Bassiouni in 1992.⁸

10. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on his *tour de force* in drafting an intellectually stimulating document in record time. The message of the eleventh report was clear: the Commission's task should be approached with pragmatism, realism and flexibility. The report focused on the substantive and procedural aspects of an international criminal court as well as on its operation and on administrative matters. Yet it did not claim to solve all the delicate problems caused by the creation of such a court. As pointed out in the report, it constituted at most a plan of work for the Commission.

11. The Special Rapporteur appeared to have complied with the wishes of the Working Group, which had indicated in its report⁹ that concrete recommendations should be made with a view to assisting the Commission in fulfilling the mandate assigned to it by the General Assembly. Yet in so doing, the Special Rapporteur might well have tied his own hands. In terms of methodology, the draft under consideration represented a set of questions, leaving fundamental problems unresolved. Such problems included the statute's relationship to domestic legislation and the interplay between the international criminal court and the other bodies of the United Nations system.

12. It was regrettable that a desire for concrete results had led to the unsystematic treatment of certain issues. A rewording of some of the provisions on the applicable law, the competence of the court and the procedures to be used within the court, for example, might serve to highlight better, including for the benefit of the General Assembly, the position of an international criminal court within the United Nations system as a whole. It was to that end that a few specific remarks could be made.

13. Article 2 stated that the court was a judicial organ of the United Nations. The commentary discussed the specificity of the court's jurisdiction in relation to the primacy of ICJ as the principal judicial organ of the United Nations, but the report failed to delve into the consequences of that institutional arrangement. The Statute of ICJ gave it the authority to handle cases arising out of the application or interpretation of treaties. But the international criminal court was to be established on the basis of a treaty. He wondered whether the decisions of that court should be deemed subject to the jurisdiction of ICJ and whether that would not make ICJ an appeals court for the decisions of the international criminal court. He wondered whether ICJ would have the authority to review the decisions of the international criminal court, as it had done in the past for decisions of the Administrative Tribunal.

⁷ United Nations, *Historical survey of the question of international criminal jurisdiction*, memorandum by the Secretary-General (Sales No. 1949.V.8), p. 97, appendix 9 B.

⁸ Association internationale de droit pénal, *Nouvelles Etudes Pénales - Draft statute, international criminal court* (Erès, Syracuse, Italy, 1992).

⁹ See *Yearbook... 1992*, vol. II (Part Two), document A/47/10, annex.

⁵ See Security Council resolution 808 (1993) of 22 February 1993.

⁶ *Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*.

14. Article 4, on the applicable law, was another source of difficulty. It had a lacuna in regard to substance that could only be filled when the article was read in conjunction with article 34, on penalties. The law applicable by a criminal court must primarily have a punitive function, and only secondarily a protective one. A reference to internal law defining the penalties for various offences was conspicuously absent from the text. Without such a reference, all the penalties set out in internal law would have to be mentioned in international conventions or agreements before they could be applied by the international criminal court. He asked, conversely, if the draft were to refer to internal law, what would happen when national laws did not cover all the offences mentioned in international conventions and agreements. Clearly, the wording of article 4 was incomplete.

15. There seemed to be no need for paragraph 1 of draft article 5, which merely duplicated the terms of article 1, while the alternative formulation, in paragraph 3, lacked consistency and was unrealistic. It lacked consistency because it would be difficult in particular to reconcile the question of enforceability (*opposabilité*) with that of conferment of jurisdiction, which was implicit in any international agreement. In his view, the article was of faulty construction and should perhaps be re-examined. It lacked realism because the idea of defining offences in a unilateral instrument of a State involved a host of unknown factors. He asked whether the provision, which was couched in general terms, was directed at the State on whose territory the crime was committed, or at the State of which the perpetrator of the crime was a national, or at any State whose domestic law provided for a regime identical to that laid down for crimes which could be tried by the court. The last of those possibilities would apply only in cases for which there was a code of crimes, but, in that eventuality, he wondered why a State which had a comprehensive system should not have direct jurisdiction to try the criminals in question. Such questions were not unrelated to the nature of the body it was hoped to establish.

16. Mr. KABATSI said that a solution to the question of the establishment of an international criminal court to try and punish individuals guilty of criminal conduct that outraged the conscience of the world seemed to be imminent now that the Commission had been requested by the General Assembly to prepare a draft statute for such a court as a matter of priority. No longer was the world prepared to stand by as innocent blood was being shed. The world community was looking to the Commission to fire the first shot in the war against criminals who had thus far acted with impunity. It had at last recognized that the situation could not be allowed to continue and was asking the Commission to initiate the process that would put an end to such shameful events.

17. The Commission had the capacity, and the legal materials, to carry out its task expeditiously. It had worked on the subject for some time and had had the benefit of contributions from the Sixth Committee, from Governments and from various international law bodies. Above all, it had before it the excellent draft statute prepared by the Special Rapporteur. Hence there was every reason to believe that the Commission would be able to

respond to the General Assembly's request sooner rather than later. The Working Group, which had already achieved commendable results, was moving ahead with more confidence at the current session. A project of the kind envisaged would inevitably encounter difficulties, but the current mood throughout the world was that those difficulties were not insurmountable and should not be allowed to stand in the way of the establishment of an international criminal court in the foreseeable future. The Special Rapporteur's eleventh report would provide the Commission with a valuable working document on the basis of which it would be able to submit a draft statute of an international criminal court to the General Assembly, if not at its next then at the following session.

18. Mr. MAHIOU said that he agreed with the Special Rapporteur's general approach, as reflected in the statement in paragraph 4 of the report, that the aim should be to establish "an organ with structures that are adaptable, not permanent and of a modest cost". That was a somewhat idealistic solution perhaps, but it signified the general direction in which the Commission should move.

19. He also endorsed the general idea behind article 2, which was, however, somewhat terse. The proposed court must, of course, be an organ of the United Nations but the nature of the link between the two still had to be determined.

20. It would be premature for the Commission to discuss the seat of the court (art. 3), which was primarily a political matter. However, provision should perhaps be made for the court to move in order to cater for situations in which it could not sit at the normal place. It might, for instance, have to try a national of the State in which it had its seat. He wondered whether it would be possible in such a case to ensure that the trial was conducted in the necessary calm environment?

21. Article 4 was at once too general and too absolute, and a distinction might be made between two types of rules: on the one hand, rules governing the characterization of a crime, which could be drawn from international conventions and agreements, and on the other, rules governing the functioning of, and procedure before, the international criminal court, when it would be only logical to draw on general principles of law and on custom. No statute could ever cover all eventualities. It was therefore important to leave the door open so that reference could be had to other sources of law. The Special Rapporteur and the Working Group might wish to reflect on the matter.

22. Article 5, on the jurisdiction of the court, would no doubt prove to be the most controversial. Paragraph 2 caused some difficulty in that it required two States to confer jurisdiction: the State of the territory in which the crime had been committed, and the State of which the accused was a national. As rightly noted by the Special Rapporteur in his commentary to article 5, the principle that was generally applied was territorial jurisdiction. The best solution, therefore, would be to give priority to that principle and to apply others, such as the principle concerning the consent of the State of which the accused was a national, as secondary rules in specific cases. It was important not to give a right of veto, as it were, to

the State of which the accused was a national since, in the final analysis, that would only neutralize the court.

23. His interpretation of the Commission's discussion of the type of crime that would come within the jurisdiction of the court was more optimistic than that of the Special Rapporteur, as reflected in the commentary to article 5. There were many crimes, in addition to genocide, that could fall within the jurisdiction of the court and he trusted that, at the current session, the Working Group would spell out the crimes with which the court could deal.

24. With regard to the procedure for the appointment of judges (art. 12), there seemed to be some concern to avoid the drawbacks of full-time judges. In particular, the Special Rapporteur, in his commentary, established a link between judges who sat full time and the election of such judges by the General Assembly. Such a link was not automatic, however. There were organs that could be elected by the General Assembly but that did not have a permanent function—the Commission itself being a prime example—and the same would, in his view, apply to an international criminal court. The most important thing was to ensure that the members of the court were appointed in a highly formal manner, by the General Assembly, inasmuch as they sat on behalf of the international community to ensure respect for law and order at the international level.

25. The procedure for the appointment of judges by States would result in a veritable armada of judges and, for that reason, it would be advisable to provide from the outset for a modest structure. By the same token, the number of judges of which a chamber of the court was composed—the subject of article 15—should not be too large and should certainly be less than nine; in his view, seven would suffice. In addition, there would of course be the judges who dealt with the investigation; and if a prosecution authority or department were to be set up there would also be the judges who were to form part of it. In appointing the judges, the traditional principles should be observed, including those relating to representation of the different legal systems and different regions and also the principle that more than one national from the same State could not sit on any organ which tried the accused.

26. Paragraph 1 of article 23 (Admission of a case to the court) was linked to article 25 (Prosecution) inasmuch as any decision adopted with respect to the submission of a case to the court would have an effect on the prosecution procedure. If States were to be responsible for conducting the prosecution, then it was only logical that they should also be responsible for the submission of cases to the court, as provided for in article 23. If, on the other hand, the prosecution was to be the responsibility of an organ of the court or of a prosecution department, the right to submit a case to the court could be open to complainants other than States—for instance, to international organizations and possibly also to certain non-governmental organizations concerned with humanitarian matters. Under the terms of article 23, States alone would be complainants, so that an exception should be introduced so as to allow the United Nations, and specifically the Security Council and the

General Assembly, to refer a case to the international criminal court.

27. So far as article 25 was concerned, he would favour a prosecution department to conduct the prosecution, rather than the complainant State or States, since that would ensure that the trial was conducted in a calmer atmosphere. He therefore did not altogether agree with the commentary to alternative B of article 25, which established an automatic link between the existence of a prosecution department and the permanence of such a department. A prosecution department could become permanent if the numbers of accused persons were such that it had to work on a full-time basis, but it would be permanent in operational, not structural, terms.

28. The Special Rapporteur was obviously hesitant about article 27 because it appeared between brackets. For his own part, he did not agree that proceedings by default should be excluded. Also, he was not sure whether, as stated by the Special Rapporteur in the commentary to that article, the predominant view in the Commission really had been opposed to proceedings by default. If so, he would invite members to reflect on the consequences of such an exclusion. All an accused would have to do to escape proceedings was to take refuge in a State which was not party to the statute of the court. That was particularly serious for two reasons. In the first place, the State in question could simply take no action and allow the accused to leave for a friendly country, the reasoning being that it would then have neither to extradite nor to try him. That would open the door to evasion of the terms of the statute of the court, particularly when it came to trying a State's political leaders. Secondly, the lack of any provision for proceedings by default could create the idea of impunity but, if the accused were found guilty in such proceedings, the threat of arrest would hang over him like the sword of Damocles and he would not be able simply to stay quietly where he was.

29. With reference to article 34 (Penalties), he was strongly in favour of the court's applying the penalties provided for in the criminal law of the State on whose territory the crime had been committed. When for whatever reasons, a State ceded to an international criminal court the right to judge the perpetrator of a crime committed on its territory, it transferred to the court its own power of jurisdiction over the accused, and it was logical to assume that such a transfer of jurisdiction also entailed transfer of the provisions of that State's criminal law, including the rules applicable to penalties. Another reason for preferring the solution based on territoriality was that it was important to avoid what might be described as *à la carte* penalties, as could be the case if two or more individuals were accused of the same crime on the territory of the same State and the court decided to apply the penalties provided for by the criminal law of the State of which each of the accused was a national. In such a situation, several different penalties might be imposed for the same crime committed in the same country.

30. Lastly, in regard to article 35 (Remedies), although he was convinced that revision alone would provide sufficient guarantee of the quality of the court's judgments, especially as the proceedings would undoubtedly

take place in the presence of international observers and would be extensively reported by international media, version B of the article included appeal and thus seemed more in line with developments in the field of human rights and of the relevant principles of international law.

31. Mr. RAZAFINDRALAMBO said that he had hesitated about speaking, because the Special Rapporteur's eleventh report seemed to propose nothing that had not formed the subject of extensive discussion in the past and which had not been recommended by the Working Group the previous year. However, there had been some unprecedented developments since the Commission's forty-fourth session. The decision to establish an international tribunal,¹⁰ and the highly instructive report of the Secretary-General,¹¹ were undoubtedly the most striking of those developments. However, the international legal community's concern with the issue was also reflected in the convening of the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights by the International Institute for Higher Studies in Criminal Sciences at Syracuse, Italy, from 2 to 5 December 1992. Those events on the international scene since July 1992 would in themselves warrant renewed discussion, although the Commission should not, of course, revert to those points on which a consensus had already been reached.

32. There appeared to be a trend in favour of giving priority consideration to the statute of an ad hoc criminal court. The adoption of such a course, could consign the matter of the statute of a permanent international criminal court to oblivion and render the exercise conducted by the Commission over the past few years completely useless. That possibility would become a reality if, for political and budgetary reasons, the Commission were to accept the view held by some members that it was materially impossible for two international criminal jurisdictions, one ad hoc and the other permanent, to co-exist. Unfortunately, some of the proposals in the Special Rapporteur's eleventh report appeared to be based on considerations of that kind. In particular, he did not agree with the procedure for the appointment of judges proposed in article 12. Criminal judges, unlike those on arbitration tribunals or even those of ICJ, were called upon to pronounce upon the honour, reputation and fate of individuals; in consequence, they were exposed to pressures and threats of all kinds. It was therefore quite unacceptable to advocate a judicial system which provided, on the one hand, for the appointment of international criminal judges by their own Governments, rather than by an impartial international election process, and on the other, for them to return home without any security guarantees whenever the court was not in session. Such proposals could only be the fruit of a timorous reluctance to uphold the impartiality and independence of international courts for fear of losing the support of certain Powers.

33. As the World Conference at Syracuse, Italy had made abundantly clear, the international community wanted the Commission to continue its work and redou-

ble its efforts with a view to the early completion of its task of elaborating a permanent international criminal jurisdiction worthy of that name. He would comment in greater detail on specific points at a later stage and wished to thank the Special Rapporteur for a report which provided a most useful basis for the work at hand.

34. Mr. YANKOV said that, as a member of the Working Group, he would have other opportunities to express his views on specific articles of the draft statute and he wished to express his appreciation to the Special Rapporteur for an excellent and well-structured report.

35. The first organizational point he wanted to raise might appear at first glance to be a minor one, but it related to a significant change in the Commission's mandate. Whereas the General Assembly, in its resolution 46/54, had invited the Commission to consider the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism, in resolution 47/33, the Assembly requested the Commission to continue its work on the question "by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority". He therefore proposed that the Working Group previously known as "the Working Group on the question of an international criminal jurisdiction" should henceforth be called the "Working Group on a draft statute for an international criminal court". In addition to the more formal advantage of reproducing the language of Assembly resolution 47/33 on the subject, such a step would offer the substantive advantage of clearly determining the Working Group's mandate.

36. His second general observation was that the statute should, through its provisions relating to the composition and jurisdiction of the court, applicable law, investigation, evidence and the trial procedure, including enforcement and penalties, provide the foundations and the legal guarantees for an impartial judicial institution based on the principles of the rule of law and be free, as far as possible, from political considerations. That was all the more indispensable as the cases referred to the court would for the most part be of a political nature. The court's impartiality and viability as a court of law would largely depend on the way it was established and the way its composition was determined. Naturally, the more subjective factor of the moral integrity, independence and competence of the court's members was also of the greatest importance. Those general considerations should find expression, as far as practicable, in the relevant provisions of the statute, namely, the internal regulations relating to its functioning and the rules governing investigation and trial procedures.

37. In that connection he wished to enter a reservation in respect of article 15, paragraph 3, stipulating that the President or Vice-President of the court should select the judges to sit in the chambers of the court, and also to express doubts about the provisions in article 5, paragraph 3, and articles 23 and 25, associating himself in that connection with the comments made by Mr. Mahiou.

38. Lastly, the Commission should aim at submitting a finalized draft statute to the General Assembly in time, at the latest, for the fiftieth anniversary of the United

¹⁰ See footnote 5 above.

¹¹ Document S/25704 and Corr.1 and Add.1.

Nations in 1995, as a contribution both to the anniversary celebrations and to the United Nations Decade of International Law.¹²

39. The CHAIRMAN said that the proposal to rename the Working Group was an important one and deserved serious consideration.

The meeting rose at 11.40 a.m.

¹² Proclaimed by the General Assembly in its resolution 44/23.

2300th MEETING

Tuesday, 25 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Vaclav MIKULKA

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/446, sect.B, A/CN.4/448 and Add.1,² A/CN.4/449,³ A/CN.4/452 and Add.1-3,⁴ A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ARANGIO-RUIZ said that, as most of the points he would have raised with respect to the Special Rapporteur's eleventh report (A/CN.4/449) had already been dealt with by other members of the Commission, he would confine himself to just one question on which he wished to express his views directly, in plenary, namely, the question of ad hoc or special criminal courts and of the relationship between that question and the task the General Assembly, in its resolution 47/33, had entrusted to the Commission.

2. At the end of the Second World War, the establishment of an ad hoc tribunal had been the only practical

solution: there had been virtually no international political institutions, the matter had called for a speedy solution and the four victorious Powers had been in occupation of the countries from which the accused came. The matter therefore had had to be dealt with by those four Powers, but they had decided to act pursuant to an international legal instrument, the London Agreement.⁵ As that Agreement had been concluded between victorious Powers, it had obviously not been possible to secure any participation by the vanquished Powers in the court that had been set up.

3. The dramatic situation which obtained at present in the territory of the former Yugoslavia likewise called for urgent measures, one being the introduction of some machinery to bring to justice any individuals guilty of crimes against humanity. That did not necessarily mean, however, that an ad hoc criminal court should be established: there were at least three reasons for saying so.

4. In the first place, as every lawyer knew, ad hoc courts were not the best method of administering criminal justice. The members of a court set up in response to a particular situation might be influenced by that situation and by, as it were, an obligation of result. Furthermore, quite apart from the very serious risk of a lack of objectivity and impartiality, ad hoc or special criminal courts were essentially instruments used by despotic regimes. It would set a bad example if the international community were to resort to such means and would not augur well for respect for human rights and the rule of law at the national level.

5. Secondly, while the perpetrators of such abhorrent acts should, of course, be prevented from pursuing their activities as a matter of urgency, the choice of the ad hoc solution would not be enough to have that deterrent effect. In any event, it would take some time to set up a court, even an ephemeral one. What operated as a deterrent was the clearly proclaimed intention of the General Assembly and the Security Council to investigate those crimes and prosecute the persons responsible and they already knew what they could expect from the international community. There was therefore no absolute necessity for the United Nations to set up institutions which might not be unimpeachable from the legal standpoint.

6. Thirdly, those who favoured an ad hoc court apparently considered that such a body would be established by virtue not of a multilateral convention adopted under United Nations auspices, for that, it was claimed, would take too long, but of a decision of the Security Council. Such a procedure was, however, even less in keeping with the fundamental principles of criminal law. Indeed, it was not at all clear under which express or implied provisions of the Charter of the United Nations the Security Council would be empowered to set up a criminal court and define its task. Those who would have to collect the evidence and decide on the criminal responsibility of the accused would have sufficient difficulty in performing that task without having, in addition, to deal with challenges to the constitutional legitimacy of the whole operation. The position would of course be differ-

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook . . . 1993*, vol. II (Part One).

³ Ibid.

⁴ Ibid.

⁵ 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).

ent if the Security Council were engaged in an action against an aggressor under Chapter VII of the Charter of the United Nations. In that case, by analogy with a belligerent State, the Council would be entitled to set up tribunals to try persons arrested for violations of the laws of war. Otherwise, a treaty would, in his view, be indispensable.

7. In order to deal with the problem of urgency, the Commission should reflect on the precise nature of the mandate entrusted to it by the General Assembly in its resolution 47/33, paragraph 6, which was not just to report to the Assembly, but to produce as a matter of priority a draft statute for an international criminal court. The Commission would have already completed that draft had its members not been restricted for too long by a narrow understanding of the obvious implications of the topic of the draft Code of Crimes against the Peace and Security of Mankind. He had repeatedly insisted, in previous sessions, on the obvious inclusion, within the Commission's mandate, of the elaboration of a statute for an international criminal court.

8. Mr. PELLET said that the only general criticism he had to make of the eleventh report of the Special Rapporteur was that it contained no statement of the doctrinal perspective within which it fell. That perspective had, of course, been outlined in the report of the Working Group that the Commission had established at its forty-fourth session⁶ and the report itself had been approved by the Commission, the Sixth Committee and the General Assembly. Notwithstanding some positive elements, however, that report had still followed an unduly conventional approach, whereas it should have raised questions as to the task and functions of the court it was proposed to establish before embarking on the drafting of its statute. Although serious and massive violations of humanitarian law and the laws of war were now occurring in several places throughout the world, they were not necessarily of the same kind as the crimes that had grieved the world 50 years earlier, and the conditions in which the perpetrators should be tried were very different. It was now no longer a question of the victors judging the vanquished, but, on the contrary, of preventing the excesses of a "victors' justice". At any rate, that was one of the *raisons d'être* of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (hereinafter referred to as the international tribunal) which the Security Council had decided to establish⁷ and for which the Secretary-General had just submitted a draft statute.⁸

9. Unlike Mr. Arangio-Ruiz, he was a firm supporter of that initiative and was not persuaded by the Special Rapporteur's reference in his commentary to article 8 of the draft statute concerning the "delays" encountered in setting up the court. In point of fact, it had taken only a few months to introduce the idea of the court, to decide on its establishment and to outline its statute in broad terms, whereas it had taken more than 45 years not to

create a permanent court. He questioned what the reason was for such speed and efficiency. It was essentially the fact that the court met a specific and clearly defined need. On that point, he had not changed his opinion: a single and monolithic permanent court, designed to take account of widely diverse needs, might very well not meet any of those needs satisfactorily. The Special Rapporteur had, no doubt, introduced into his proposals a measure of flexibility, but it was still not enough. The aim should be, of course, not to create a new Nürnberg Tribunal, but to provide a set of legal mechanisms that would promote respect by States and individuals for the most fundamental principles of international law and to impose penalties for failure to respect those principles. To that end, the best course might be to draw up a model statute for an ad hoc court, possibly with alternatives according to the categories of crimes contemplated; to establish, where appropriate, lists of persons to be members of that court and of the international bodies responsible for investigation and prosecution; perhaps to set up a permanent court for the special case of drug trafficking; and to provide the necessary mechanisms to assist States in applying international criminal law, including a judicial body to give a preliminary ruling on *renvois* by national courts, with a view to harmonizing national case-law.

10. The Commission and the General Assembly, however, adhered to the old, and highly questionable, postulate of the necessary parallelism between international and internal law, with the result that the Commission now had to draw up a draft statute for an international criminal court. It was from that perspective, which he regretted, but to which he could not object, that the Special Rapporteur had identified the main problems involved in the creation of such a court and had proposed a possible solution in each case.

11. The first major set of problems concerned the institution as a whole. The Special Rapporteur had been right to call the court "criminal" and not penal, for what was at issue were indeed crimes under international law. Had it been otherwise, the national courts would have sufficed. Also, if there had to be an international criminal court, it would be advisable for it to operate within the framework of the United Nations, even though, contrary to what the Special Rapporteur apparently believed, an independent court, created under a treaty and administered by the States parties to that treaty, was highly conceivable. If status as a United Nations organ was preferable, it was because it would facilitate the operation of the court and, in particular, its financing and the statute would enhance its moral authority.

12. That approach, which he endorsed, raised the fundamental problem of the method of creation of the court. If it was to be an organ of the United Nations, its creation would require either an amendment of the Charter of the United Nations, which did not seem very likely, or a resolution of the General Assembly or the Security Council (Arts. 22 and 29 of the Charter, respectively). Its joint creation, under similar resolutions from the two bodies, would be the best solution and there was nothing to prevent that under the terms of Articles 10 and 24 of the Charter. If that solution were not adopted, it would then be necessary to fall back on a treaty, in which event the court would no longer be an "organ of the United

⁶ See *Yearbook*... 1992, vol. II (Part Two), document A/47/10, annex.

⁷ See Security Council resolution 808 (1993) of 22 February 1993.

⁸ Document S/25704, annex.

Nations''. It would then be an organ that cooperated with the United Nations, but was composed of and controlled by the States parties to its statute. Apart from the material problems that situation would raise, the second solution would divest the court of its universal character when it claimed to sit in judgement on behalf of mankind.

13. The second major category of problems raised by the establishment of an international criminal court was that of jurisdiction and applicable law. On that most important and most difficult question, he did not endorse the choices made by the Special Rapporteur and, in particular, article 4 of the proposed draft statute dealing with applicable law. The draft statute of the international tribunal⁹ did not include any article on that point and confined itself to defining the crimes to be prosecuted. That would be the wisest course to adopt. In any case, it was essential not to refer by name to any convention, a procedure whose drawbacks were described in the report of the Committee of French Jurists.¹⁰ He was therefore of the opinion that article 4 should be deleted and replaced by one or more articles listing and briefly defining the punishable crimes. That article or set of articles would, as it were, define the "maximum" jurisdiction of the court, which all States would not necessarily be required to accept in its entirety. It was quite possible that States might be invited to indicate the crimes or categories of crimes in respect of which they accepted the jurisdiction of the court, or those in respect of which they rejected it. In accepting the jurisdiction of the court, States would also be free to say whether they understood that jurisdiction to be exclusive or concurrent with that of national courts. In practice, such a system would probably have the same results as might be expected of the application of article 5, paragraphs 3 and 4, as proposed by the Special Rapporteur.

14. With regard to the problem of jurisdiction *ratione personae*, he saw no reason why the jurisdiction of the court should be made subject to the agreement of two States, that of which the accused was a national and that in whose territory the crime had been committed. It should be enough for the State complaining of a crime to express the wish that its perpetrator should be brought before the court, which would obviously be free to institute proceedings or not to do so.

15. Judgement by default was a serious problem, in connection with which the Special Rapporteur was right to say in his commentary to article 27 that the solution of not permitting proceedings by default "would be liable to paralyse the work of the court". That might well turn out to be the case of the international tribunal if the Secretary-General's draft was not amended on that point. The court should at least be allowed to issue an international arrest warrant in the event of the non-appearance of the accused, if only because of the arrest warrant's deterrent effect, and to publicize the indictment. The position adopted by most States on the problem of the jurisdiction of the international tribunal was rather disturbing in that regard because, unless it was at least agreed that the indictment should be made public, there was a risk—whether the court was an ad hoc or a permanent one—of

setting up an illusory court with no means of carrying out the task entrusted to it, and that would probably discredit the very idea of an international criminal court for quite some time.

16. The provisions proposed by the Special Rapporteur on the composition and functioning of the court called for many comments, but they related to points of detail. He would simply say that the concern for flexibility that had guided the Special Rapporteur could be taken much further. The question of hearings would also call for comments that were only of minor importance.

17. Turning to two questions which were, in his view, much more important, namely, prosecution and the rules applicable to investigation and penalties, he said that, as far as the first was concerned, he was completely opposed to the system proposed by the Special Rapporteur in alternative A of article 25 (Prosecution), which made the State which brought a complaint before the court responsible for conducting the prosecution. He did, of course, share the "general concern to establish a small body that would not be too costly", as referred to by the Special Rapporteur in his commentary to article 25, but the concern to save money would not justify neglecting the most fundamental principles of the neutrality and impartiality of the courts. The existence of a "filter" between prosecution and judgement would, if anything, be even more essential in an international than in a national context. On the contrary, States and, possibly, international organizations, as well as non-governmental organizations or some of them, should be free to bring cases before the court. In that case, however, applications for prosecution would have to be reviewed by an impartial body—a prosecutor or, better still, a collegiate body—that would be responsible both for instituting proceedings, where necessary, and for investigating the case. Otherwise, any type of abuse might be possible.

18. As to the rules applicable to investigation and penalties, in particular, the law applicable to certain aspects of the investigation dealt with in article 26 and the penalties referred to in article 34, he was sceptical about the Special Rapporteur's solution of referring to national systems of criminal law. The court being envisaged was an international court which would be called upon to try, on the basis of international law, individuals accused of having committed international crimes. Why then refer to a national law, whatever it might be? True, as the Special Rapporteur pointed out in his commentary to article 34, the principle *nulla poena sine lege* required that provision be made for the penalties imposed upon a guilty person before the incriminating acts had been committed. But the result would be the same if the statute itself laid down the applicable penalties, without, moreover, going into too much detail: it would be enough for the statute to establish the general framework, such as imprisonment, but certainly not the death penalty, leaving it to the court to decide for how long. To his knowledge, there was no rigid scale of penalties in States and the courts always had some measure of discretion.

19. What was true of the bringing of the charge was also true of penalties: the principles *nullum crimen sine lege* and *nulla poena sine lege* had to be respected, but they would be if both the crimes and the penalties were provided for in the statute. Any other solution would, in

⁹ Ibid.

¹⁰ Document S/25266, para. 61 (b).

his view, be incompatible with the international character of the court and, in that connection, he quoted the position adopted by the Committee of French Jurists in paragraph 52 of the report mentioned in paragraph 13 above: "... the essential starting point would seem to be the international character both of the crimes themselves and the institution which will be entrusted with the task of judging them. Accordingly . . . it is unthinkable that the Tribunal should apply, both as regards procedure and as regards law, national rules that are specific to a given State or States".¹¹

20. In the same context, he requested the Special Rapporteur to clarify the provision in article 28, paragraph 2 (b), stating that "The accused does not enjoy immunity from prosecution". It seemed to him that under international law, no one was exempt from prosecution if he had committed an international crime, especially a crime against the peace and security of mankind.

21. The proposal to set up a working group on a draft statute for the court would be the best way of complying with the General Assembly's instructions, whatever reservations he might continue to have as to their merits.

22. Mr. AL-BAHARNA said that he welcomed the draft statute proposed by the Special Rapporteur, but was not sure, in view of the topic's grave political significance, whether the time for such a draft had come. It was true that the Commission had already discussed the topic, without, however, reaching a consensus on the core elements of the statute, and that recent events in the Balkans, and especially the genocidal acts perpetrated there, demonstrated the need for a machinery for the trial of international crimes.

23. As a general comment, he noted that the draft statute included several provisions which were somewhat tangential to the actual machinery of the statute. For example, articles 20 (Solemn declaration), 21 (Allowances, emoluments and salaries) and 32 (Minutes of hearings), could best be included in the rules of the court. In connection with articles 12 (Appointment of judges) and 17 (Loss of office), he considered that the proposed system was not a sufficient guarantee of the independence and impartiality of the judiciary—and those were essential requirements which should be enshrined in the statute of the court.

24. As to some of the salient features of the draft, one of the first points to be considered was whether the court should be a judicial organ of the United Nations, as proposed in article 2. The Working Group on the question of an international criminal jurisdiction had stated in paragraph 76 of its report¹² that: "In the first phase, at least, it is not necessary to seek to do this [associate the court with the United Nations] by formally incorporating the court within the United Nations structure". While he did not share that view, he would have liked the alternatives to that proposed by the Special Rapporteur to be put before the Commission, thus enabling it to choose advisedly. He personally would prefer a strong link between the United Nations and the court; the court should

be an instrument of the United Nations, if not one of its organs. He would come back to that point later.

25. Bearing in mind the need for cost-effectiveness, the Special Rapporteur proposed in alternative A of article 25 (Prosecution) that the State which brought a complaint before the court should assume responsibility for conducting the prosecution. That proposal would, however, defeat the purpose of establishing an international criminal court because States might be influenced by considerations of political expediency rather than of justice in prosecuting offenders. Notwithstanding the cost factor, he preferred the "more classic" procedure proposed in alternative B of article 25, which entrusted prosecutions to a prosecutor general.

26. As to the nature and character of the court, the Working Group had recommended in paragraph 46 of its report that "a court should not be a full-time body, but an established structure which can be called into operation when required". The Special Rapporteur proposed in article 12 (Appointment of judges) that judges should be appointed by the States parties to the statute. While such a procedure might be suitable for an institution like the Permanent Court of Arbitration, he doubted whether it was apt for an international criminal court, even if the latter were not a full-time body. He therefore suggested that the Commission should consider the alternative of judges being elected by the General Assembly and the Security Council or only by the General Assembly. The elective process would contribute to the independence and impartiality of the judiciary while strengthening the links between the United Nations and the court.

27. Noting that, in paragraph 3 of article 15 (Composition of a chamber of the court), the Special Rapporteur proposed that "The President or, in his place, the Vice-President should select the judges to sit in the chambers of the court from the list referred to in article 12", he found that such power would be excessive and somewhat undemocratic, since, in the scheme of things, the court would come into being only after the President had exercised that power. In that context, it should be recalled that the Working Group had suggested in paragraph 50 of its report that "when a court was required to be constituted, the bureau would choose five judges to constitute the court"; and, furthermore, that in Article 26 of the Statute of the International Court of Justice, paragraph 2 provided that "the number of judges to constitute (. . .) a chamber shall be determined by the Court with the approval of the parties". Those examples might be useful in broadening the basis of article 15, paragraph 3, of the draft statute. Incidentally, a nine-member chamber would be too large and unwieldy; five judges, as recommended in the Working Group's proposal, would be better.

28. The Special Rapporteur admitted to taking a "restrictive" view of the applicable law in proposing article 4 (Applicable law), which read: "The court shall apply international conventions and agreements relevant to the crimes within its jurisdiction (as well as general principles of law and custom)", adding in the commentary to that article that it had been his intention "to remain faithful to the Working Group". However, the Special Rapporteur did not appear to have taken into account the Working Group's suggestion in paragraph 109 of its report that "it may be necessary to add references to other

¹¹ Ibid., para. 52.

¹² See footnote 6 above.

sources such as national law, as well as to the secondary law enacted by organs of international organizations, in particular the United Nations . . .'. He would like the Commission to broaden the sources of applicable law in conformity with the Working Group's recommendation and, in any case, considered that the brackets in article 4 should be removed.

29. Article 5 (Jurisdiction) was undoubtedly the most important. The Working Group stated in paragraph 4 (d) of its report that the court "should not have compulsory jurisdiction"—a realistic position in the present world situation—and the Special Rapporteur apparently held that view as well. Although he himself agreed with the main thrust of article 5 that the jurisdiction of the court was based on the principle of consent, he recalled that some multilateral treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, conferred jurisdiction on ICJ in respect of disputes arising out of their application. The question was whether such jurisdiction should be vested in the proposed court. If the answer was affirmative, a new provision recognizing the jurisdiction of the court on the basis of pre-existing multilateral conventions should be added to article 5.

30. In the introduction to the report, the Special Rapporteur also stated that "the jurisdiction of the court is not exclusive, but concurrent, each State being capable either to judge itself or to relegate a defendant to the court". That comment was in keeping with the principle that jurisdiction was based on consent, but he was afraid that it was likely to result in confusion, if not in discord. It meant that the same international crime would be tried differently depending on whether it was brought before a national court or referred to the international criminal court, owing to the application of varying procedures and penalties. The Commission should therefore consider devising a method to minimize the detrimental effects of the dual system for the trial of international crimes. The ideal would, of course, be to create machinery for exclusive international criminal jurisdiction. Even if that solution was not practicable for all international crimes, it should exist at least in respect of aggression, genocide, war crimes and apartheid.

31. Article 28 (Handing over an accused person to the court) failed to provide a solution in cases where an accused person had fled the territory of the complainant State. In his commentary to the article, the Special Rapporteur stated that the complainant State should obtain the extradition of the accused, but that was not a satisfactory position. The Commission should consider providing for the obligatory handing over of the accused in cases brought before the court. He agreed with the Special Rapporteur, as stated in the commentary, that the court would not be competent to conclude extradition agreements, but it could be authorized by its statute to request the Security Council to secure the surrender of the accused.

32. The Special Rapporteur proposed in article 34 (Penalties) that the court could, pending the adoption of an international criminal code, apply the penalties provided for by the criminal law of the State of the perpetrator, of the complainant State or of the State where the crime had been committed. While that solution was in

principle in keeping with the recommendation of the Working Group that sentencing should be based on the applicable national law, it was far from perfect because it did not indicate what particular legal system was to be chosen and how. As penalties were a core aspect of any criminal law, a more satisfactory provision than article 34 was called for. He had mixed feelings about the words in brackets in article 34: "[However, the death penalty shall not be applicable.]". While he would like the draft statute to adopt a progressive approach to capital punishment, he was sceptical about including provisions that might work against broad acceptance of the statute. It might be more prudent to leave out the words in brackets.

33. With regard to remedies, the Special Rapporteur proposed two alternative texts for article 35, the first dealing only with revision and the second with appeal and revision. As the Special Rapporteur noted in his commentary to that article, the opinion of the Commission on the subject was divided. Since the question of appeal and revision was related to the issue of jurisdiction, however, the Commission could not consider the possibility of appellate jurisdiction until it had solved the problem of jurisdiction. He therefore suggested that the Commission should discuss article 35 only after it had decided the issue of jurisdiction. The Nürnberg precedent declaring the Tribunal's judgement as final was not relevant in the present case.

34. Mr. ROSENSTOCK said that failure to respond to Mr. Arangio-Ruiz's comments on the establishment of an international tribunal should not be interpreted as agreement or disagreement with those comments. Rather, it should be construed as a desire not to distract the Commission from the task before it by venturing to comment at the present stage on matters that were being considered by another fully competent forum, namely, the Security Council. As was clear from the report of the Secretary-General,¹³ in creating an ad hoc tribunal, the Security Council was acting within its mandate under the Charter to respond appropriately to a perceived need.

35. Mr. THIAM (Special Rapporteur), replying to a comment by Mr. Pellet, said that, by indicating in article 28 that a State requested to hand over an accused person to the court must ensure that "the accused does not enjoy immunity from prosecution", he had merely been referring to a conclusion reached by the Working Group. Such a provision was not at all unusual: there were persons such as diplomats who benefited from immunity from prosecution and who could not be prosecuted in the country to which they were accredited, but who could be returned to their country of origin for prosecution. If a diplomat enjoyed immunity from prosecution, he could not be arrested and handed over to the court. The advisability of the provision might be open to question, but the provision itself was perfectly understandable. Similarly, if the court requested a person's transfer, the national judicial authorities first had to ascertain that he had not already been tried.

36. Mr. KOROMA said that he did not see why, as Mr. Pellet had said, a permanent court would not play the same role as an ad hoc tribunal such as the one proposed

¹³ See footnote 8 above.

in the case of the former Yugoslavia. He himself thought that a permanent court might fill the gaps left by an ad hoc court and meet very specific needs. Mr. Pellet had also been surprised that an international court might rely on national laws to sentence persons responsible for international crimes. Where international instruments could not be invoked to try the perpetrator of a particularly serious international crime, however, it was quite normal to refer to the criminal law of the State of which he was a national. Contrary to what Mr. Pellet had said, an international criminal court would not duplicate the efforts of existing bodies responsible for applying international instruments because it would try only the most serious crimes. The establishment of the court would thus not necessarily lead to the disappearance of such bodies as the Human Rights Committee, which would continue to be useful. Although it was true that the proposed international criminal court must not be a replica of the Nürnberg Tribunal, it was also true that some of the Nürnberg principles¹⁴ remained valid and that the Commission could rely on them in elaborating the Code of Crimes against the Peace and Security of Mankind.

37. Mr. Sreenivasa RAO said he was aware that, as other members of the Commission had pointed out, the general debate on the establishment of an international criminal court was now finished and it was time to move on to specific proposals. That was the task of the Working Group and the Commission would in due course consider the results of its efforts. He nevertheless wished to make a few comments on some general ideas which had been expressed by a number of speakers, including Mr. Pellet, Mr. Yamada and Mr. Calero Rodrigues, and with which he fully agreed.

38. Provision should be made for a certain amount of flexibility in the manner in which the court was to be set up so that most States could become parties to the statute and still have an option to express certain reservations. The role of the prosecuting authority was a very important element. The Prosecutor could serve as a bridge between the court and the Security Council, particularly in cases of aggression, so that the court should not be used to bypass a potentially difficult political situation.

39. The relationship between national jurisdiction and international jurisdiction was a vital matter that must be considered very carefully. The inherent jurisdiction of States when crimes were committed in their territories was a fundamental principle that must not be undermined. The need to give precedence to territorial jurisdiction in a wide range of offences could not be underestimated, even in the process of establishing a permanent international court. At all events, that was the best solution in the interim period until the permanent court had become an acceptable institution with a well-defined structure and a well-defined jurisdiction of its own. The existing system, which, despite its imperfections, had proven its usefulness, should not be done away with and replaced by an institution that would inevitably have to evolve over time. On the contrary, the old system must be preserved, but that did not preclude building another

system, which, once solidly established, would one day supplant the earlier institution. That was an important point that had not received the attention it deserved.

40. He agreed with the members of the Commission who had emphasized the need for references to national law where there were no established norms and principles in international law relevant to a particular case. National law was the standard that should be applied, particularly in the case of penalties, because none of the international conventions to which reference might be made provided for penalties. The need to apply that principle could not be overemphasized.

41. In conclusion, he pointed out once again that, while a general debate should certainly not be reopened at the present stage, the members of the Commission must be free to state and exchange general views, either in plenary or in the Working Group, because the question of the establishment of an international criminal court raised a great many concerns, of which not all had yet been expressed. The purpose of the exercise was, after all, to establish a system that took account of different cultural conceptions, backgrounds and needs so as to ensure its impartiality and objectivity and respect for natural justice.

42. The CHAIRMAN, speaking as a member of the Commission, said that the eleventh report of the Special Rapporteur should enable the Commission to make considerable progress in drafting the statute of the future international criminal court. A reading of that report and of the report by the Working Group¹⁵ showed how important it was to preserve the judicial guarantees enjoyed by any person accused of a crime. Establishing the court by treaty should be an adequate means of giving it the necessary strong foundation it would need. As Mr. Pellet had pointed out, it was not easy to make a United Nations body of a court set up by treaty, but it was nevertheless important for the international court to be linked to the United Nations in one way or another, so that it would represent the international community as a whole and enjoy the same prestige and authority as the United Nations.

43. With regard to the question of jurisdiction, including jurisdiction *ratione personae*, he said that, while he endorsed the principle of jurisdiction limited to individuals, he did not agree with the idea that the court's jurisdiction should be subordinated to the agreement of the State of which the individual was a national and of the State in whose territory the crime had been committed. The court should be able to exercise its jurisdiction in two ways: either in the presence of the accused and with his participation, or by default. It was obvious that, in the first case, the agreement of the State directly concerned, namely, the State that was handing the accused over to the court, would be necessary, and that would limit the court's freedom of action. The court must therefore be empowered to judge by default; in view of the moral and legal authority it would have, that would enable it to reach decisions that would have a definite political weight. It would also have the advantage of bringing to the attention of world public opinion facts of which it had previously had only partial knowledge. In

¹⁴ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (see *Yearbook* . . . 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127). Text reproduced in *Yearbook* . . . 1985, vol. II (Part Two), para. 45.

¹⁵ See footnote 6 above.

order to avoid any conflict with the provisions of certain international instruments, particularly the International Covenant on Civil and Political Rights, an accused person being tried before the court must be given all the necessary judicial guarantees. It might also be necessary to foresee the possibility of not automatically applying the penalty imposed if the accused subsequently agreed to appear before the court. The sentence could then be reviewed in his presence and confirmed or rejected, as appropriate. Such a system that did not require the agreement of any given State would help to enhance the court's effectiveness and its authority in the eyes of the public.

44. He endorsed article 8 on the permanent nature of the court's jurisdiction but did not agree with the composition of the court as proposed by the Special Rapporteur. In his view, the court should be made up of only a small number of judges—nine or eleven—who would be appointed by the General Assembly rather than by States and who would have no permanent function, but would be convened by the President. Only the officers of the court would operate on a permanent basis: they would consist of the President and the Vice-President(s), to be elected by the panel of judges, as well as the Registrar and the Prosecutor General, and would be assisted by a small staff.

45. Concerning the prosecuting authority, he preferred alternative B of article 25. There must be a prosecutor representing the international community, who would act entirely independently and beyond any political considerations. The States concerned also had to be able to intervene in the criminal procedure, as provided in article 24 (Intervention).

46. Speaking as Chairman, he recalled that Mr. Yankov (2299th meeting) had proposed that, in line with paragraph 6 of General Assembly resolution 47/33, the Working Group on the question of an international criminal jurisdiction should henceforth be called the Working Group on a draft statute for an international criminal court. If he heard no objection, he would take it that the Commission adopted that proposal.

It was so decided.

Mr. Mikulka took the Chair.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/446, sect. D, A/CN.4/450,¹⁶ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR

47. Mr. BARBOZA (Special Rapporteur) introduced his ninth report (A/CN.4/450) which contained the third version of a set of draft articles on prevention. He recalled that some aspects of the question had already been dealt with in the fifth, sixth, seventh and eighth reports.¹⁷

¹⁶ Reproduced in *Yearbook*... 1993, vol. II (Part One).

¹⁷ The four previous reports of the Special Rapporteur are reproduced as follows:

48. The introduction to the ninth report, made up of sections A and B, dealt with the mandate of the Special Rapporteur and the nature of obligations of prevention respectively. The Commission had assigned the Special Rapporteur a very clear mandate: to confine his study to activities involving risk, namely, activities which might cause transboundary harm as a result of accidents due to a loss of control, and to start with the articles on obligations of prevention. The question of activities "having harmful effects", or, in other words, which caused transboundary harm in their normal operation, would be discussed after the completion of the work on activities involving risk.

49. In section B of the introduction, he dealt with the main features of the obligations of prevention, defined essentially as obligations of due diligence imposed on the State; that meant that the State must make an effort in good faith to prevent any transboundary harm. The State would thus be fulfilling its obligation of vigilance if it applied reasonable administrative measures to ensure that the precautions imposed by its law on operators were observed.

50. The articles proposed in the ninth report, with the exception of article 20 *bis* (Non-transference of risk or harm), had all originated in the eighth report because they were based on the nine articles that had been placed in the annex on non-compulsory rules.

51. In the previous reports, the chapter on "prevention" had come immediately after article 10, that is, after the articles that had been referred to the Drafting Committee.¹⁸ He considered that those first 10 articles were not affected by the directive adopted by the Commission at its forty-fourth session on the recommendation of the Working Group¹⁹ and could thus apply without modification to activities involving risk. In the current state of affairs and subject to the opinion of the Drafting Committee, the articles on prevention would therefore begin with article 11.

52. The presentation adopted in the ninth report could serve as a starting-point for drafting new articles. Each of the articles that had been placed in the annex in the eighth report had been assigned to a section, at the head of which the text of that article was transcribed and amended where necessary to purge references to activities having harmful effects. The comments made during the debate in the Commission at its previous session and in the Sixth Committee, arguments contained in earlier reports and excerpts of international instruments and ar-

Fifth report: *Yearbook*... 1989, vol. II (Part One), p. 131, document A/CN.4/423;

Sixth report: *Yearbook*... 1990, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1;

Seventh report: *Yearbook*... 1991, vol. II (Part One), p. 71, document A/CN.4/437;

Eighth report: *Yearbook*... 1992, vol. II (Part One), document A/CN.4/443.

¹⁸ For texts and summary of discussion, see *Yearbook*... 1988, vol. II (Part Two), pp. 9 *et seq.* For the revised articles proposed by the Special Rapporteur, which were reduced to nine, see *Yearbook*... 1989, vol. II (Part Two), p. 84, para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in his sixth report, see *Yearbook*... 1990, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add.1; for the text of the proposed articles, *ibid.*, pp. 105-109.

¹⁹ See *Yearbook*... 1992, vol. II (Part Two), p. 51, para. 349.

ticles of doctrine underpinned the texts of the new, re-numbered articles at the end of each of the sections. The new instruments cited included the Convention on the Transboundary Effects of Industrial Accidents, the Convention on Environmental Impact Assessment in a Transboundary Context and the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,²⁰ which dealt mainly with States' obligations of prevention. The Rio Declaration on Environment and Development²¹ was also quoted in support of some of the new provisions.

53. Article I of the annex (Preventive measures), into which a text on pre-existing activities was incorporated, had been split into four and renumbered as articles 11 to 14. Article II (Notification and information) had been replaced by articles 15 and 16. Article III (National security and industrial secrets) had become article 17. Articles IV and V were not dealt with in the ninth report, as they related to activities with harmful effects. Article VI (Activities involving risk: consultations on a regime) had become article 18 after undergoing slight modifications. Article VII (Initiative by the affected State) had become article 19 (Rights of the State presumed to be affected); apart from several drafting changes, its content had not been altered.

54. He had intentionally omitted article VIII of the annex (Settlement of disputes). The settlement of disputes could relate to two types of situations. When disputes arose during negotiations, they were usually the result of diverging interpretations of facts or consequences of the activity in question and they could be rapidly settled by fact-finding experts or commissions. In such cases and given the nature of the questions involved, a non-binding procedure of that type might be acceptable to States. As far as the interpretation or application of articles was concerned, however, Governments were likely to be reluctant to accept third-party settlement. He had therefore preferred to postpone the consideration of the first type of dispute until he had submitted his proposals on a general provision for the settlement of disputes.

55. Article IX of the annex (Factors involved in a balance of interests) had been reproduced unchanged as article 20, pending the Commission's decision on where it should be inserted. Article 20 *bis* (Non-transference of risk or harm) could either be placed in the chapter on principles or left in the one on prevention, to which it primarily related.

56. Lastly, he had focused on the "polluter pays" principle, which had not yet been considered in the treatment of the topic. On reflection, he believed that the Commission should examine the subject later, in the context of the chapter on principles. Unlike the principle of the non-transference of risk or harm, which dealt mainly with measures of prevention, the "polluter pays" principle had gradually expanded beyond the framework of prevention to focus also on costs, for example those incurred in connection with compensation.

57. In view of the opinions expressed in the Commission on the very general nature of the chapter on prevention, he believed that the proposed texts, which would be referred to the Drafting Committee at the end of the current debate, were sufficient. Another article which should also go to the Drafting Committee was article 10 (Non-discrimination), the provisions of which were covered in paragraphs 29 and 30 of the sixth report,²² and which the Commission had accepted without much comment.

58. Mr. KOROMA commended the Special Rapporteur on his clear presentation but said that he was disappointed that, in deciding to focus only on measures of prevention relating to activities involving risk, the Commission had taken a step backwards, whereas, in the seventh report²³ and during the debate in 1989, it had been decided, it seemed to him, that it would continue its consideration of activities having harmful effects. For him, that raised three questions. First, when did activities involving risk become harmful or wrongful? Secondly, where did harmful effects fit into the draft articles, if, as the Special Rapporteur had said, the proposed articles were sufficient for the drafting of a general convention? Thirdly, he wished to know whether the Special Rapporteur had provided for a separate regime on the settlement of disputes for activities having harmful effects. For his part, he did not see how the Special Rapporteur intended to dovetail activities involving risk and activities having harmful effects. For example, how would the principle of the balance of interests governing compensation be applied to activities involving risk if those activities had no harmful effects? Lastly, referring to section B of the introduction of the ninth report, which stated that "the State will not, in principle, be liable for private activities in respect of which it carried out its supervisory obligations" was, in his view, contrary to the general principles of international law and the progressive development of that law.

59. Mr. BARBOZA (Special Rapporteur) said he admitted that the approach adopted in the ninth report was a step backwards to some extent, but, although the Commission had decided, for the time being, to consider only activities involving risk, those were still activities that could cause harm. Consequently, if the Commission first designed a regime of prevention for transboundary harm, it would then have to tackle the problem of liability and mechanisms for bringing that liability into play when harm occurred. In other words, a regime of prevention and liability was to be established that included the obligation of compensation.

60. With regard to section B of the introduction of the report, it was true that, if the State complied with its obligation of prevention by adopting the necessary legislation and by supervising its application in order to prevent accidents that occurred as part of the activity of private operators from causing transboundary harm, it would not in principle be bound by any obligation. In some cases, however, the State might assume subsidiary liability, for example, if the operator or his insurance was unable to produce the funds for making good the

²⁰ E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

²¹ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 3-8.

²² See footnote 17 above.

²³ *Ibid.*

damage caused, as provided for in some conventions in the nuclear field.

61. Mr. PELLET said he disagreed that the Commission had taken a step backwards in deciding to focus on prevention. The debate of the previous year had shown that prevention was the best line of attack for examining the topic. In his ninth report, the Special Rapporteur had systematized the old texts, producing a coherent result. Whether in plenary or in the Drafting Committee, the Commission must confine itself to the approach adopted if it did not want to make the subject incomprehensible once again.

62. Mr. VERESHCHETIN said that he agreed with Mr. Pellet, commended the Special Rapporteur on the quality and clarity of his report and noted that, although the Commission had decided in 1992 to break the subject down into several parts because it was so difficult, that did not mean that each aspect must be considered separately. Focusing at present on preventive measures for activities involving risk did not rule out examining preventive measures relating to activities that could, de facto, have harmful effects, or studying financial liability. At present, however, the Commission must confine itself to prevention and decide, when the time came, whether to continue the discussion in plenary or to refer most of the articles to the Drafting Committee.

63. Mr. THIAM said that, if the topic was not to be confined to prevention, it would be necessary to decide what the next stages would be because it was essential to have an overall plan.

64. Mr. BARBOZA (Special Rapporteur) stressed the need to follow the order of work indicated in the report. The first 10 articles already referred to the Drafting Committee might be looked at again quickly in the light of the Commission's decision to deal only with preventive measures in respect of activities involving risk and perhaps simply propose deletions or amendments. The Drafting Committee should, however, focus primarily on the wording of the articles on prevention. The Commission must in any event take care not to reopen the debate and confine itself for the time being to prevention, reserving the right to take up liability at a later stage, if only to do justice to the title of the topic.

The meeting rose at 1.10 p.m.

2301st MEETING

Friday, 28 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,² A/CN.4/449,³ A/CN.4/452 and Add.1-3,⁴ A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. THIAM (Special Rapporteur) thanked the members of the Commission for an interesting and instructive discussion, which proved very helpful. In summing-up, he wished to focus on three main points: the relationship between the court and the United Nations; jurisdiction and the applicable law; and the functioning of the court.

2. There was general agreement on the need for a link between the court and the United Nations. Indeed it was hard to see how a court could function in disregard of the Organization. The court would need United Nations logistical support for its administrative functioning, for example in electing judges, and for financial matters. Yet regardless of those material questions, the fact was that the court would have jurisdiction in matters of direct concern to the United Nations, such as war crimes and crimes against the peace and security of mankind. He asked how the court could rule on such questions without taking into account the Charter of the United Nations or the Security Council? Thus, although the Working Group might want to modify the wording of article 2 of the draft statute, some link between the court and the United Nations had to be maintained.

3. His initial proposal in a previous report had been that the applicable law should not be limited to agreements or conventions, but should also include the general principles of law, custom and even, in some cases, national law. The Working Group, however, had concluded that it should be confined to agreements and conventions. He did not agree; in such an area experiencing constant change, the Commission should not favour rigid codification. Some matters were not ripe, and it would be necessary to have recourse to national law. For instance, no appropriate formulation had yet been found for penalties, which varied greatly, depending on the State and the philosophy involved. Again, moral considerations had a great influence in determining what the penalties should be. If the court was to impose penalties and was to respect the principle of *nulla poena sine lege*, it would have to refer to a State's national law when it found that it was faced with a legal vacuum. He had proposed either the law of the State on whose territory the offence had been committed or of the State of which the accused was a national. He had no preference either way, but did not believe that national law could be ruled out systematically. In earlier proposals for a draft statute, it had in fact been envisaged that the court should apply the national law of a State in certain cases. It was gratifying to note that the Working Group had been rethink-

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook . . . 1993*, vol. II (Part One).

³ *Ibid.*

⁴ *Ibid.*

ing its position on that subject, because the previous day the draft articles proposed in the Working Group had repeated the text he himself had suggested two years earlier.⁵

4. With regard to the court's jurisdiction, there again, differences of opinion had emerged in both the Commission and the Working Group. Originally, he had proposed that the jurisdiction of the court should not depend on acceptance by certain States. Later, seeking to accommodate the objections raised by one member of the Commission, he had altered his proposal to make jurisdiction subordinate to acceptance by certain interested States. That proposal had in turn been criticized by other members, who argued that, on the contrary, it was out of the question for jurisdiction to depend on the agreement of the State of which the accused was a national. Actually, that possibility had been envisaged in the 1953 draft statute for an international criminal court.⁶ In his view, a court could not be created without taking into consideration the existence and jurisdiction of States. Some form of compromise had to be found, because the court must function with the agreement of States; otherwise, it would be paralysed from the outset. Perhaps jurisdiction could be dependent on acceptance by the State in whose territory the accused was found, for if the court were to try to judge the accused without such acceptance, it would constantly be judging by default, something that was hardly the best solution. Clearly, a number of divergences of opinion still had to be overcome.

5. In the matter of the organization of the court, the Working Group had hesitated as to whether the judges should be elected or appointed. As far as he was concerned, there was no great difference. Judges who were appointed were just as independent as those who were elected, provided they were afforded certain guarantees, for instance that they could not be removed or could not be sanctioned for the decisions they took. It was common practice in many States for the Executive to appoint judges, and yet those very same judges, acting independently, could issue summonses against the very ministers who had appointed them and could even institute proceedings against them. In the case of constitutional courts, judges who had been appointed could annul laws if they were unconstitutional. Thus, as long as they were guaranteed independence, it was irrelevant whether the judges were elected or appointed. Members of the Commission should not confuse the procedure for appointing arbitrators according to the statute of the Permanent Court of Arbitration with the appointment of judges by an international criminal court. In the case of the Permanent Court of Arbitration, the parties to the conflict chose arbitrators from a pre-existent list, whereas in the case in point, States parties to a dispute would not choose the judges who must have jurisdiction in the case. Objections had been raised to the use of the term "General Assembly of Judges" (art. 13), on the grounds that it might be mistaken for the General Assembly of the United Nations. He would point out that the term

"General Assembly" was in common use and the United Nations did not have a monopoly on it.

6. So far as the investigation procedure (art. 26), was concerned, he did not care for the French system, and proposed instead that the investigation should be carried out by the court itself, at the hearing. That was closer to the British system. If a case was too complex, the court might appoint a special committee from among its members to carry out the investigation. Some members of the Commission had disagreed, arguing that an investigating body must be established. He did not object, but such a body would not make for the small, flexible structure as called for by the Working Group. The system of the examining magistrate was unsatisfactory because he had too much power to make arbitrary decisions about the freedom of an individual; such a magistrate could sometimes even place a person in custody before having heard the case or having questioned him. If the investigation was to respect human rights, the powers of the examining magistrate had to be limited as much as possible, and another arrangement must be found which would prevent the judge from reaching his decision according to his mood, instead of in accordance with the law. Hence, such investigations should be carried out not behind closed doors, but in a public hearing. If the public hearing by the plenary court did not make any headway, the court could appoint an investigative committee from among its members, which could then report to the court on the case.

7. In article 25, he had proposed in alternative A that the complainant State, not a Prosecutor General, should be responsible for conducting the prosecution. Even in courts in which a Prosecutor General was responsible for prosecution, the complainant took part in the proceedings, pleading the case and bringing forward evidence in support of allegations made. Often, the Prosecutor General simply repeated the complainant's arguments. The sole difference was that the Prosecutor General could demand penalties, because he represented the prosecuting authority, whereas the complainant could simply demand compensation. He had therefore proposed alternative A because it was simpler. With reference to article 35 (Remedies), revision had been generally accepted, but no member of the Commission had been categorically opposed to appeal.

8. With regard to penalties, the matter had been appropriately discussed in connection with the draft Code of Crimes against the Peace and Security of Mankind, rather than the draft statute. Several proposals had been made, but none had been adopted yet. If the court were to be created without such a scale being envisaged, it would prove necessary to refer to an internal law. A State might conceivably stipulate application of its own national legislation as a condition for accepting the court's jurisdiction as to the applicable penalty.

9. In closing, he wished to express the hope that he had addressed the essential questions raised in connection with the jurisdiction and organization of an international criminal court.

10. Mr. BENNOUNA thanked the Special Rapporteur for the clarification he had given and said he had been unduly modest about the progress that had been made.

⁵ See *Yearbook... 1991*, vol. II (Part One), document A/CN.4/435 and Add.1, chap. II.

⁶ See *Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953 (Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645))*, annex.

11. One issue not touched on by the Special Rapporteur in his remarks was that of the means whereby the international criminal court would become a judicial organ of the United Nations. The commentary to article 2 referred to Security Council resolution 808 (1993) of 22 February 1993 establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991. However, the Commission had rejected the idea of creating the international criminal court on the basis of a resolution by a United Nations body. Therefore the establishment of the international tribunal could not be cited as a precedent.

12. The Commission had determined that the best way to establish the international criminal court was by international treaty. The commentary was virtually silent on that point, whereas it would have been useful to look into the ways and means of achieving that objective. ICJ, for example, was envisaged in the Charter of the United Nations. It might be argued that if the international criminal court was to be a judicial organ of the United Nations, it, too, should be mentioned in the Charter, but that would require an amendment.

13. An imaginative approach to the problem might be to explore the implications of the international criminal court not being set up as a United Nations body *per se*. The example of the specialized agencies could be used: like them, the court could have parallel yet cooperative relations with the United Nations on the basis of a treaty or agreement. Some such kind of relationship had to be established, if only for financial and administrative purposes—the appointment of judges, for example—for under the draft in its present wording that matter would be the responsibility of the United Nations.

14. Mr. VILLAGRÁN KRAMER said that Mr. Bennouna's remarks had prompted him, too, to put forward a number of considerations that might be useful.

15. He was deeply apprehensive about basing the future court's operations on an ad hoc mechanism like the one set up by the Security Council for the former Yugoslavia. In the absence of any interrelationship between an international criminal court and the United Nations, the Security Council might start to set up ad hoc tribunals whenever it thought such a course was necessary. The guarantees offered by more centralized structures were well established in contemporary concepts of international law. Decentralization ultimately led to oversimplification in international law, while the advantages of centralization were greater flexibility in the drafting and application of legislation at the international level.

16. He could not agree that, if something was not provided for in the Charter it could not be done. On the eve of the twenty-first century, lawmakers should not consider themselves tied by the conceptions of the law that had prevailed 50 years before. They should explore new avenues for determining the specific competence of judicial organs. A restrictive interpretation of such competence should no longer be used; rather, it should be decided whether inherent competence could be usefully applied in a given case. World public opinion seemed to have greater faith in flexible relations within the United Nations and in an associative arrangement between the Organization and national courts.

17. Mr. THIAM (Special Rapporteur) said he endorsed the ideas advanced by Mr. Villagrán Kramer about the relationship between the court and the United Nations. The two should not work independently; rather, they should be associated in a way that would be productive for the international community as a whole. He had not yet arrived at a definitive concept of the form that such cooperation could take: that would be a subject for collective appraisal by members of the Commission.

18. It was clear, however, that if the United Nations truly wanted an international criminal court, it would have to adopt the reforms required to enable the court to function without acting in breach of the Charter. The establishment of ad hoc tribunals by the Security Council was not always advantageous, and members of the Commission had indicated they did not want an international criminal court to be entirely dependent on the Council. The problem was to devise a way of ensuring close cooperation between the court and the United Nations, without establishing a relationship of subservience. Personally, he saw no problem in the international criminal court being an organ of the United Nations. ICJ was the primary judicial organ of the United Nations system, but not the only one.

19. Some members of the Commission wanted the court to be created by a resolution, while others preferred a treaty. He thought both roads could be taken. A General Assembly resolution could be adopted and, on that basis, a statute elaborated and a treaty signed by Member States to give it effect. In any event, priority should be given now to elaborating the statute of the court.

20. Mr. ARANGIO-RUIZ said he welcomed the views expressed by Mr. Bennouna and Mr. Villagrán Kramer about establishing the international criminal court on the basis of a treaty, something which was absolutely essential.

21. The commentary to article 2 referred to the international tribunal, but in his opinion no court of criminal justice could be established as a subsidiary body of the General Assembly or of the Security Council, nor could one be created by a resolution of either of those bodies, for they were not empowered under the Charter of the United Nations to take such steps. They could, as had been the case with the Administrative Tribunal, establish an administrative body—but not an international criminal court. He proposed to address that delicate matter at a later stage of the debate.

22. The CHAIRMAN announced that the meeting would be adjourned to enable the Working Group on a draft statute for an international criminal court⁷ to continue with its efforts.

The meeting rose at 11 a.m.

⁷The Commission, at its 2300th meeting on 25 May 1993, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called "Working Group on a draft statute for an international criminal court".

2302nd MEETING

Tuesday, 1 June 1993, at 10.20 a.m.

Chairman: Mr. Gudmundur EIRIKSSON

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)*

1. Mr. PELLET welcomed the fact that the Special Rapporteur had, on the whole, convincingly carried out his assigned task of submitting a report on prevention, but regretted that he had not taken that logic to its ultimate conclusion. Prevention was not, of course, the whole of the topic, but it was the topic's most firmly established part. States that conducted or authorized activities likely to cause harm in the territory of other States or in international areas were bound by an obligation of prevention, which consisted in doing everything in their power to prevent such harm from occurring or, if it did occur, to minimize the harmful effects. Such was the positive law, as already reflected in a relatively large body of case-law, starting with the arbitral award in the *Trail Smelter* case.² On the other hand, it did not seem possible to say that States had an obligation of reparation in the event of harm or that the time was ripe to develop the law in that direction. In his ninth report (A/CN.4/450), however, the Special Rapporteur did not entirely take account of that distinction between prevention and reparation; on several occasions, particularly in the Introduction and in draft articles 14 and 20 *bis*, he came back to the idea of prevention *ex post facto*. Perhaps that idea should not be ruled out altogether, but, in any event articles dealing with prevention *ex post* would have to be separate from those dealing with prevention *ex ante*, which was the only genuine prevention. In that connection, he was surprised by the reaction of the members of the Commission who, following the introduction of the ninth report, had said they regretted that the document dealt only with the prevention of activities involving risk, since prevention of an activity not involving

risk *a priori* was not warranted and, if harm had already occurred, the problem was one of reparation or mitigation of harm rather than one of prevention.

2. He did not agree with Mr. Bennouna's view that "acts not prohibited by international law" did not mean "lawful acts".³ The principle of national sovereignty entailed a presumption of lawfulness of acts performed by the State on its territory. Accepting Mr. Bennouna's view would also mean transferring the problem from the topic under consideration to the topic of State responsibility.

3. In that connection, he thought it would be useful to recall the two different meanings of the word *responsabilité*. In the sense of "responsibility", it referred to the mechanism that could lead to reparation, but, in the sense of "liability", it meant being liable for a person, a thing or a situation. In the case of activities conducted in the territory of a State, a distinction had therefore to be drawn between, on the one hand, unlawful activities for which States were responsible within the first meaning of the term and which came under the draft articles on State responsibility⁴ and, on the other hand, activities which were not prohibited, and therefore not unlawful *a priori*, for which States were also "liable" within the second meaning of the term, the first consequence of such liability being the obligation to prevent transboundary harm. The statement made in the Introduction of the ninth report that prevention did not form part of liability was thus very much open to discussion. Quite to the contrary, prevention was at the very heart of liability and it was because the State was liable for activities conducted in its territory that it had the legal obligation to prevent the transboundary harm that might result from them. That principle was so important that it might be worthwhile stating it formally at the beginning of the articles on prevention. Article 8 of the draft⁵ did, of course, set forth an obligation of prevention, but without linking that obligation to *responsabilité* in the sense of "liability".

4. It was generally regrettable that, in his ninth report, the Special Rapporteur, had simply reproduced the technical draft articles he had submitted in 1992 without providing an overall picture of the obligation of prevention, although he quite rightly recalled that several provisions contained in his earlier reports under the headings "General Provisions" and "Principles" were also relevant to issues of prevention.⁶ If the Special Rapporteur had extracted the necessary elements from those provisions, he could have submitted a homogeneous whole on prevention that could have formed the first part of the draft articles, possibly to be followed by further parts on reparation and on the settlement of disputes. His own conclusion was thus that most of the draft articles submitted by the Special Rapporteur should be referred to the Drafting Committee, although he hoped that the Drafting Committee would consider those draft articles and the elements of earlier draft texts referred to it with a

³ See *Yearbook*... 1992, vol. I, 2271st meeting, para. 18.

⁴ For a historical account of the draft articles on State responsibility, see *Yearbook*... 1991, vol. II (Part Two), paras. 302-307.

⁵ For the texts of the draft articles, see *Yearbook*... 1990, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add. 1, annex.

⁶ Document ILC(XLV)/None No.4, of 21 May 1993.

* Resumed from the 2300th meeting.

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

view to preparing a full and consistent set of draft articles on prevention.

5. Articles 11 to 14 were an improvement over article I of the annex, which derived from the former article 16⁷ dealing in a single provision with the separate problems of authorization, conditions for authorization and assessment. There was still the question of the order in which those problems should be tackled, since the authorization to conduct activities involving risk could be given only after the assessment of the risks, if possible in cooperation with the other States concerned. It would therefore not be desirable for the article on authorization to come first.

6. With regard to article 12, he proposed that the words "order an assessment to be undertaken" should be replaced by the words "undertake an assessment", since the prevention of major risks was part of the prerogatives and responsibilities of the State.

7. It was at that stage, in other words, when assessing transboundary effects and before the authorization was given, that it would be logical for the State having liability to enter into consultation with the other States concerned ("concerned" rather than "affected", since the activities in question involved risk), as provided for in article 15 in the form of the obligation to notify and inform. In connection with that article, he continued to be sceptical about the possibility of imposing any obligation at all on "an international organization with competence in that area" and even about whether such organizations should be referred to, except where, like the International Seabed Authority, IMO or ICAO, they dealt with areas outside the jurisdiction of States. He also had some reservations about article 15, subparagraph (d), because it was up to each State to decide who should be informed and how.

8. In his view, article 18 on prior consultation was unbalanced. On that point, the Special Rapporteur had implicitly been working on the basis of a presumption of wrongfulness, whereas the State of origin was liable for an activity not prohibited by law and its decisions therefore had to be presumed to be lawful. Requiring "mutually acceptable solutions" was thus going much too far. The State of origin naturally had to listen to what the other States had to say, but it alone had to take the final decision, possibly taking account of the "factors involved in a balance of interests" referred to in article 20. Only the principle of taking account of the interests of other States and of the international community should be included in the draft and a non-exhaustive list of those factors should be included in the commentary.

9. In his view, the problem of presumption was fundamental because the State hypothetically had the right to conduct or authorize the activities in question, but, since there was also hypothetically a risk of transboundary harm, that right had to be exercised with circumspection and caution and the vigilance of the State had to be exercised both before the authorization was granted and afterwards, when the operator began and continued his activities. He was therefore inclined, although he realized that what was involved was the progressive development of the law, to make provision for States not to

encourage, as provided in article 14 (Performance of activities), but to require the use of insurance.

10. Having consulted, informed in good faith, assessed and imposed the necessary preventive measures, including insurance, the State should be able to authorize the activity without the potentially affected States being able to prevent it from doing so, contrary to what article 18 implicitly provided. The point was not to find mutually acceptable solutions, but to authorize the conduct of a lawful activity with a "lesser risk". It would be logical, however, that States which had not been consulted should be given the right to express their point of view in the spirit of what was provided in article 19 (Rights of the State presumed to be affected), but subject to two reservations. First, that was not a right of the State "presumed to be affected", but of the State "likely to be affected". Secondly, the text proposed by the Special Rapporteur should be redrafted in such a way as to distinguish between risk, which, in the context, it was legitimate to take into consideration, and harm, which was not within the scope of prevention. In his view, there was no need to go any further, in particular as far as the settlement of disputes was concerned. All obligations of prevention linked to "liability" were, in fact, firm obligations which the State had to fulfil, account being taken of the circumstances, existing technology and the means available to it; if it did not fulfil those obligations, it would be responsible, but within the framework of the topic of State responsibility.

11. To sum up, while appreciating the efforts made by the Special Rapporteur to focus his report on prevention, he considered that the structure of the draft articles should be seriously reviewed. The draft should first enunciate some principles, starting with the obligation of prevention linked to liability as a result of the risks involved in the activities envisaged. That would mean putting together article 3, paragraph 1, articles 6 and 8 and including the provisions of article 2, subparagraphs (a) and (b), already referred to the Drafting Committee,⁸ in that part of the draft. It might also be necessary to include an article in the general part on risks to areas not under the national jurisdiction of States ("global commons").

12. The principles would be followed by modalities, classified under six separate headings: (a) notification, information and the limits thereto; (b) assessment, taking account of the views of other potentially affected States—and, possibly, international organizations—and of the balance of interests; (c) authorization, which would be made contingent on insurance effectively covering risks; (d) the maintenance of the obligation of vigilance after the start of activities and the question of activities already in progress at the time of the adoption of the future convention; (e) the possible grouping of all provisions relating to the cessation and limitation of harm, which could be described as prevention *ex post*; and (f) the explicit statement of another basic general principle, namely, that, if the State in whose territory the activity involving risk took place did not fulfil its obligations of prevention, its liability for failure to do so would be incurred. That principle would spell out what was

⁷ See footnote 5 above.

⁸ See 2300th meeting, footnote 18.

already stated rather esoterically in article 5, which had been referred to the Drafting Committee.⁹

13. Subject to a basic difference of opinion on the presumption of lawfulness, he agreed with the request made by the Special Rapporteur in the Introduction of his report that the full set of articles 1 to 20 *bis* should be considered by the Drafting Committee at the current session, but only from the viewpoint of the prevention of risk.

14. Mr. PAMBOU-TCHIVOUNDA said that the ninth report of the Special Rapporteur was a turning-point in the Commission's work from the point of view of both substance and method. As to substance, the priority given to prevention should make it possible to define the framework of a system for engaging the liability of States and thus break the grip of presumption, which was based on the fact that the activities involving risk took place in their territory. As to method, the Special Rapporteur had acted pragmatically in rearranging the place of the concept of prevention in the draft. Abandoning the idea of treating the subject in an annex, he had decided to make prevention a general principle of law, which he had then developed by indicating several of the conditions for its application. The ninth report thus mapped out the contours of a coherent legal regime which the Drafting Committee might be requested to consider, its task being not only to revise, but to reformulate the proposed draft articles in order to improve on some of their structural and material shortcomings.

15. With regard to the structural weaknesses, he said that articles 10 to 20 *bis* did not reflect the disparities of development and industrialization between the States subject to the principle of prevention. The developing countries, where all industrial activity, even rudimentary, was by definition an activity involving risk, had neither the industrial infrastructure nor the legislative or administrative apparatus to respond in the same way as the developed countries to the need to implement the primary rules being proposed. As conceived in the proposed draft articles, the principle of prevention did not take account of the situation of those countries with regard to access to industrial technology; and the resulting undifferentiated implementation of primary rules might give rise to a new type of condition being posed for the transfer of technology that might well make the developing countries increasingly hesitant about acceding to the system advocated within the framework of the United Nations. The Commission must bear those facts in mind by including special provisions for the developing countries while not compromising the universality of the proposed system. The Special Rapporteur was not indifferent to those concerns, as he had shown in his report, and he proposed to include the text he had envisaged on that subject in that part of the articles dealing with the "principles which guide the application of all the specific rules". In his own view, one or more modulating criteria should be defined at the stage of the general principles; such criteria would prove their full usefulness during the drafting of specific rules. That was a shortcoming in the very conception of the subject which there was still time to remedy.

⁹ Ibid.

16. The other structural problem in the ninth report had to do with the order of the draft articles. The provisions on "Preventive measures" (arts. 11 to 14), "Notification and information" (arts. 15 and 16) and "Consultations on a regime" (art. 18) all pursued the same goal: to explain the principle of prevention. On the other hand, the provision entitled "National security and industrial secrets" (art. 17) set a limit on the scope of the general principle of prevention. As the Special Rapporteur had stressed with reference to the participation of the affected State, however, impact assessment, notification, information and consultation were closely linked. The unexpected insertion of an exception in the middle of the rule was thus out of place. Simply rearranging the provisions would restore the unity of the principle, not for the sake of pure form, but to make the discussion more coherent.

17. As to the material weaknesses of the ninth report, there was, first of all, the serious distortion of the regime that would be brought about by the dual privilege provision based on reasons of national security and industrial secrets. The exception contained in article 17 was not without value, but, apart from the fact that it heightened inequality between States, it might well defeat the purpose and scope of the obligation to cooperate in good faith. In particular, it might suppress any inclination to exercise the right of initiative that article 19 recognized for the State likely to be affected by giving the State of origin a discretionary power not only for the information to be transmitted, but even for the decision whether or not to transmit it. That extravagant monopoly must be corrected to ensure the balance of interests at play, as well as a certain realism, given the existence of remote sensing devices whose use was likely to make the exception clause illusory.

18. The other material problem to which he drew the Commission's attention related to the autonomy of the regime that the Commission was in the process of devising. Defining the primary rules that derived from the obligation of prevention for activities involving risk was to some extent tantamount to subjecting those activities to international law, through the intermediary of States. Non-compliance with the obligation of prevention would then constitute an internationally wrongful act within the meaning of the ordinary law of international responsibility and the affected State would merely be exercising its right under settled case-law to ensure that international law and, in particular, general international law was being respected to its advantage. But how was a distinction then to be made between the ordinary law of international responsibility for an internationally wrongful act and the special law of international liability for activities involving risk allegedly not prohibited by international law? The Commission would have to answer that question some day.

19. Mr. BENNOUNA recalled that the Commission had decided to draft a set of articles not on liability in the strict sense of the term, but on prevention and on ways of repairing harm, with priority being given to prevention. It was with that in mind that the Commission had requested the Special Rapporteur to submit, at the current stage, draft articles in respect of activities having a risk of causing transboundary harm. In his view, that decision raised two questions. The first was that of the

definition of prevention and, on that point, he agreed to a large extent with Mr. Pellet. The second related to the difference between activities involving risk and activities with harmful effects; although the Special Rapporteur had drawn subtle distinctions between the two, the difference was perhaps not as clear as it might seem.

20. It had been decided that the Commission would come back to the title at the end of its work on the topic and it would in fact be better to focus at present on the basic problem of obligations and liability incurred for State activities with transboundary effects. It was time to sever the umbilical cord connecting the topic under consideration and that of State responsibility.

21. The topic hinged on legal obligations arising out of the conduct of an activity that had transboundary effects and that automatically brought into play the rights of the operators involved and the limits of those rights. It was necessary to determine the legal source of those obligations, which might not be a particular source, but might derive from various forms of lawmaking, such as treaties, custom and principles. If that was not possible, the activity and the conduct of the State had to be defined by reference to the international public order because it was that which conferred the status of subject of law and governed peaceful relations between States. The Commission might therefore attempt to fill the legal vacuum, a kind of "natural state of things" in which the relation of power is in no way mediatized by the law. Article 6 (Freedom of action and the limits thereto)¹⁰ established that link with the international public order, a consequence of the principle of the sovereign equality of States, which was violated if one State caused another State to incur a risk.

22. The Commission thus had to formulate residual rules applicable to the consequences of the activity of the State which arose independently of its will and, indeed, of any expression of *opinio juris*. In that sense, it was the activity that gave rise to the obligations whose purpose was to preserve the sovereign equality of States. Those obligations must be established before the accomplished fact: that was the role of prevention, which was indispensable if the law was to perform its function of protecting and safeguarding its subjects. In sum, the Commission must, in its role of codifying international law, produce a legal framework into which activities involving risk could be fitted and which would give States and the courts the necessary points of reference. Governments must know that, when they acted within their borders, they were also assuming international obligations and responsibilities.

23. The draft articles should therefore be as general as possible so as not to distort the obligation of prevention through legalistic or excessive procedures, which would not reflect the true situation. States did not expect a detailed and binding procedure, but the statement of general obligations on which they could draw in deciding on their relations in that regard.

24. Turning to the proposed articles, article 14 (Performance of activities), which was at the heart of the obligation of prevention, was acceptable on the whole. He agreed with Mr. Pellet's comments on the concept of

prevention and pointed out that the text envisaged two types of prevention: prevention before damage occurred and prevention *ex post facto*, which the Special Rapporteur justified in the report by stating that it was that broad concept of prevention "with which most agreements on civil liability deal". What was involved, however, was not civil liability or a particular convention, but general obligations of prevention before harm occurred. The problem of prevention *ex post facto* related to liability in the strict sense, with the cessation of the activity, compensation for harm caused, and so forth; and that was another question which came under the second part of the topic, namely, corrective measures. As he was in favour of a restrictive concept of prevention, he urged the Drafting Committee and the Special Rapporteur to confine themselves to that concept and proposed that article 14 should be amended to read: "The State shall, through legislative, administrative or other measures, allow on its territory only the activities of operators who take all necessary measures, including the use of the best available technology, to minimize the risk of transboundary harm. It shall make the conduct of such activities subject to the use of insurance commensurate with the risk incurred".

25. Article 12 (Transboundary impact assessment) was unnecessary as it was for the State to decide how it should proceed. Clearly, a State would undertake an assessment, and even investigations, and would require a particular type of material before issuing or refusing its authorization, whether for pre-existing or new activities.

26. Article 15 (Notification and information) was not satisfactory. The State of origin did not have to notify the other States of the conclusions of its assessment; instead, it should inform them of the content of its legislation and the measures it had taken to ensure that the activities were consistent with that legislation. He also agreed with Mr. Pellet about the role of international organizations and about informing the public.

27. He agreed with article 16 (Exchange of information), and also with article 17 (National security and industrial secrets), which seemed to him to be standard, contrary to what Mr. Pambou-Tchivounda thought. He shared some of the views expressed by Mr. Pellet on article 18 (Prior consultation) and did not see why such consultation should take place before the activity was carried out. The activity of a State should not be subject to the intervention of another State. Consultation should take place following the exchange of information and did not necessarily have to result in mutually acceptable solutions, in which connection he referred to the commentary to article 18. Further, he too considered that the title of article 19 (Rights of the State presumed to be affected) was incorrect. He even wondered whether the article was necessary. The consultation provided for under article 18 was sufficient as it could be requested by either State. Lastly, with regard to article 20 *bis* (Non-transference of risk or harm), he found it hard to see how States could transfer risk or harm. The article only complicated the situation.

28. In short, he agreed that the Commission should move ahead with its work, but considered that it should confine itself to obligations that were as general as possible and that could serve as a framework of reference, while allowing States the most room to manoeuvre.

¹⁰ Ibid.

29. Mr. TOMUSCHAT said he regretted that the Special Rapporteur's ninth report, the logic of which was flawless, had not provided an opportunity to review the work already done and to examine in particular the developments that had taken place since 1985 with regard to prevention. He agreed with Mr. Pellet on the need for an introductory article in the draft which would state clearly the principle of prevention and with Mr. Benouna's observation that that principle derived essentially from the principle of equality of States. However, the issue which seemed extremely important to him since a new orientation had been given to the topic at the forty-fourth session was the scope *ratione materiae* of the draft articles. They were, of course, concerned with prevention, but the classes of activity which would fall under the future instrument should also be clearly defined. Article 11 proposed by the Special Rapporteur simply referred in that connection to article 1 (Scope of the present articles), which, even in conjunction with article 2 (Use of terms), hardly filled that lacuna. Article 1 spoke of activities involving risk, while article 2 explained that it concerned risk of appreciable transboundary harm. But all kinds of activities could cause transboundary harm and the Special Rapporteur should have identified the different categories of such activities instead of proposing rules which could apply only to specific groups of activities, for instance, the building of nuclear power plants. Such provisions could not possibly be framed in the abstract without first giving thought to the whole range of human activities to which they could apply. In any industrialized society, there were normal activities, whether regular or not, which involved risk and would perhaps require specific rules, different from the rules applicable to major industrial complexes. If there was one general lesson to be learned from environmental law, it was certainly that preventive efforts must always be adapted to the specificities of the danger to be combated.

30. He wished to raise the question of the usefulness of general rules. In order to prevent the danger from materializing, the international community needed hard rules that went beyond the 1972 Stockholm Declaration¹¹ and the Rio Declaration on Environment and Development.¹² In addition, the areas in which there was still a regulatory deficit should be identified. Admittedly, the Special Rapporteur referred to the Convention on Environmental Impact Assessment in a Transboundary Context and to the Convention on the Transboundary Effects of Industrial Accidents, but he had not discussed the impact of those two instruments on the topic—an impact that was perhaps considerable. Perhaps, too, he should have explained how he conceived the relationship between the rules he proposed and the often fairly detailed provisions of the United Nations Convention on the Law of the Sea. Before proceeding to any drafting exercise, it was necessary to have that additional information in order to define the exact scope of the rules on prevention. The topic under consideration was important and the international community was looking to the Commission for tangible

results. Unfortunately, the Commission was not yet in a position to produce such results.

31. Mr. CALERO RODRIGUES said that the Commission had not really made the Special Rapporteur's task any easier by inviting him, at its preceding session, to submit once again draft articles on the preventive measures to be taken in the case of activities which involved a risk of causing transboundary harm,¹³ as compared—and he did not altogether understand the comparison—to activities that actually caused transboundary harm, without, however, having taken any decision on certain basic issues. For example, the Special Rapporteur made reference in article 11, to “the activities referred to in article 1”, but article 1 had still not been finalized.

32. None the less, he would abide by the Commission's decision and would confine himself to responding to the issues raised by the Special Rapporteur and to making certain remarks on the report. The first and extremely important question was whether there should be articles on the settlement of disputes and whether those articles should apply to disputes in general or only to disputes arising out of the consultations contemplated. The Special Rapporteur presented convincing arguments in favour of specific procedures dealing with disputes relating to the original assessment of risk, more particularly in the form of inquiry commissions. For his own part, he agreed on the need for articles on the settlement of disputes which might arise regarding the nature of the risk and the conduct of the activity.

33. Another question was whether a list of factors involved in a balance of interests should be drawn up, as proposed in article 20. The Special Rapporteur was in favour of such a list. He himself was ready to accept the idea if the majority of the Commission was in favour of it, but on condition that the provisions in question appeared in an annex. He saw even less merit in having such a list in the body of the draft, since as was apparent from the opening clause of article 20, it would not be exhaustive. In the circumstances, he wondered why factors should be quoted by way of example if States were not obliged to take account of them.

34. Like the Special Rapporteur, he considered that the “polluter pays” principle should be included not in the articles on prevention of risk, but in the general principles. He also agreed with the Special Rapporteur's approach with regard to article 20 *bis* (Non-transference of risk or harm). In that connection, he drew attention to a mistake in the article: the words “between areas or environmental media” were not a proper translation of the original Spanish words *de un lugar o medio ambiente a otro*.

35. He further agreed that there was no point in including provisions in the draft articles on such matters as emergency preparedness, contingency plans and early warning systems for accidents, since the proposed instrument was of a general nature.

36. He had no particular comment to make, for the time being, on the draft articles themselves, the text of which could no doubt be improved in the Drafting Com-

¹¹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

¹² A/CONF.151/26/Rev.1 (Vol.I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 3-8.

¹³ See *Yearbook* . . . 1992, vol. II (Part Two), p. 51, para. 349.

mittee. In article 12 (Transboundary impact assessment), however, it should be made clear whether the assessment would be the responsibility of the operator or the State. With respect to article 13 (Pre-existing activities), he considered that the State should make the possibility of authorizing the continuance of the activity subject to the conclusion of an agreement with the other States concerned or at least to the conclusion of consultations with them, since the liability of the operator did not affect the risk and the other States might have something to say about the risk itself. Lastly, he noted that article 15 (Notification and information) referred to "the assessment referred to in the preceding article", but article 14 (Performance of activities) made no mention of assessment. As had already been pointed out, however, the information communicated to other States should relate not only to assessment, but also to the decision taken, or on the point of being taken, by the State in which the activity was carried out. Article 15 should therefore be redrafted to specify the purpose of the notification and information.

37. Mr. VERESHCHETIN said that the task entrusted to the Special Rapporteur was a difficult and complex one, for the topic was closely related to international environmental law. He shared the view expressed by the representative of Austria during the consideration of that topic by the Sixth Committee at the forty-seventh session of the General Assembly that the preparation of separate instruments applicable to different situations would be preferable to having a single legal regime for the protection of the environment.¹⁴ That idea had been taken up by Mr. Tomuschat, who had stressed the need to define more clearly the scope of the articles on prevention. An example of constructive efforts in terms of specific activities in the field of environmental protection was to be found in the Principles Relevant to the Use of Nuclear Power Sources in Outer Space,¹⁵ which related to the risks of a single activity. Specific rules along those lines could be applied in other areas as well.

38. The time would come when a clear response would have to be given to the question whether or not international law prohibited activities capable of causing significant transboundary harm. If the answer was yes, then the subject of the ninth report would have to be dealt with in the general framework of State responsibility. In view of the complexity of the topic, the attempt made by the Commission and the Special Rapporteur to approach it from a number of angles should be welcomed. Although he agreed with those who considered that the problem of prevention was not directly linked to the question of liability, he conceded that the set of articles proposed by the Special Rapporteur was of great interest and believed that, if the Commission was now focusing its efforts on the rules relating to prevention, that did not mean it would not take up other aspects of the topic under consideration.

39. The Special Rapporteur had chosen to base the new articles on prevention on those already submitted to the Commission. That was a logical and comprehensible method of work, but one that involved a number of ma-

terial difficulties, since the earlier articles dealt both with activities involving risk and with activities that had actually caused transboundary harm and the texts had not yet been adopted by the Drafting Committee. It would be preferable for the new articles to be independent from the earlier ones and numbered differently, so as to avoid any kind of confusion.

40. With regard to articles 11 to 14, which would replace article I of the annex, the Special Rapporteur referred to unilateral measures of prevention and he wondered whether that meant that the measures outlined in the following articles would be bilateral or multilateral. It was open to question whether notification and information on activities envisaged by a State without taking account of the views of another State, as well as consultations, could be considered measures for the prevention of possible harm. The obligation to provide information could be unnecessary in some cases and indispensable in others. The launching of satellites, for example, was an activity involving risk that could cause transboundary harm, but the communication of technical information on that activity was indispensable only if the satellite had a nuclear power source on board, which would increase the risk of harm. That accounted for the need for an instrument dealing specifically with such situations, such as the Principles Relevant to the Use of Nuclear Power Sources in Outer Space. It was therefore open to doubt whether articles 15 and 16 were well founded because it was difficult to draft principles that would be valid for all types of activity involving risk, all the more so as the term "risk prevention" was highly debatable. An "activity involving risk" presupposed that it was impossible to avert completely that risk and that it could only be minimized.

41. He thanked the Special Rapporteur for the efforts he had made to carry out his task. Many complex questions remained unanswered, however, and he doubted that, at the present stage, the Drafting Committee could achieve real results.

42. Mr. GÜNEY said that, in his ninth report and in conformity with the decision adopted by the Commission at its forty-fourth session,¹⁶ the Special Rapporteur had focused his attention on the elaboration of draft articles covering activities involving risk, leaving aside questions relating to liability. It was true that the codification and progressive development of the law on the subject involved the definition of the obligations to be imposed to prevent or minimize the risk of transboundary harm, as well as liability for harm that had actually been done. In view of the nature and complexity of the topic, however, it would be better to deal only with the first aspect of the problem.

43. It should also be recalled that, in accordance with the Rio Declaration on Environment and Development,¹⁷ States must ensure that the activities carried out in their territory or under their control did not jeopardize other States. In his view, the draft articles on prevention were on the whole satisfactory in that regard. They presupposed that it was the basic obligation of States to regulate all dangerous activities under their jurisdiction or

¹⁴ See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 26th meeting, para. 57.

¹⁵ General Assembly resolution 47/68.

¹⁶ See footnote 13 above.

¹⁷ See footnote 12 above.

control, to evaluate the effects and to adopt the necessary legislative and administrative measures to minimize the risk of transboundary harm. Any further obligation would be incompatible with the sovereign right of a State to carry out legitimate activities in its territory without the agreement of another State as long as the rights of that State were not impinged on by the activities in question. Vigilance on the part of the State of origin must be considered sufficient at that stage. As to the protection of innocent victims, it had to involve compensation for any harm inflicted. To illustrate the scope of the State of origin's obligation, the Special Rapporteur emphasized that it was the people or the environment of that State that was the first to be harmed by a hazardous activity, and that, in the end, it was that State which had a primary interest in requiring prior authorization. In any event, whatever procedures were followed, they must not cause a given activity to be suspended until the State or States that might be affected were satisfied. In such cases, the action to be taken by the State of origin consisted in satisfying the requirements of absolute prevention, without that necessarily involving the suspension of the planned activity or the granting of some kind of right of veto to States that might be affected by the activity. All that was necessary was for the State of origin to carry out an in-depth analysis of the effects of the planned activity so as to prevent, control and reduce the risk of harmful effects.

44. Turning to article II of the annex (Notification and information), he said that the question that arose in connection with the role of international organizations was which of them was to be considered competent. That clarification had to be made in a legal instrument, especially when the interests of many States were at stake. Notification and information were essential when an evaluation brought to light the possibility of significant transboundary harm, but he was not convinced that provision had to be made for official consultations. The State of origin could not reasonably be expected to refrain from undertaking a lawful activity, especially when that activity was deemed indispensable to the country's development and when there was no other solution. Obliging the State of origin to consult all States that might be affected would amount to according them a right of veto, and that would be inadmissible. Stress should therefore be placed not on consultations, but on cooperation based on the principle of good faith and undertaken in a spirit of good neighbourliness. That should be spelled out in the text of article 17 (National security and industrial secrets) by adding the words "and in a spirit of good neighbourliness" after the words "in good faith". Similarly and in the light of the explanations that had been given, he believed that article 18 proposed by the Special Rapporteur (Prior consultation) was out of place in the body of the instrument being drafted.

45. The settlement of disputes (art. VIII of the annex) seemed to him to be closely related to the content and the type of instrument that was to be drafted. It would therefore be premature to discuss that question until the content and final wording of the draft articles had been established. As to article 20 (Factors involved in a balance of interests), it would be preferable to avoid the use of terms, such as the words "shared natural resources", which had been disputed and rejected by many bodies,

including the Commission itself. That article would be better placed in an annex.

46. In conclusion, he suggested that the Special Rapporteur should submit a long-term plan to the Commission specifying future stages in his work and start to prepare the final version of the draft articles on liability or in other words the obligation of the party responsible for the harm to provide compensation for it. Such a legal regime would be based on the liability of the operator rather than on that of the State. The reason was that liability derived from something other than failure to fulfil an obligation and did not entail full compensation for harm, regardless of the circumstances in which the harm had occurred. Transboundary harm resulting from an activity involving risk carried out in the territory or under the control of a State might, however, give rise to the liability of the State of origin.

The meeting rose at 1.05 p.m.

2303rd MEETING

Friday, 4 June 1993, at 10.05 a.m.

Chairman: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that all statements made so far had been interesting and deserved to be commented on. He proposed to do so in the usual way, but thought at the end of the exercise it would be useful for the continuation of the discussion if he responded to three of the statements at the present stage.

2. First, he agreed with most of the remarks by Mr. Pellet (2302nd meeting) and, in particular, with the criticism of article 18, proposed in the ninth report (A/CN.4/450), to the effect that the phrase "with a view to finding mutually acceptable solutions" appeared to

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

establish a presumption of wrongfulness. It had not been his intention to create such an impression—quite the contrary—and he would have no objection to changing the wording in question or deleting it altogether. Mr. Pellet would also have preferred him to create a more complete system of prevention by enunciating a general principle, which was already contained in article 8, and including the concepts set out in article 3, paragraph 1, and articles 6, 7 and 8.² While agreeing with that view as well, he would point out that the articles in question had already been referred to the Drafting Committee and he had refrained from making any further proposals for fear of confusing the issue.

3. The thrust of Mr. Bennouna's statement (2302nd meeting) had been that the proposed procedure should be simplified. The point was well taken and deserved to be taken into account. Mr. Tomuschat (*ibid.*) had complained that the report failed to take account of developments in matters of prevention since 1985. Actually, it contained references to the Convention on the Transboundary Effects of Industrial Accidents, the Convention on Environmental Impact Assessment in a Transboundary Context and the Code of Conduct on Accidental Pollution of Transboundary Inland Waters.³ It would be helpful to know what other developments since 1985, or aspects thereof, Mr. Tomuschat had in mind. Mr. Tomuschat had also suggested that he should have set out different categories of activities in groups so as to adapt the preventive measures to the specific dangers. In that connection, it had to be borne in mind that the document the Commission hoped to produce was a framework convention of a very general type. To group various activities in the manner suggested would, in his view, be both impossible and useless: impossible because no one could foresee what types of dangerous activities would develop in the future, and useless, because the Commission's aim should be to establish very general preventive measures. Due diligence was a general concept which applied, *mutatis mutandis*, to all activities.

4. He sometimes wondered whether some members wanted him to prepare a report or an encyclopedia. In any case—and the remark was not intended for Mr. Tomuschat, of whose good faith he had no doubt—he felt that those members who, for many reasons including their own country's interests, did not like the topic would be well advised to say so and ask the General Assembly to drop it, instead of imposing impossible conditions on him in his capacity as Special Rapporteur or engaging in criticism of the most whimsical nature.

5. Mr. BOWETT said that the core provision of the ninth report was undoubtedly the obligation imposed on the State to require an environmental impact assessment to be undertaken before authorizing any activity likely to cause transboundary harm to be carried out on its territory. The provision should, in his view, be spelled out, perhaps in some detail, so that the essential components of a good environmental impact assessment were clearly defined. Precedents for such definitions existed, both in conventions and in decisions of the Governing Council

of UNEP. Unless the essential requirements were thus identified, there was a risk that a State might appear to have fulfilled its obligations by carrying out a study of some kind, whereas, in reality, it had totally failed to have the potential risk properly assessed.

6. The consequences of an inadequate assessment could be of different kinds. First, if the assessment revealed that no risk existed and the State therefore did not notify any neighbouring State and authorized the activity, what would happen if, notwithstanding the assessment, harm to a neighbouring State did ensue? Would the State which had carried out the assessment be immune from any suit in respect of the harm caused, or could the injured State still bring a suit, claiming either that the assessment had been faulty or that the first State's conclusions on the basis of the assessment had been wrong? Secondly, if the assessment did reveal a risk of significant harm, the State of origin was required only to notify the affected State or States of the situation, but not to transmit the actual assessment. Why was that so? The reason could hardly be a matter of national security and industrial secrets, something that was dealt with separately in article 17. The participation of the public, a matter mentioned in the report, would appear to rule out such considerations. To ensure that the State gave sufficient and adequate information to the affected States it might be necessary to introduce a provision to the effect that failure by the State of origin to communicate information to a neighbouring State which proved in due course to be essential to any assessment of the risk would in itself constitute grounds establishing the liability of the first State.

7. As to the procedure for further consideration of the topic, there was clearly some overlap between articles 1 to 9, already referred to the Drafting Committee,⁴ and the new set of articles 10 to 20 *bis*, on prevention. Articles 10 to 20 *bis* should be referred to the Drafting Committee so that it could concentrate on prevention issues, as decided by the Commission. However, with the help of the Special Rapporteur, the Committee could perhaps perform a wider role than that of simply carrying out a drafting exercise. It could consider whether the scheme of the new articles was logical and complete and, if not, what new provisions might usefully be included. Then, and only then, should it concern itself with the actual drafting of the articles. Finally, when a satisfactory set of articles on the prevention of risk had been thrashed out, the Committee might turn to the question of how the new articles fitted in with the general provisions in articles 1 to 5 and with the principles set forth in articles 6 to 9. By adopting such a course, the Commission would be proceeding in a systematic manner, which in his view was preferable to requesting more and more reports from the Special Rapporteur.

8. Mr. CRAWFORD said that he did not intend to comment on the report in detail, for two reasons. First, he agreed in substance with Mr. Pellet's comments, the only point of disagreement—apart from the second point raised by the Special Rapporteur earlier in the meeting—being that of compulsory insurance (art. 14). Insurance was essentially a private sector matter and could not

² For the texts of the draft articles, see *Yearbook... 1990*, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add. 1, annex.

³ E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

⁴ See 2300th meeting, footnote 18.

form the subject of an international obligation with respect to a risk which might or might not be commercially insurable. He also concurred with Mr. Bowett on the subject of how the Commission should proceed further with the topic.

9. Secondly, the Commission might well fall into some disrepute in connection with its handling of the topic under consideration. It was ironic that the Working Group concerned with the long-term programme of work should have favourably considered the idea of the Commission doing some work in the field of environmental law when, for the past 10 years, the Commission had failed to do any such work because of its mishandling of the present topic. In that regard, he strongly disagreed with Mr. Tomuschat. It was neither appropriate nor proper to hold up the debate in plenary because some members disagreed with specific proposals or with the topic as a whole. What the Special Rapporteur needed was access to the Drafting Committee, not more discussion in plenary; and what the Commission needed was not more reports, however excellent, but work in the Drafting Committee on the substance of the topic. For that reason, he would simply commend the Special Rapporteur and suggest that the articles proposed in the ninth report should be referred to the Drafting Committee. If the Committee could not devote substantial time to the topic at either the current or the next session, the Commission might consider setting up a special working group or a second drafting committee with a different membership. In any event, progress on the topic had to be made.

10. Mr. FOMBA said that nowhere was the saying "prevention is better than cure" truer than in the case of the environment. The fundamental question was how to avoid, at best, the occurrence of international environmental harm or, at worst, how to make good such damage if it did occur. Admittedly, no universally accepted legal definition of the term "international environmental harm" existed as yet, but customary international law today recognized that States were duty bound to refrain from causing such harm. It was therefore important to achieve agreement among States on a minimum of principles of conduct, with due regard for biological and political diversity. The scope *ratione materiae* of those principles necessarily involved cooperation in both the prevention and the reparation of environmental harm. Thus, the two main elements of any legal regime to be established were the question of notification and consultation of neighbouring States before commencing activities capable of causing significant transboundary harm; and, the definition of "international environmental harm" and of the nature of international liability incurred for causing such harm. In that connection, the fundamental issue was the precise substance of the State's obligation to make sure that activities carried out within its jurisdiction or under its control did not cause environmental harm in other States.

11. The element relating to preliminary information and consultation sometimes gave rise to fears that the consulted State might, in effect, exercise a right of veto over lawful activities performed in the consulting State or might unjustifiably delay such activities. Another fear was connected with the potentially confidential nature of the information to be divulged. Such fears needed to be

dispelled in the most flexible manner possible and in a spirit of respect of State sovereignty.

12. In Africa, the principle of prevention of transboundary harm was enshrined in a number of legal instruments, such as the African Convention on the Conservation of Nature and Natural Resources; the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa (hereinafter referred to as the Bamako Convention); the Convention relating to the Status of the Senegal River; the Convention and Statutes relating to the development of the Chad Basin; the Agreement concerning the Niger River Commission and the Navigation and Transport on the River Niger; the Convention creating the Niger Basin Authority, and others. Quoting extensively from those instruments, he pointed out that only the Bamako Convention contained provisions on liability, the others dealing essentially with prevention and cooperation issues.

13. He agreed with other members that in regard to prevention, the scope *ratione materiae* was not risk but harm, the point at issue being to prevent the occurrence of harm from an activity which, by its very nature, involved a risk. He also agreed that prevention *stricto sensu* was *ex ante* rather than *ex post facto*, and also that material liability had to cover both the prevention and the reparation of harm.

14. As for preliminary notification and consultation, it was not wise or realistic to try and impose a precise obligation on States in connection with information to be made public at the domestic level. The supply of information to other States should be governed by the two fundamental principles of good faith and good neighbourliness, which were more a matter of conduct than of the means employed. Lastly, he was generally in agreement with the comments as to both substance and form made by Mr. Bennouna, Mr. Pellet and Mr. Pambou-Tchivounda (2302nd meeting).

15. Mr. VILLAGRÁN KRAMER congratulated the Special Rapporteur on his useful report. He noted that efforts to render the title more concise had been unsuccessful; some of the members at any rate were working on the assumption that the topic concerned international liability for injurious consequences arising out of lawful activities.

16. Mr. Pellet had reported on a number of terminological and theoretical problems raised by the concepts of strict liability and fault. Most members of the Commission had agreed that it was important to decide when strict liability would come into play and when, as an exception, the theory of fault might be acceptable. The Special Rapporteur had addressed the duality of the theory in connection with the concept of prior authorization, which he regarded as essential. To a certain degree, even when the general rule of strict liability applied, in the case of prior authorization the Commission must consider whether the theory of fault was applicable. The Drafting Committee would ultimately have to deal with that problem.

17. Over the years, the concept of harm had taken on a more defined profile. Regulations involving the concept existed for accidents with aircraft and space objects, in the nuclear energy field, for industrial accidents and for

the transport of dangerous substances by road, rail and sea. Regulations were beginning to take shape in connection with harm caused to the environment through maritime, land and air pollution. Furthermore, regional efforts had been made in that area, and he thanked Mr. Fomba in that context for the list of instruments adopted in Africa that touched upon the concept. In the case of Latin America, the matter was reflected in the Convention on the Conservation of the Living Resources of the Southeast Atlantic and other instruments.⁵

18. As to the question of principles, in his view the Special Rapporteur had not sufficiently stressed the relationship between benefit and transboundary harm. No State should be able to benefit from an activity without being subjected to its consequences, and it would be useful if the Special Rapporteur could focus on that issue. Concerning the principle that the State which in the exercise of an activity caused harm should make reparation for that harm, the Special Rapporteur had spoken of "the polluter pays" principle, but it was a principle that called for clarification of certain acts, both before they had occurred and after the State had been informed that they had begun: transboundary risk, harmful activities, activities prohibited by international law, activities not prohibited by international law, hazardous activities and ultra-hazardous activities. He was not sure whether those activities should be listed in the articles or not, but they must be taken into consideration in some way.

19. That raised the question of the role of the State. The very fact that members were prepared to discuss the Special Rapporteur's proposal that prior authorization by the State should be required for certain activities that might cause transboundary harm made it imperative for the Commission to face certain realities: there was a trend in the private sector to call for a smaller State role, for deregulation and for fewer regulations and restrictions. In bringing up the question of prevention, the Commission would be directly addressing the issue of State activities and the legal consequences thereof. The Special Rapporteur had taken the right approach by stressing that the purpose of the activities of the State was to seek to minimize the risks that could lead to transboundary harm and then to contain any harm that occurred. Thus, the State did not regulate activities *per se*, but assumed responsibility for minimizing the risks and containing any actual harm. Yet as the State was confining itself to a legal text on prevention, the question that might then be raised in the private sector was what its own responsibilities would be and whether it was expected to implement those provisions, and in that context he thought that the idea of encouraging the adoption of compulsory insurance was a good one.

⁵ For example, the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, 24 March 1983) and the Protocol concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region (Cartagena de Indias, 24 March 1983) (*International Legal Materials*, vol. XXII (1983), pp. 227 and 240, respectively); the Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima, 12 November 1981) and the Supplementary Protocol to the Agreement on Regional Cooperation in Combating Pollution of the South-East Pacific by Oil and Other Harmful Substances in Cases of Emergency (Quito, 22 July 1983), documents reproduced by UNEP (United Nations, New York, 1984).

20. He thanked the Special Rapporteur for the list of recent international instruments on prevention and related activities. In that connection, the arbitrators who had ruled in the *Trail Smelter* case⁶ and the *Lake Lanoux* case⁷ deserved the gratitude of jurists the world over. In the former case a decision had been reached on a complex problem concerning the environment at a time when there had been no debate on that issue. In the latter case, the decision was most useful for the Commission in connection with the topic of the law of the non-navigational uses of international watercourses. If those jurists had succeeded, despite the absence of relevant case-law, in reaching decisions, how much easier it should be for the Commission, given the rich jurisprudence on the question under consideration, to agree upon an adequate text.

21. He shared the Special Rapporteur's view that for prevention and notification, it was important to ensure that all participating States had a legitimate interest in preventing harm or, if such harm had occurred, in containing it. He wondered, however, what type of liability would apply for non-compliance. He would also stress the importance of consultations, which had the advantage of ensuring the participation of the affected States. Involving all States concerned in the participation process created a sense of community that would be useful for dealing with problems of transboundary harm.

22. Lastly, he wondered whether it would be possible to examine in greater detail the concept of equity: even if the Commission did not refer to its parameters, judges would take them into account. No international court could ignore the question of equity, and the Commission should attempt to provide greater clarity as to its scope.

23. Mr. KOROMA paid tribute to the Special Rapporteur for his efforts in elaborating a regime on the topic, which included the environment, pollution control, the transfer of hazardous wastes, the use of nuclear materials and matters relating to economic and industrial development. He also thanked Mr. Bowett for his useful suggestion, which might help the Commission find a way out of the current deadlock.

24. After some 14 years spent on the topic, the Commission had decided in 1992 that attention should be focused at the current stage on drafting articles in respect of activities having a risk of causing transboundary harm and that the Commission should not deal, at the present time, with other activities which in fact caused harm.⁸ Accordingly, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm. The Special Rapporteur had interpreted that to mean that the discussion of whether rules of prevention were needed was suspended for the time being. Yet prior to the 1992 decision, the Commission had been working on the understanding that the topic encompassed the physical consequences of a particular activity which had caused transboundary harm. With the 1992 decision to focus on activities hav-

⁶ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

⁷ *Ibid.*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook... 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

⁸ See *Yearbook... 1992*, vol. II (Part Two), p. 51, para. 346.

ing a risk of causing transboundary harm, the scope of the topic had not only been unnecessarily narrowed, but had also become conceptually problematical.

25. First of all, international law recognized no liability for risk of damage without damage having actually taken place. State practice did not support the risk proposition either. States had not been willing to take on such an obligation. Furthermore, assuming that the risk proposition was tenable, it was not clear how the risk could be assessed or how the possible compensation for such a risk could be determined. Adopting the risk approach would mean that the mere release of pollutants into international watercourses or into the atmosphere could be enough to incur liability if the act was of such a nature as to endanger human health or harm the environment, without taking into account the fact that in concrete cases the pollutants might not have reached the frontier. With the risk approach, the very existence of a nuclear plant in the border region of a State could be considered as the basis of a claim for compensation, without material damage having occurred. However, if compensation was to be determined as the cost of measures taken for the anticipated harm, it seemed unlikely that States would accept such an obligation. Therefore, although the risk approach was included in many international legal instruments, the aim was not to allow for compensation, but to control pollution through international co-operation. That was the reason for the procedures for information, consultation and mutual assistance between Governments and authorization of polluting activities, dumping and the like contained in those legal instruments, which did not link transboundary pollution with international liability. Accordingly, it could be concluded that liability for environmental risk did not exist and had little chance of being accepted by the international community.

26. He wished to go on record as not supporting the Commission's decision in 1992 to change the title of the topic,⁹ which was no longer tenable in its current form. The closest support one could find for the risk proposition related to ultra-hazardous activities, the liability for which was neither strict nor absolute; yet even that liability arose from the serious damage or harm that was likely to occur in the event of an accident rather than from the risk involved. But the scope of the topic before the Commission was not confined to ultra-hazardous activities for draft article 1 spoke of all types of activities that might cause transboundary harm.

27. In his view, in elaborating the articles, the approach should be based on harm and the physical consequences of harm or, if the Commission was determined to continue with its existing mandate, to amend the scope of the topic to confine it to ultra-hazardous activity. His preference was for the broader approach of liability for the physical consequences of an activity, a concept which also encompassed risk. That would seem to be the approach in many legal systems and not only in common law. Even proponents of a civil law approach had demonstrated that present-day international law did not recognize the principle of international liability for

risk, as that would mean that even without any actual damage to the environment of a country, a State would be liable for activities that might possibly cause damage. That was also the position adopted in the United Nations Convention on the Law of the Sea.

28. The Special Rapporteur had noted that though the principle of prior authorization had been widely supported, the opinion had also been expressed that such an obligation was unnecessary. The trend in international agreements was to require States parties to adopt legislation on specific issues in order to ensure that specific obligations were carried out. If an agreement required prior authorization and a private operator violated that obligation, the State would still be liable, since it had undertaken a binding obligation. To protect themselves, and in view of the realities of modern-day life, States tried to impose liability on the operator, who was usually in the best position to exercise supervision. That led to an impasse, however. If a State imposed too many regulations on operators, it could be accused of impeding private investment. Yet if it refrained completely from regulating economic activities, it could be held liable for accidents occurring in its territory. Therefore, two standards would have to be set: one for States that were able to exercise the controls stipulated in an agreement, and another for those that lacked the necessary scientific and technical infrastructure.

29. Increasingly, international agreements demanded that prior notice be given and consultations be held before certain activities were carried out. The Bamako Convention, for example, prohibited the export of hazardous waste unless the other State had agreed to import it and undertaken not to export it to countries that had prohibited the import of such products. Yet the Convention dealt specifically with hazardous substances, while the topic being developed by the Commission encompassed ordinary activities as well—building a dam on a watercourse, operating a factory, and so on.

30. Hence, although the Commission's topic was linked with environmental law, it was not identical to it. Although the materials for elaborating it overlapped with those for the topics of State responsibility and the law of the non-navigational uses of international watercourses, the Commission should not lose sight of the autonomy of the topic itself.

31. The importance of the informed consent safeguard, particularly for developing countries that lacked the necessary machinery for risk assessment, could not be denied. But that safeguard should be handled with care, as it could become a double-edged sword, used to veto genuine attempts at economic development.

32. Under a preventive regime, States had to minimize the risk of transboundary harm by reducing the frequency of accidents or minimizing the magnitude of the potential harm. Yet that approach did not entail prevention *per se*, it was described in the report as "prevention *ex post facto*". However, simply seeking to prevent the frequency or magnitude of dangerous operations like those at Chernobyl and Bhopal might not be enough. The requisite preventive regime was one that would fully safeguard environmental integrity and human health from the dangers of transboundary harm. Under the

⁹ Ibid., para. 348.

Fourth Lomé Convention,¹⁰ for example, the European Community had agreed to prohibit the export of radioactive and hazardous wastes to African States party to the Convention.

33. Article I of the annex could at first glance be said to state the obvious, but on further reading it should put operators on notice that they would be held responsible if they caused transboundary harm and had not received overt authorization in advance for a given activity.

34. As to article 13, on pre-existing activities, when a State discovered that an activity that might cause transboundary harm was being carried out under its jurisdiction without authorization, the most appropriate response would be not only to warn those responsible but also to enjoin them to comply with the established requirements. In its present wording, the article merely provided for the issuance of a warning, however, a stronger tactic should be adopted.

35. Article 14 should be interpreted in the light of section B of the introduction of the report, which indicated that a State would not, in principle, be liable when it had taken all reasonable measures to ensure compliance with the relevant regulations. His own view, however, was that when a private operator violated an agreement requiring a State party to adopt legislation on a given activity, the State was still liable, since it had undertaken a binding obligation. A State should protect itself by not only imposing liability on the operator, but by insisting that sufficient insurance coverage be taken out to make sure that the burden of any eventual harm would not be borne by the State alone.

36. Articles 15 to 18 were reasonably well drafted, and he supported them, in principle. It would none the less be interesting to see what additional materials the Special Rapporteur would bring to bear in constructing a regime to cover activities entailing the risk of transboundary harm should the Commission decide to elaborate a separate regime for activities with harmful effects—as he hoped it would.

37. With reference to activities involving risk, he would point out that, even with nuclear activities involving risk, liability would be incurred only if the State where the nuclear activity took place caused harm to another State. The fact that a nuclear activity was risky in and of itself was not a sufficient basis for liability.

38. On dispute settlement, he could support provisions similar to the ones in the Convention on Environmental Impact Assessment in a Transboundary Context or the Convention on the Transboundary Effects of Industrial Accidents, provided that the issues to be determined were real and not hypothetical.

39. Article 20 was appropriate in a draft like the present one, designed as a framework convention whose provisions were meant not to be binding but to act as guidelines for States. The article referred both to equitable principles and to scientific data. It was not clear how it would be applied in practice, but as long as it was intended to help in applying the provisions of a framework convention, he could endorse it.

40. Lastly, he shared the Special Rapporteur's opinion that the "polluter pays" principle should be included as a component of the general principles regulating the topic and wished to thank the Special Rapporteur for his industry and perseverance in his task.

41. Mr. MAHIOU said the report met with the Commission's request that efforts should be focused at present on activities involving risk, and specifically on preventive measures, with the understanding that corrective measures, or reparation, would be dealt with at a later stage. The Special Rapporteur was on the right track in attempting to define prevention and in putting forward a set of articles that improved on what had been proposed at the previous session.

42. Referring to unilateral preventive measures and to article 14 of the draft, he noted that the Special Rapporteur had outlined three types of measures. The first type included steps to reduce the likelihood of accidents, in accordance with the classic definition of prevention. Such measures were extremely important, and it was often at the design or organizational stage that they had to be adopted. The second type aimed at reducing harmful effects, if, despite all precautions, an accident did occur. Steps that States could take in advance to reduce harmful effects and prevent them from affecting neighbouring States, and the preventive deployment of human, material and other resources were envisaged in that category.

43. The third category differed from the first two and entered a domain—called by the Special Rapporteur "prevention *ex post facto*"—that might give rise to some doubts. Indeed, the term "prevention" did not seem entirely appropriate for dealing with measures taken after the harm had already been done. Such measures were really in the nature of reparation for, or correction of, harmful effects, and could therefore more suitably be covered at the next stage in the Commission's work. It was true, however, that the dividing line between prevention and correction was often difficult to pinpoint. With that minor reservation, he agreed with the line taken by the Special Rapporteur in the draft articles.

44. He particularly welcomed the replacement of article I of the annex by articles 11 to 14, as article I had involved numerous complex subjects that were better handled separately. With reference to the problem of developing countries that lacked the necessary technological, financial or human resources to perform risk evaluation of activities carried out in their territories, that problem must be kept in mind in elaborating a set of articles that placed many obligations upon States. Yet at the same time, the need for vigilance must be impressed on developing countries, since the harmful effects of accidents in their territories would usually affect other developing countries that were themselves lacking in technological and financial resources. The old adage "An ounce of prevention is worth a pound of cure" was especially apt in that context, particularly as prevention costs less. So, while prevention must be emphasized, developing countries must be helped in acquiring the necessary technological competence and resources to carry out risk assessment.

45. Article 15 dealt, appropriately, with the role that international organizations could play, but restricted that role to notification and information. However, notifica-

¹⁰ Concluded between the European Community and the States members of the African, Caribbean and Pacific Group and signed on 15 December 1989 (see *The ACP-EEC Courier*, No. 120 (March-April 1990)).

tion was something for the States concerned, except in certain cases. International organizations, with their financial and technological resources, could provide assistance in many other areas, such as preventive measures and risk assessment. Their involvement should therefore be envisaged, and the conditions should be outlined in a separate article or articles. One of the major concerns would be to prevent States from opposing action by international organizations if it was truly justified, and to ensure that they agreed on the way in which such action was to be carried out.

46. He agreed with the Special Rapporteur on the desirability of incorporating the obligation to consult at the request of an affected State (art. 18). It was the very basis of the notion of cooperation around which the draft articles were being articulated. Yet the parallel obligation to reach agreement among States seemed to go too far; he therefore welcomed the changes introduced by the Special Rapporteur. While it was clearly desirable that States should be obliged to consult, it was impossible to require them to reach agreement. A mechanism for settlement of disputes would have to be considered for cases in which no agreement was reached.

47. In his opinion the draft articles could be sent to the Drafting Committee for further elaboration.

48. Mr. SHI said that, in keeping with the decision adopted by the Commission at its forty-fourth session, the Special Rapporteur's helpful report confined itself to an examination of prevention in respect of activities involving risk of transboundary harm and presented a revised version of the relevant articles. The Special Rapporteur was to be commended for his efforts to make as much progress on the topic as possible.

49. The Commission had been working on the topic for 14 years, but not one single draft article had yet been adopted on first reading. The reason lay in the difficulties inherent in a topic that involved sharp divergences in the rights and interests of States, divergences which had to be reconciled by the Commission as part of the progressive development of international law. The Commission did not work in a vacuum: its members all came from countries at varying stages of development and with different legal and cultural backgrounds. To some members, the decisions made at the previous session seemed a step backward, while others thought otherwise. On the whole, he was happy with the decisions, though he somewhat regretted the reversion to the usual practice of taking a decision on the final form for draft articles only after completion of the work on a topic, and believed that an exception to that rule should have been made. For example, a decision at an early stage that the draft should take the form of guidelines for States would speed up the Commission's work and make the draft more acceptable to States in general. Nevertheless, he would abide by the Commission's decision.

50. The proposed draft articles on prevention raised two points of concern. In the first place, he wondered whether some of the articles could be applied in general to all activities which involved a risk of transboundary harm. It would not be either easy or appropriate to derive rules of general application from the many treaties which regulated specific activities, since each activity had its own characteristics. The Convention on International Liability for Damage Caused by Space Objects, for exam-

ple, provided for absolute liability for damage but did not include any provision on prevention. Would the proposed draft articles apply to space activities? In the case of the transboundary harm caused by the Soviet satellite which had crashed on Canadian territory, if the Soviet Union had been able to assess the extent of that harm prior to the launching of the satellite it would probably have changed its plans; but the ensuing notification and consultation would also probably have been tantamount to inviting Canada to veto the planned activity. Furthermore, the Special Rapporteur had proposed, in his fifth report,¹¹ that activities involving risk should be delimited by reference to the physical consequences of those activities. Such a broad delimitation would, however, make it extremely difficult to formulate rules on prevention suitable for application to a wide range of activities, particularly if it was hoped to secure acceptance of those rules by the international community. For all those reasons, the scope of activities involving risk should be further defined.

51. The second point of concern was that the proposals did not make adequate provision for the special needs of the developing countries. The Special Rapporteur's suggestion, in his ninth report, that some general form of wording should be included in the chapter on principles to take account of the position of those countries did not go far enough. Their needs, including the need for preferential treatment, should also be reflected in the articles on prevention, which should take account in particular of the principles laid down in the Rio Declaration on Environment and Development.¹² Also, with regard to preventive measures, the standards which applied to developed countries might be unsuitable for developing countries since the costs, in social and economic terms, might be so great as to impede their development. Again, article 14 provided for "the use of the best available technology". Did that mean the best technology available in the State of origin or available throughout the world? For many developing countries, it was something that would make a great difference. The articles on prevention should therefore include general provisions on ways of facilitating the transfer of technology, including new technology, in particular from the developed to the developing countries.

52. Mr. Sreenivasa RAO, noting that the subject of international liability had been before the Commission for some time, said that there was an understandable impatience at the absence of any preliminary conclusions on a matter which was so crucial to the development of that area of the law.

53. One of the reasons why the topic had not acquired any logical structure of its own was that it had not altogether broken free of the topic of State responsibility. Unlike that topic, where the State was accountable for its failures as a State, and unlike the topic of the law of the non-navigational uses of international watercourses, where the State owned, regulated and maintained the natural resource, international liability was concerned with acts over which the State might not, or could not,

¹¹ *Yearbook*... 1989, vol. II (Part One), p. 131, document A/CN.4/423.

¹² A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 3-8.

have control. That was because of the human rights and freedoms enjoyed by individuals, because of the need to separate the State from other entities engaged in production, commerce and services, and because of the need to meet the demands of entrepreneurs in terms of the technology and financial resources needed to promote development. There was inevitably some hesitation in accepting the view that States should be liable for activities that caused transboundary harm, since it was felt that, in the interest of allowing market forces free play, excessive regulation was to be avoided. The matter was further complicated where no direct and immediate causal link could be established between the activities within the territory of the State and the harm allegedly caused across international borders. None the less, the basic principle that no State should allow its territory to be used so as to cause transboundary harm was so well accepted as not to need any repetition, provided the causal connection between the activity and the transboundary harm was well-established. Accordingly, the position of the State involved was governed by State responsibility, while the position of the operator or the owner was well regulated by the law of tort and the law of agency. Any principle the Commission might indicate as a basis for laying down the consequences of liability at the international level could not, therefore, be altogether dissociated from those branches of the law.

54. It would perhaps be easier to prescribe the appropriate rules on prevention, both for the State and for other entities, if the State was dealt with separately from the operator or owner. The State's role, as noted by the Special Rapporteur, was essentially to prescribe standards and to enact, and monitor the implementation of, laws and regulations. The role of the operator was different and more demanding. His obligations could be, among others, to submit an environmental impact study of the activity concerned, to give an indication of the level of risk entailed, to propose measures to deal with such risk and to contain any consequences. If an activity was likely to cause transboundary harm, a requirement could also be laid down that the activity should be carried out in such a way that it would cause no foreseeable harm to another State, or, the operator could be required to obtain the necessary authority to carry out the activity after engaging in consultation with those responsible in the State or States concerned.

55. The State, for its part, could under its own laws, which were enforceable through its judicial system, take various measures to prevent the likelihood of harm being caused, and where such harm was caused seek damages against the operator. In other words, while the State would have sovereignty and a measure of freedom to allow certain activities to be carried out on its own territory in the interests of its own development, the principle that the innocent victim should not be made to bear the loss could be protected in a variety of ways other than through the medium of State liability. It was therefore incumbent on the Commission to explore all avenues to develop a regime of liability that focused on the operators without neglecting the role that a State should play in ensuring, for instance, proper protection for the environment, prevention of pollution, and damage to foreign States. The proposed articles were not, in his view, sufficiently clear in that regard.

56. The Special Rapporteur said in the report that "the State will not, in principle, be liable for private activities in respect of which it carried out its supervisory obligations" and he apparently contradicted that view when in the footnote he suggested the State should have "residual liability" to meet the costs of damage caused if "the operator or his insurers cannot produce the sum required to cover the harm caused ... or in other cases which might be imagined". The Special Rapporteur had also made the helpful suggestion that the large majority of States, which did not have the necessary technical know-how and resources to monitor activities within their jurisdiction and to assess the potential for causing transboundary harm, should be able to call on the competent international organizations for help. As the Special Rapporteur had rightly remarked himself, however, such an obligation could not be imposed on international organizations under the proposed articles but could only arise between an international organization and a State under the terms of a treaty between the two or under the constitutional provisions governing the particular organization.

57. While the obligation on States to cooperate in the conduct of activities likely to cause transnational harm was unexceptional in principle, there was no guidance as to how it would actually be put into effect. A State should first satisfy itself that an activity was likely to cause significant harm before notifying the other State or States and entering into an obligation to consult. Unless the activity was State-run, the State would usually have to depend on the operator to provide the necessary information: it would not have to assume full responsibility to plead the case of the operator with the other State or States. The Commission might wish to consider that point.

58. The requirement that individuals should obtain insurance, mentioned in the report, was a necessary condition for authorization of an activity, but it would be preferable to deal with it at the prevention stage.

59. With regard to article 12, the obligation to provide an environmental impact assessment should rest with the operator. He did not altogether understand the circumstances in which article 13 (Pre-existing activities) would come into play. Once the State had undertaken new obligations to allow certain activities to be conducted on its territory, with due regard to its duties towards other States and to environmental considerations, it should normally prohibit any activity that did not meet those standards. In any event, it was normally the operator, not the State, that would be required to pay for any damage caused. The phrase reading "... the State shall be liable for any harm caused, in accordance with the corresponding articles" was confusing and should be re-examined. Article 14 should likewise be re-examined. The obligation imposed under that article was for the State to prescribe a duty or duties for the operator to undertake; it was not an obligation to ensure that the operator in fact carried out those duties. Should the operator fail to do so, the obvious sanction would be for the State not to authorize the activity.

60. As for article 15, the authorizing State did not always need to become directly involved in satisfying the other States likely to be affected: the burden of providing the necessary information and engaging in consultation

could therefore be left, at least in the initial stages, to the operator himself. Similarly, while article 16 was reasonable in principle, the obligation to provide information periodically should rest with the operator. Protection of national security and industrial secrets, the subject of article 17, was a very necessary element in regulating the supply of information to other States. The article required careful drafting, however, in order to achieve a satisfactory balance of interests.

61. Articles 18 and 19 made an obvious point with respect to the granting of requests for consultation in connection with activities likely to cause transnational harm. A problem would arise, however, where one State considered that an activity was not likely to cause such harm while the other insisted on limiting the freedom of the citizens of another State to engage in activities beneficial to them. Even if the complainant State was not allowed a right of veto, as explained in the commentary to article VI, the obligation to consult would itself entail a duty to satisfy that State and to accept conditions which were perhaps so onerous that the activity itself would have to be abandoned. In such instances, one obvious solution would be to adopt some means for the peaceful settlement of disputes, such as recourse to neutral expert opinions. He was none the less doubtful about the value of such proposals, as well as about the list of factors the Special Rapporteur had suggested for incorporation in another article in a framework convention. He shared the Special Rapporteur's misgivings on that score and would recommend that any articles on those subjects should be omitted at the present stage. The balance-of-interest factor was not peculiar to that particular field but lay at the heart of the operation of international law. He was also hesitant about entering into details of the kind proposed in article 20 *bis* and about the "polluter pays" principle. Such matters could be reviewed when more progress had been made on the basic concepts.

62. Lastly, he agreed that prevention could not be dealt with in the abstract and that different types of principles of prevention might be relevant to different types of activities. He also endorsed the view that the topic should not generate a new set of conditions for the transfer of the resources and technology which the developing countries required to sustain their development. Further effort should be devoted to clarifying the basic principles, although the drafting of the procedural principles could be left largely to States themselves.

Draft Code of Crimes against the Peace and Security of Mankind¹³ (continued)* (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,¹⁴ A/CN.4/449,¹⁵ A/CN.4/452 and Add.1-3,¹⁶ A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

63. Mr. KOROMA (Chairman, Working Group on a draft statute for an international criminal court) said that

* Resumed from the 2301st meeting.

¹³ For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

¹⁴ Reproduced in *Yearbook... 1993*, vol. II (Part One).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

the Working Group had made considerable progress in the past two weeks. After examining and reaching a preliminary understanding on a series of draft provisions dealing with such general aspects of the matter as the status of the court, judges, the registrar and the composition of chambers, it had set up three subgroups to deal with jurisdiction and applicable law, with investigation and prosecution, and with cooperation and judicial assistance. The subgroups had produced detailed reports with specific draft provisions accompanied in some cases by notes or preliminary comments, which had then been discussed in the Working Group. The subgroups had subsequently resumed their work with a view to incorporating into the draft articles, in so far as possible, the observations made in the Working Group and to considering certain issues which had been identified as possible additional matters for a statute. It had been agreed that, after the subgroups had completed their work, the task would be undertaken of consolidating in a coherent whole the various provisions and commentaries from the Working Group and its subgroups.

64. He was confident that the Working Group would be able at the present session to place before the Commission a substantive piece of work that would put it on the road towards complying with the mandate entrusted to it by the General Assembly,¹⁷ namely, the drafting of a statute for an international criminal court.

The meeting rose at 1.10 p.m.

¹⁷ See General Assembly resolution 47/33.

2304th MEETING

Tuesday, 8 June 1993, at 10.10 a.m.

Chairman: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN invited the members of the Commission to continue the consideration of the ninth report of the Special Rapporteur (A/CN.4/450). He said that Mr. Yamada, who was unable to be present at the meeting, had requested that the text of his statement should be distributed to the members of the Commission.
2. Mr. THIAM said that the Commission, which had already considered the question in its many aspects and had decided in accordance with the General Assembly's instructions to confine its consideration of the topic to issues of prevention in respect of activities involving risk, should conclude the general debate and move on to the practical stage of the work with which it was entrusted, namely, the draft articles on prevention. He thanked the Special Rapporteur for his patience and suggested that the new articles proposed in the ninth report should be referred to the Drafting Committee.
3. Mr. MIKULKA said that he associated himself with the thanks addressed to the Special Rapporteur, who had acquitted himself faithfully of a task made more difficult by the fact that the Commission was still not about to reach consensus on the precise scope and content of the topic. It had nevertheless taken an important step forward in 1992 when it had decided to deal henceforth only with prevention in respect of activities involving risk and to leave aside activities with harmful effects²—a most reasonable decision, since, as Mr. Pellet had pointed out (2302nd meeting), it was in the case of activities involving risk that the concept of prevention became meaningful. The decision did not mean that the Commission had abandoned the idea of devising a set of rules on corrective measures to be taken in the event of transboundary harm and of then considering the question of liability because, as Mr. Koroma had said (2303rd meeting), risk did not in itself give rise to liability. He therefore endorsed the Commission's method of work, which was to tackle problems one by one.
4. With regard to the articles on preventive measures proposed by the Special Rapporteur, he said he realized that the purpose of such measures was to minimize the probability of an accident occurring as a result of activities carried out under the jurisdiction and control of States, and not to avoid the occurrence of harm. However, he did not think it necessary, at the present stage, to answer the question of whether the liability of a State which had fulfilled its obligations of supervision and prevention could be incurred or not, as did the Special Rapporteur. That question, which was at the heart of the second part of the topic, could be decided only after in-depth study by the Commission.
5. It was clear from the ninth report, as well as from the eighth report,³ that the Special Rapporteur endorsed the view that the legitimacy of all measures defined in the framework of the topic, including preventive measures, was based on the fact that every State was prohibited from using its territory for purposes contrary to the rights of other States. That hypothesis might, however, be a source of misunderstanding, since any activity capable of causing harm to another State could be regarded as an unlawful activity and it could then be asked whether what was involved was not State responsibility for wrongful acts.
6. Article 11 (Prior authorization), proposed by the Special Rapporteur, gave rise to two problems. The first related to the definition of the concept of risk. Only in the light of that definition could it be said whether States could reasonably be expected to accept prior authorization as a general obligation. The second problem related to the periodic renewal of the authorization or the possibility, or even the obligation, to withdraw it in certain cases, which was not expressly provided for anywhere. Article 12 (Transboundary impact assessment) was drafted in a very general way. Logically, the authorization referred to in article 11 should be refused if the results of the assessment were not satisfactory, but the proposed text did not say so. Furthermore, article 15 (Notification and information) gave the impression that, even if the assessment required under article 12 showed a possibility of substantial transboundary harm, the State could nevertheless give its authorization within the meaning of article 11. But why, in that case, should it be required to notify the other States of the results of the assessment?
7. Article 13 (Pre-existing activities) was somewhat confused. It seemed to indicate that, although activities undertaken without the authorization of the State might continue to be carried out, the State was liable for any harm caused. Perhaps it might be stated that the continued exercise of such activity was without prejudice to the question of State responsibility. Article 14 (Performance of activities) dealt with two different issues which deserved to be treated separately: the use of the best available technology to minimize the risk and the use of compulsory insurance.
8. In connection with notification and information, the Special Rapporteur raised the question of establishing special regimes, perhaps in the form of a convention governing everything relating to the activity in question. In view of that possibility, it was difficult to understand why, according to article 18 (Prior consultation), the States concerned should enter into consultations with a view to finding mutually acceptable solutions for any issue of concern in connection with the activity in question, "on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument". If the articles under consideration were one day to become a framework agreement, it would, in his view, be quite logical to leave States the possibility of establishing special regimes including the strict liability

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² See *Yearbook*... 1992, vol. II (Part Two), p. 51, para. 346.

³ Reproduced in *Yearbook*... 1992, vol. II (Part One), document A/CN.4/443.

regime, to regulate in detail the questions dealt with by the framework agreement. It should always be possible to waive the rules of the framework agreement, even in respect of liability.

9. In conclusion, he said that he was prepared to support Mr. Bowett's proposal (2303rd meeting) on the procedure to be followed in connection with the new articles and the articles already referred to the Drafting Committee.

10. Mr. RAZAFINDRALAMBO said that, in accordance with the decision taken by the Commission at its forty-fourth session, the Special Rapporteur had focused his ninth report on prevention in respect of activities involving risk and had thus had to reconsider the whole set of draft articles relating to prevention which he had submitted in his eighth report,⁴ without, however, casting doubt on the legal basis for prevention, a question which the Commission had considered in detail at its forty-fourth session. Reopening the discussion on that issue was therefore not necessary, and it would be better, as Mr. Thiam had suggested, immediately to refer the new articles to the Drafting Committee. In his ninth report, however, the Special Rapporteur had not confined himself to revising the earlier draft articles, but had included in them the results of the study he had carried out in the light of the comments made by the members of the Commission and of instruments recently adopted in the environmental field. The Special Rapporteur should be congratulated on his efforts, which had finally succeeded in dispelling the doubts of those who had not been convinced of the viability of a general instrument on the strict liability of States for the consequences of lawful activities.

11. Turning to the draft articles themselves, he noted with regard to article 13, which extended the scope of international liability to pre-existing activities, that such activities could continue for several years without ever causing harm, and that presupposed that they had not involved any significant risk at the outset. To make such activities subject to the requirements envisaged might therefore create difficulties in the relationship between the State and the operators, since the new demands of the State with respect to prevention could be regarded as a departure from the initial undertakings or as a modification, implied or otherwise, of the investment contract and the specifications. There was also the fear that, under cover of article 19, the State presumed to be affected would interfere in the economic and industrial policy of the State of origin and cause that State material harm, particularly if its initiative resulted in the activity in question being suspended. In his view, it would therefore be preferable, in the case of pre-existing activities, to confine the application of measures of prevention to activities having harmful effects or at least to potentially dangerous activities such as nuclear or chemical plants, a list of which could be incorporated in an annex, as Mr. Tomuschat had suggested (2302nd meeting).

12. Article 15 raised the problem of the situation of the developing countries and the intervention of international organizations, a problem that could not be over-emphasized. The Special Rapporteur had already dis-

played particular concern with respect to the developing countries, in accordance with a general trend in the progressive development of international law. Certainly, special treatment should be accorded to the developing countries so far as the assessment of transboundary effects and measures of notification and information were concerned and an assistance programme should be established to provide them with funds and technology. Such a programme and such treatment should be the subject of special provisions, similar to articles 202 and 203 of the United Nations Convention on the Law of the Sea. It should also be compulsory to take out insurance so as not to impose a financial burden on those States that would be beyond their means. In the case of activities carried out by private operators, the State should have residual liability in exceptional cases only, since the total amount of compensation should be covered by insurance. As to international organizations, their intervention in the field of prevention should be of a systematic nature, particularly in the case of the assessment of the transboundary effects of activities.

13. With regard to the settlement of disputes, it would be more sensible to devote a special section to the question which would provide for various methods of settlement and would be based on Part XV of the United Nations Convention on the Law of the Sea. If the dispute was simply a matter of a difference of view concerning the interpretation of texts or the technical assessment, however, the solution would perhaps be, as the Special Rapporteur proposed, to initiate an inquiry procedure, for instance, in the form of a commission of inquiry which would be responsible for giving an opinion. Lastly, in his view, it would be logical and normal to include in the draft articles the principles of the non-transference of risk or harm and the "polluter pays" principle, along with the other principles governing the topic.

14. Mr. AL-BAHARNA said he was not sure that the Special Rapporteur had chosen the best method when he had drawn, for his new draft articles, on the set of articles that had been placed in an annex,⁵ purged of any reference to activities having harmful effects. In that process, he had revived certain controversial issues that should be discussed before dealing with the wording of the proposed articles. First, with regard to the question whether the proposed articles would be of a binding nature, the Special Rapporteur stated that the discussion was "suspended for the time being", which was perhaps unfortunate, as the answer to that question would depend on the wording of the articles. It would be preferable for the Commission to proceed on the assumption that the articles would constitute a set of binding obligations, since, in the case of hazardous activities, prevention was better than cure and, consequently, the regime of prevention should be obligatory.

15. Secondly, the Special Rapporteur had apparently restricted the scope of obligations of prevention, since he stated that the aim of preventive measures was "to attempt to ensure that activities under the jurisdiction or control of a State are carried out in such a way as to minimize the probability of an accident occurring which would have transboundary effects" and had then added:

⁴Ibid., chap. II.

⁵Ibid.

"We underscore 'to attempt' in order to show that the purpose of the obligation is not 'to prevent the occurrence of any harm' ... but to compel the adoption of particular measures in order to achieve the above-mentioned results". His own view was that, on the contrary, the object of the articles on prevention should be to act as a check on all activities likely to cause transboundary harm.

16. Thirdly, the apportionment of liability contemplated by the Special Rapporteur by which the State would not in principle be liable for private activities in respect of which it carried out its supervisory obligations, subject however to residual liability in some cases, appeared to him to be artificial, if not unworkable. Where liability was concerned, the possibility of action being taken against the State in whose territory an activity was carried out could not be excluded. The civil liability of the operator would by definition remain national unless it acquired an international dimension by virtue of the applicable principles of international law.

17. Fourthly, with regard to the possibility of differential treatment for the developing countries because they lacked the financial resources and technology required to monitor certain tasks, the problem was, of course, a real one but the Commission should find a way of resolving it without diluting the legal regime that was being constructed.

18. Turning to the draft articles proposed by the Special Rapporteur, he agreed with the principle whereby the State in whose territory activities involving a risk of transboundary harm were carried out should have a controlling function. He feared, however, that such detailed regulations as those laid down in articles 11 to 14 might ultimately mean that the legal regime of prevention would amount to interference in the domestic affairs of States. He would also like a clarification of the link between "prior authorization", under article 11, and "transboundary impact assessment", under article 12, which lay at the heart of the monitoring process.

19. With regard to articles 15 and 16, while he supported the principle of notification by the State of origin and the principle of exchange of information between the State of origin and States at risk, he considered that their wording should be re-examined with a view to taking account of the fact that the State of origin could not always determine in advance which States might be at risk. As to the intervention of international organizations, he shared the Special Rapporteur's misgivings and also did not see how any legal obligation could be imposed on them under an instrument to which they were not parties. It would be best to delete any reference to international organizations in article 15, subparagraph (b), and to add a subparagraph whereby the State of origin could request technical assistance from international organizations with regard to the prevention of transboundary hazards. Article 15, subparagraph (d), which referred to the participation of the public, should also be deleted, as it seemed to be very unrealistic.

20. He agreed on the whole with article 17, but considered that, to prevent States from using it as a means of evading the legal regime of prevention, the concepts of "national security" and "industrial secrets" should be narrowly defined and that the second part of the article

should be strengthened so as to ensure a proper balance between the needs of security and the provision of information pertaining to transboundary hazards.

21. With regard to the principle of consultations, the importance of which was explained in the report, it was perhaps unwise to formulate it in such imperative terms as those of article 18. Furthermore, the last phrase, "on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument", was unnecessary, since liability would in any event be governed by the applicable norms of international law. The wording of article 19 (Rights of the State presumed to be affected) was acceptable, save for the last sentence concerning payment of compensation for the cost of the study, which might impede the consultations. Consideration of the issue of the settlement of disputes, which was analysed in the commentary to article VIII, was a little premature, as recognized by the Special Rapporteur. A system of inquiry commissions could perhaps be considered, provided that the decisions of such commissions were recommendatory.

22. Lastly, he supported the Special Rapporteur's proposal to retain the text of article IX (Factors involved in a balance of interests) either in the form of an article or in an annex. He also supported the idea of including a provision on non-transference of risk or harm, along the lines of article 20 *bis*.

23. Mr. TOMUSCHAT said that he felt compelled to elaborate on three comments which he had already made (2302nd meeting) and which the Special Rapporteur had declined to take up. The first was that the scope of the draft articles *ratione materiae* was unclear. As Mr. Bowett had said (2303rd meeting), the Special Rapporteur's proposals were essentially directed towards establishing an environmental impact assessment system, which was certainly not suitable for all activities involving risk and would be relevant only with regard to planned works whose dimensions went beyond a certain threshold that must be carefully defined. It was significant in that regard that all existing instruments attempted to describe in precise detail the activities to which they applied. That had been done by the European Communities in Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,⁶ which was supplemented by two lists of activities to be subjected to preventive procedures of assessment, and in the Convention on Environmental Impact Assessment in a Transboundary Context. The general concept of activities involving risk might well be suitable when liability for harm was being considered. Yet a procedure for assessment of environmental impact must be confined, on account of its very nature, to certain easily identifiable activities which, when carried out in isolation, involved a specific risk of transboundary harm. Global threats to the environment must be combated by other means. As Mr. Yamada had indicated in the text of his statement circulated at the start of the meeting, there would probably be a need to analyse and categorize the specificities of various existing and possible activities involving risk, so that the

⁶ *Official Journal of the European Communities*, No. L 175, vol. 28, 5 July 1985, p. 40.

draft articles might be fully adapted to the diversity of risks and activities and to the rapid progress of science and technology.

24. His second point was that the report did not provide enough information on recent developments. The Protocol on Environmental Protection to the Antarctic Treaty,⁷ for example, contained important provisions on environmental impact assessment and article 3 of the United Nations Framework Convention on Climate Change embodied the principle that a lack of full scientific certainty should not be used as a reason for postponing precautionary measures.

25. His third comment related to the possible impact of recent instruments on the topic. Taking the example of the Convention on Environmental Impact Assessment in a Transboundary Context, which was mentioned in the report, it could be asked whether it would not deprive the draft articles of some of their interest if the Commission decided to restrict their scope to environmental impact assessment.

26. In conclusion, he stressed that his comments had been made only for the purpose of helping the Special Rapporteur and the Commission move forward in their work and that he would not oppose the referral of the draft articles to the Drafting Committee or to a working group, if other members of the Commission so wished.

27. Mr. ROBINSON said the fact that the draft articles dealt with activities that involved a risk of transboundary harm but were lawful would influence the attitude of many States, particularly developing countries, which, on account of their lack of adequate resources and technology, might find the obligations imposed by the articles unduly onerous. Why should a developing country be obliged to ensure that a transboundary impact assessment was undertaken in respect of an activity taking place in its territory, to carry out consultations with potentially affected States and to design and implement preventive measures for activities that were inherently lawful and beneficial to its economy because they generated employment? The fact that the activities were often undertaken by transnational corporations over which the developing host country did not have sufficient effective control would not make it any easier for some of those countries to accept the obligations imposed by the articles. In another forum of the United Nations, developed States had staunchly resisted the adoption of a code of conduct for transnational corporations which would, *inter alia*, oblige such entities to conduct their activities in accordance with environmentally sound practices. It was good that the Special Rapporteur had exhibited a keen sense of the kind of problems which the implementation of the articles posed for developing countries and had promised to include, perhaps in the chapter on principles, a text that would address their concerns. It was to be hoped that the formulation of such a provision would not be unduly general and abstract.

28. Of course, the cost of a transboundary impact assessment and other costs related to the implementation of the articles would not necessarily have to be borne by the State in whose territory the activities were undertaken; those costs should fall to the State only when it

was itself carrying out the activities. In other cases, the State should or could arrange for the costs to be defrayed by private operators. That analysis was borne out by article 12, in which the word "order" should be taken to mean that the State itself need not carry out the assessment or defray its costs.

29. Another important factor from the point of view of the State in whose territory the activities were carried out was that the highest obligation that the articles should impose on it was one of "due diligence", which was defined in the report as obligations deemed to be unfulfilled only where no reasonable effort is made to fulfil them. The essence of the State's obligation was thus to carry out its supervisory function by putting in place appropriate legislative, administrative and enforcement measures in respect of the activities being undertaken in its territory. It was, however, open to question whether the wording of article 14 sufficiently conveyed "due diligence" as distinct from an absolute obligation. If a State adopted the necessary legislative and administrative measures, which, if applied by the private operator, would minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of accident, contain and minimize such harm, and, if the operator failed to comply with those measures, would the expression "ensure" that operators "take all necessary measures" mean that the State was in breach of the obligation imposed by the article? Surely the State should not be responsible in such cases and the wording of article 14 should be revised accordingly.

30. He also had some doubts about the practical application of the obligation provided for in article 15, subparagraph (d), to give the public liable to be affected information and to enable it to participate in the decision-making process. He was concerned both about the scope of the obligation to provide information, since it related not only to the public of the State of origin, but also to the public of the potentially affected State, and about the mechanism that would have to be devised to discharge the obligation to involve the public in the decision-making process.

31. He believed that a dispute settlement system established by the articles should have a technical inquiry commission as an essential component, but thought that the precise nature of the system should be decided on only when the whole set of draft articles had been finalized.

32. He had doubts about the relevance and utility of the concept of "balance of interests" and, consequently, about the list of factors contained in article 20.

33. Despite those reservations, he could agree that the draft articles should be referred to the Drafting Committee.

Cooperation with other bodies

[Agenda item 7]

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

34. The CHAIRMAN welcomed Mr. Njenga, who was attending the Commission's meeting in his capacity as

⁷ Signed at Madrid on 4 October 1991. *International Legal Materials*, vol. XXX, No. 6 (November 1991), p. 1461.

Secretary-General of the Asian-African Legal Consultative Committee.

35. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that his organization greatly valued its long-standing ties with the Commission. As its Secretary-General and a former member of the Commission, he was deeply committed to strengthening the bonds between the two bodies in the service of their mutual interest. At the thirty-second session of the Committee, held in Kampala, in early 1993, the Commission's outgoing Chairman, Mr. Tomuschat, had given a comprehensive and most informative account of the progress made by the Commission at its forty-third session. The Committee particularly appreciated that he had stressed the permanent and, on many questions, innovative role of the Committee in the codification and progressive development of international law, which was all the more striking in that it had extremely modest material means compared to those available to the Commission.

36. The meticulous way in which the Commission dealt with matters of vital importance to the international community was universally acknowledged. All the items on its agenda were of special interest to the Committee, but three of them were of particular importance for the States of Asia and Africa: the draft Code of Crimes against the Peace and Security of Mankind; international liability for injurious consequences arising out of acts not prohibited by international law; and the law of the non-navigational uses of international watercourses. The last of those topics had also been on the Committee's work programme for some time and the Committee welcomed, as a sound basis for the future convention, the draft articles adopted by the Commission on first reading.⁸ The Committee, which hoped that the second reading of the draft articles would be completed as soon as possible, had prepared detailed comments on the topic, which might be of use to the Commission at the current stage. At its last session, the Committee had also requested its secretariat to examine other aspects of the question of river system agreements, with special emphasis on the utilization of freshwater resources.

37. Following the proclamation by the General Assembly of the United Nations Decade of International Law,⁹ the Committee's secretariat had prepared a paper for the twenty-ninth session of the Committee on its role in attaining the objectives of the Decade. The Committee had subsequently commissioned an in-depth study on the subject, dealing with all the objectives of the Decade, and had submitted it to the Legal Counsel of the United Nations. The Committee's secretariat had recently forwarded to the Office of the United Nations Legal Counsel a summary report of the Committee's activities which were aimed at achieving the objectives of the Decade in 1993 and 1994. The item would remain on the Committee's agenda in years to come, so that it could make its modest contribution to the Decade of International Law. In that context, the Committee was actively cooperating with the Government of Qatar in organizing a conference, to be held in Doha from 22 to 25 March

1994, on international legal issues relating to the environment, the United Nations Decade of International Law, the peaceful settlement of disputes, the law of the sea, the new international economic order and other topics. He invited all members of the Commission to attend the conference, in which the United Nations Secretary-General, various senior officials of the United Nations, several members of ICJ and distinguished international law experts and eminent academicians would take part.

38. The Committee, which had always attached great importance to the law of the sea, had examined at its thirty-second session a report on the work of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. It had called on member States to give timely consideration to adopting a common policy and strategy for the period between the sixtieth ratification and the entry into force of the United Nations Convention on the Law of the Sea. It had also urged member States which had not yet done so to ratify the Convention. He had attended the meeting of the Preparatory Commission in Jamaica and the tenth session of the informal consultations, chaired by the United Nations Legal Counsel, at which considerable progress had been made.

39. Another area of activity that had taken on increased importance was that of environmental protection. During the past two years, the Committee's secretariat had actively participated in the preparatory and final phases of the United Nations Conference on Environment and Development, the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change and the Convention on Biological Diversity. The Committee's focus was currently on the evaluation of the implementation of Agenda 21¹⁰ and the follow-up of the two above-mentioned Conventions. In addition, the secretariat was monitoring the progress of negotiations on an international convention on combating desertification and, during the current year, in cooperation with UNEP, the Committee planned to convene an expert group meeting on the environment for in-depth consideration of environmental issues.

40. On the question of the status and treatment of refugees, the Committee's secretariat had prepared two papers for the thirty-second session of the Committee, one entitled "AALCC's Model Legislation on Refugees: A Preliminary Study" and the other, "Establishment of Safety Zones for the Displaced Person in the Country of Origin". Shortly thereafter, an informal meeting had been held in Addis Ababa with officials of OAU and UNHCR, at which it had been decided to convene a joint meeting of the three organizations. The tripartite meeting had been held on 3 June 1993 in Geneva and had been followed by a meeting of the "Reflection Group" on 4 and 5 June, which had considered two items, "temporary protection" and "protection in conflict". The Committee looked forward to strengthening its relations with UNHCR and OAU on the vital issue of refugees; other areas of mutual interest had also been identified.

41. Recognizing the importance of the relationship between economic development and the harmonization of

⁸ See *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

⁹ General Assembly resolution 44/23.

¹⁰ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

legal regimes concerned with international trade through the sharing of accumulated experience among member States, the Committee had established a data collection unit at its headquarters in New Delhi. When the unit acquired sufficient expertise in collecting and analysing data, an autonomous centre would be established for research and development of legal regimes applicable to economic activities in developing countries. Having acquired the necessary hardware, the unit was in the process of preparing the software and had approached member States and the relevant international organizations for assistance in making data available to it.

42. The Committee's programme included studies and papers on other subjects, such as the deportation of Palestinians as a violation of international law, particularly the 1949 Geneva Conventions; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; the Indian Ocean as a zone of peace; the legal framework for industrial joint ventures; legal issues involved in the privatization of State-owned enterprises; and international trade law matters. All those items would be considered at the thirty-third session of the Committee, to be held in Tokyo in 1994. On behalf of the Asian-African Legal Consultative Committee, he invited the Chairman of ILC to attend the session. In closing, he noted that, at its thirty-second session, held in Kampala, the Committee had taken a decision on the crucial question of the relocation of its headquarters from New Delhi to Doha, Qatar. He was confident that, in its new headquarters, to which it expected to move in 1994, the Committee would continue to assist the aspirations of its member States and contribute to the common endeavour of the promotion and progressive development of international law.

43. Mr. TOMUSCHAT said that, at the thirty-second session of the Asian-African Legal Consultative Committee, which he had attended as an observer of the Commission, he had been struck by the extraordinary efficiency with which the staff of the Committee's secretariat, under Mr. Njenga's guidance, had provided services for so many meetings, which had often continued late into the night, and by the warm and cordial welcome he had been given by all the participants. Clearly, the contacts between the Commission and the Committee were very enriching. As its resources were infinitely greater than those of the Committee, the Commission was in a position to delve deeper into most of the questions on its agenda, but none the less the Committee had reached remarkable results. Furthermore, it should not be overlooked that the Committee had a much wider scope of activity, not confining itself to general international law, but also dealing with human rights, refugee law, the law of the sea, and so on. The Commission might also profit from a more direct contact with reality. In any event, it would try to take account of the comments made by Mr. Njenga in his complete and very interesting report on the Committee's work.

44. Mr. KOROMA said that the Asian-African Legal Consultative Committee might perhaps add questions of humanitarian law and human rights to the many items on its programme of work and consider the possibility of

closer cooperation with ICRC and the Centre for Human Rights.

45. The CHAIRMAN thanked Mr. Njenga for his statement and the words of encouragement he had addressed to the Commission. He noted with satisfaction that the Committee remained active in the field of the law of the sea. As pointed out by Mr. Tomuschat, the Committee's work was of great value to the Commission, which would certainly continue to benefit from its ties with the Committee. On behalf of the Commission, he accepted with pleasure the invitation to attend the next session of the Committee as an observer and wished the Committee great success in considering the important questions on its programme of work.

The meeting rose at 12.25 p.m.

2305th MEETING

Thursday, 10 June 1993, at 10.05 a.m.

Chairman: Mr. Gudmundur EIRIKSSON
later: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. de SARAM said that as he saw it, the Special Rapporteur had sought in his ninth report (A/CN.4/450) to be responsive to the Commission's decision in 1992 on the way in which work on the topic should proceed, and also to be sensitive to the different views repeatedly expressed, both in the Commission and in the Sixth Committee. In addition, the Special Rapporteur had recognized that the Commission should keep in mind the progressively developing principles of good-neighbourly relations and cooperation between States in the environmental field. That was particularly important at a time when the fragility of the earth's ecosystem had become a matter of global concern; and where international

¹ Reproduced in *Yearbook . . . 1993*, vol. II (Part One).

organizations both within and outside the United Nations system should, as the Special Rapporteur had recognized, continue to play a useful functional role.

2. The decisions of the Commission in 1992² dealt with three phases of its work. During the first phase, the Commission would prepare draft articles on preventive measures concerning activities that carried a risk of transboundary harm; during the second, it would prepare draft articles on compensation and other remedial measures for transboundary harm; and, during the third, it would consider what should be the next stage of its work on the topic. The distinction made the previous year between the first phase of the Commission's work (preventive measures) and the second phase (compensation for harm caused) was not apparently as acceptable to some members as to others, something that was understandable in view of the significant relationship between those phases. In that connection, a question has been raised as to the point at which, if a particular activity did not in fact cause any transboundary harm, failure to take a preventive measure, which was a primary obligation, would give rise to a secondary obligation under the rules on State responsibility, and what the content of such a secondary obligation would be.

3. Another matter of concern was the possibility that a view might emerge to the effect that: once the articles on preventive measures—and thus the primary rules on preventive measures—had been fully developed, they might well constitute all the general primary rules the Commission would really need to reach consensus on and formulate, under the present topic; and, thus, as a breach of such primary preventive rules could constitute failure to exercise due diligence (giving rise to secondary obligations under the rules of State responsibility) it would be unnecessary for the Commission to proceed to the second phase of its work, namely, the formulation of primary rules on compensation for transboundary harm. In view of such a possibility, it was necessary that, before the Commission became totally immersed in the first phase, on preventive measures, it should keep in mind the more general perspective and, specifically, that second phase of its work on the formulation of primary rules on compensation for harm.

4. The Commission should not, in fact, encounter any really insurmountable difficulties in its preparation of articles on compensation for transboundary harm since it appeared to agree on some of the basic propositions on which the present topic rests: (a) that the victims of transboundary harm caused by activities not prohibited by international law should, whatever the modalities of compensation, be adequately and expeditiously compensated for the harm they suffered; and (b) that the players in a transboundary harm scenario would generally be (i) the State within whose territory the activity giving rise to such harm was located—also known as the "State of origin"; (ii) the governmental or non-governmental operator of the activity; (iii) the affected State; (iv) those who benefited from the activity (which may not be solely those within the "State of origin" but possibly also within the affected State as well); and (v) the victims of the transboundary harm.

5. Thus, what would remain for the Commission to resolve would be the questions as to what ought to be the fair or equitable relationships that ought to properly obtain, at the primary rule level, between the various players in cases where transboundary harm had in fact been caused.

6. As to the relationships that should obtain at the primary rule level in the matter of compensation for transboundary harm, there was a variety of possibilities that the Commission would need to examine before making its final recommendations. A number had already been suggested by previous speakers: (a) the proposal that the criteria to be applied in determining whether or not due diligence had been exercised in a particular case should include consideration of whether or not the operator had been adequately insured against all possible harm; (b) it had also been proposed that, in certain circumstances, there should be a presumption in favour of the affected State; (c) there was also the very interesting proposal made by the Special Rapporteur in draft article 9³ whereby there would be an obligation on the State of origin to provide compensation for the harm caused, but the actual amount of compensation would be the subject of good faith negotiations between the parties: a proposal that had been noted very favourably, as being an interesting example of the combination of hard and soft law, by Professor Oscar Schachter, well-known to a number of members of the Commission and a distinguished authority in writings on the developing law of the environment; and (d) there was the further question, as well, as to what the respective roles of the State of origin and the operator, in the compensatory modalities, should be: in this connection, mention had already been made during the discussion of the difficult position of the developing countries which were desperately trying to industrialize but lacked the necessary infrastructure to administer what might be unduly sophisticated requirements. In the same context, some thought should be given to the role of industry-wide mechanisms for the funding of compensation, which had enjoyed remarkable success in the field of marine oil pollution. There would also, of course, be other possibilities that the Commission would need to consider carefully.

7. As to the specific provisions of the articles proposed, which had already been the subject of observations by earlier speakers, he would not comment, save to raise one particular matter which, it seemed to him, would need to be clarified. For preventive purposes, consultations and other interaction would take place between the State of origin and a State that might possibly be harmed. If a foreseen risk did materialize, would the State which suffered harm or its nationals be deemed to have had knowledge of, and to have acquiesced in, the possibility of the occurrence of transboundary harm? If so, would that in any way diminish their standing as claimants? Presumably that was not the intention, but the point could perhaps be resolved through drafting.

8. The overall scheme for preventive measures, as foreseen by the Special Rapporteur in his ninth report, rested on the requirements that prior authorization

² See *Yearbook* . . . 1992, vol. II (Part Two), p. 51, paras. 341-349.

³ For the text, see *Yearbook* . . . 1990, vol. II (Part One), p. 106, document A/CN.4/428 and Add.1, annex.

should be obtained from the State within whose jurisdiction the risk-producing activity was to be conducted; that the preconditions for such authorization should be a transboundary impact assessment and, where necessary, notification and consultations with States likely to be affected; and that preventive measures commensurate with the risk foreseen should be taken. Those requirements would, in his own view, provide the necessary foundation for the Commission's further work.

9. Given the uncertainties inherent in the Commission's decision in 1992 about the scope of the draft articles, it was remarkable that the Special Rapporteur had been able to respond as he had done in his ninth report.

10. The CHAIRMAN, speaking as a member of the Commission, said that, at one stage, he had thought the Commission had agreed on an approach that could have resulted in a set of some 20 draft articles, with the main emphasis on transboundary harm, although particularly risky activities would have required special duties of prevention. Had the Commission proposed such articles, it had seemed to him at the time, it would have been responding to the wishes of the overwhelming majority of the international community. In the event, that view had not prevailed and, at the previous session, the Commission had adopted the approach the Special Rapporteur had followed in his ninth report. Accordingly, he merely wished to support the proposal that the new articles should be referred to the Drafting Committee, and that the Committee should consider forming a working group to decide how to deal with the articles already before it, and with the topic in general, and to report back to the Commission later in the session.

11. Mr. VILLAGRÁN KRAMER said he had noted with interest the reference made by Mr. de Saram to the concepts of soft and hard law. Without in any way criticizing those concepts, he was a little concerned about their application to the area of the law with which the Commission was now concerned. It would be preferable not to speak of concepts that might weaken the position the Commission hoped to build up. In particular, it might perhaps be advisable to clarify the concept of soft law in order to ascertain whether or not it had a place in the area of the law under consideration.

12. The CHAIRMAN, noting that there were no further speakers on the item, said that the Special Rapporteur would sum up the debate at a later meeting.

Mr. Barboza took the Chair.

State responsibility (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,⁴ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

13. Mr. ARANGIO-RUIZ (Special Rapporteur), introducing his fifth report (A/CN.4/453 and Add.1-3), reminded the Commission that, in 1985 and 1986, the Commission had considered, and subsequently referred

to the Drafting Committee, dispute settlement provisions proposed by Mr. Riphagen, the previous Special Rapporteur.⁵ Under those provisions, if a dispute arose between an injured State and a wrongdoing State, after the latter had resorted to countermeasures, the parties would have to seek a solution "through the means indicated in Article 33 of the Charter of the United Nations". That was, of course, without prejudice to any rights and obligations regarding settlement that might be in force between the parties. Failing a solution under Article 33 of the Charter, three kinds of procedures were contemplated in article 4, subparagraphs (a), (b) and (c), as proposed by Mr. Riphagen.⁶ Subparagraph (a) provided that any dispute arising with regard to the prohibition of countermeasures which involved the violation of a peremptory norm of international law—in other words of *jus cogens*—could be submitted unilaterally by either party to ICJ for a decision. Subparagraph (b) likewise provided for unilateral application to the Court in the case of any dispute concerning the "additional rights and obligations" envisaged as the special consequences of crimes, as distinct from the consequences of delicts. Subparagraph (c) dealt with the more general category of disputes concerning the application or interpretation of the provisions of articles 9 to 13 of part 2, proposed by Mr. Riphagen,⁷ relating to the regime of countermeasures. With regard to those disputes, either party was entitled under subparagraph (c) to resort to a conciliation procedure—provided for in an annex to the articles—by submitting a request to that effect to the Secretary-General of the United Nations. As he was not ready at that stage to make definite suggestions with regard to what subparagraph (b) termed "additional rights and obligations" attaching to the internationally wrongful acts contemplated in article 19 of part 1 of the draft,⁸ he had not, for the time being, concerned himself with the settlement provisions covering crimes, in other words, with subparagraph (b) of article 4 as proposed by Mr. Riphagen. The proposals set forth in the fifth report were therefore mainly concerned with the hypothesis dealt with by his predecessor in article 4, subparagraph (c). The *jus cogens* hypothesis dealt with in subparagraph (a) of that article, was implicitly covered by all those proposals.

14. It was clear from the 1985 and 1986 debates in the Commission and in the Sixth Committee that there was general support for the solution offered by subparagraph (c) and related provisions. That support had been seen in the notion that any settlement provision in part 3 of the draft should be of such a nature as not to affect directly the *faculté* or right of the injured State to resort to countermeasures, as also with regard to the idea that the conciliation procedure introduced in part 3, as proposed by Mr. Riphagen, should come into operation, on a unilateral initiative, only when a countermeasure had been

⁵ For the texts of draft articles 1 to 5 and the annex of part 3 proposed by the previous Special Rapporteur, see *Yearbook... 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

⁶ *Ibid.*

⁷ For the texts of draft articles 6 to 16 of part 2, referred to the Drafting Committee, see *Yearbook... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

⁸ For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁴ Reproduced in *Yearbook... 1993*, vol. II (Part One).

adopted and the target State, as it were, had raised objections on that score.

15. Particularly important was the general agreement that the mandate of the conciliation commission should not be confined to any given controversial issue relating to the lawfulness of the countermeasure in question. According to the 1986 proposal, as accepted by the Commission, the conciliation commission should deal with any question, of fact or of law, that might be relevant under the future convention on State responsibility, whether in part 1 or part 2 of the articles.

16. There had also been general agreement in the Commission, though some dissenting voices had been heard, on the possibility of unilateral application for judicial settlement by ICJ of any dispute as to whether or not a particular countermeasure was in conformity with a peremptory norm of international law. That was a limited area, however, and one with which he was not concerned for the time being.

17. With regard to the most frequent hypothesis, namely, one involving any other question arising under the law of State responsibility between the injured State and the wrongdoing State following the adoption of a countermeasure, the Commission had shown itself to be generally satisfied with the proposed conciliation procedure. It had not contemplated either arbitration or judicial settlement—the only procedures that would lead to a legally binding settlement. In practical terms, the only defence against abusive and unjustified countermeasures was, according to the Commission's decision to refer part 3 to the Drafting Committee, a non-binding report by a conciliation commission.

18. Notwithstanding the extent of the agreement in the Commission on those solutions, far more advanced solutions should be considered. Members might recall how the very definite drawbacks of having to rely on unilateral countermeasures to secure compliance with international obligations had been stressed in both the third and the fourth reports⁹ and also in a number of statements made in the Commission in 1991 and 1992. Indeed, at the Commission's previous session, some members had even questioned the desirability of including provisions that would codify a legal regime of unilateral countermeasures. His immediate response had been that the way to remedy the drawbacks of countermeasures was not for the Commission to close its eyes to a practice of customary law which in fact called for express regulation through the codification and progressive development of international law. The remedy was to adopt in part 3 more advanced, more effective dispute settlement provisions so as to ensure that impartial third-party procedures could always be available in the event of unjustified, disproportionate or otherwise non-lawful countermeasures. That point was developed in the fifth report, in chapter I, section B.

19. The correctness of such an approach had been confirmed beyond any doubt by the debate in the Sixth

Committee at the forty-seventh session of the General Assembly, as reflected in the excellent topical summary (A/CN.4/446). Views expressed in the Sixth Committee on the subject were also summarized in chapter I, section B, of his report. In that connection, he wished to stress the positive, beneficial effects that could not fail to derive from the adoption of a set of really effective dispute settlement obligations as an integral part of—and not merely as a protocol to—a convention on State responsibility, effects that were discussed in chapter I, section C, of the report.

20. The title of section D of the report should read "Recommended solutions" and, as explained in section D.1, the reference to settlement procedures in article 12,¹⁰ now before the Drafting Committee, covered only those procedures which might be available to the parties, namely, a given injured State and a given wrongdoer, at the time the injured State wanted cessation and reparation and was considering whether to resort to countermeasures in order to obtain them. The fourth report had been sufficiently explicit on that score and, in particular, on the question of "availability", and the matter had been further clarified in the debate at the previous session. The main point about article 12, paragraph 1 (a), was that it referred, in addition to the vague and usually less than effective general settlement obligations deriving from Article 33 of the Charter of the United Nations or similar provisions, to such more effective obligations as might exist for the injured State and the wrongdoer in each concrete case. The reference was obviously to general treaties and clauses envisaging conciliation, arbitration and judicial settlement—such procedures to be resorted to either by ad hoc agreement or by unilateral application. He did not propose to go further into the matter at the present stage, but wished only to stress that the procedures in question were available to the injured State regardless of a State responsibility convention and should be used before that State resorted to countermeasures, as a precondition of their lawfulness. Article 12, in other words, only referred to such procedures and to the international texts under which they might be made available to any injured State. Article 12, paragraph 1 (a), did not directly create any obligation for the injured State to resort to given dispute settlement means, except, of course, in the sense of making their implementation—if available—a precondition for countermeasures.

21. The problem to be resolved in part 3 was a different one. It concerned, precisely, the settlement obligations to be set forth anew by way of, as it were, a "general arbitration clause" of the draft articles themselves. Such settlement obligations would be created by part 3 of the draft articles and eventually by part 3 of a future convention on State responsibility. The procedures would complement, supersede or tighten any obligations otherwise existing between the injured State and the wrongdoing State in any given case of an alleged breach of international law.

22. With regard to such obligations, two kinds of approaches were theoretically conceivable. One was what

⁹ Third report: *Yearbook... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1; fourth report: *Yearbook... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3; these reports were considered by the Commission at its forty-fourth session (see *Yearbook... 1992*, vol. II (Part Two), p. 19, paras. 117 *et seq.*).

¹⁰ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook... 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

might be described as a maximalist or ideal approach, the other being a minimalist one.

23. The maximalist solution would be to eliminate or reduce the difficulties inherent in relying on any more or less effective dispute settlement arrangements existing between the parties, or which the parties might conclude in a given case. As was explained in detail in the report, the way to attain that objective would be to replace provisions which merely referred to dispute settlement obligations deriving from sources other than a convention on State responsibility, as was the case with article 12, paragraph 1 (a), by provisions directly setting forth the obligation to exhaust given procedures as a condition of resort to countermeasures.

24. Recognizing that such a solution might not be acceptable to the majority of members, he also proposed: (a) to leave draft article 12, paragraph 1 (a), as it stood, namely as a provision referring to, and not creating, settlement obligations; and (b) to strengthen in part 3 the non-binding conciliation procedure proposed in 1986 by adding arbitration and judicial settlement procedures without, however, directly affecting the injured State's prerogative to take countermeasures. That prerogative would, as it were, exist only in the mind of the injured State, which would know in advance that resort to a countermeasure exposed it to the risk of third party verification of the lawfulness of its reaction. He would none the less welcome suggestions for steps in the direction of the more advanced "maximalist" solution, which, ideally, would be his first choice.

25. As to the solution recommended in the report, namely a three-step third party dispute settlement procedure which would come into play only after a countermeasure had been resorted to by an injured State allegedly in conformity with draft articles 11 and 12 of part 2¹¹ and after a dispute had arisen with regard to its justification and lawfulness, he referred members to the draft articles set out in section F of the report, which read:

PART 3

Article 1. Conciliation

If a dispute which has arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly lawbreaking State has not been settled by one of the means referred to in article 12, paragraph 1 (a), or has not been submitted to a binding third-party settlement procedure within [four] [six] months from the date when the measures have been put into effect, either party [to the dispute] is entitled to submit it to a conciliation commission in conformity with the procedure indicated in the annex to the present articles.

Article 2. Task of the Conciliation Commission

1. In performing the task of bringing the parties to an agreed settlement, the Conciliation Commission shall:

- (a) examine any question of fact or law which may be relevant for the settlement of the dispute under any part of the present articles;
- (b) where appropriate, order, with binding effect:
 - (i) the cessation of any measures taken by either party against the other;
 - (ii) any provisional measures of protection it deems necessary;

(c) resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

2. Failing conciliation of the dispute, the Commission shall submit to the parties a report containing its evaluation of the dispute and its settlement recommendations.

Article 3. Arbitration

Failing the establishment of the Conciliation Commission provided for in article 1 or failing an agreed settlement within six months following the report of the Conciliation Commission, either party is entitled to submit the dispute for decision, without special agreement, to an arbitral tribunal to be constituted in conformity with the provisions of the annex to the present articles.

Article 4. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be of relevance under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the annex to the present articles and shall submit its decision to the parties within [six] [ten] [twelve] months from the date of [completion of the parties' written and oral pleadings and submissions] [its appointment].

2. The Arbitral Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

Article 5. Judicial settlement

The dispute may be submitted to the International Court of Justice for decision:

- (a) by either party:
 - (i) in case of failure for whatever reason to set up the Arbitral Tribunal provided for in article 4, if the dispute is not settled by negotiation within six months of such failure;
 - (ii) in case of failure of the said Arbitral Tribunal to issue an award within the time-limit set forth in article 4;
- (b) by the party against which any measures have been taken in violation of an arbitral decision.

Article 6. *Excès de pouvoir or violation of fundamental principles of arbitral procedure*

Either party is entitled to submit to the International Court of Justice any decision of the Arbitral Tribunal tainted with *excès de pouvoir* or departing from fundamental principles of arbitral procedure.

ANNEX

Article 1. Composition of the Conciliation Commission

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third States. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

If the appointment of the commissioners to be designated jointly is not made within the period for making the necessary appointments, the appointment shall be entrusted to a third State chosen by agreement between the parties, or on request of the parties, to the President of the General Assembly of the United Nations, or, if the latter is not in session, to the last President.

If no agreement is reached on either of these procedures, each party shall designate a different State, and the appointment shall be made in concert by the States thus chosen.

¹¹ Ibid.

If, within a period of three months, the two States have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall meet at the seat of the United Nations or at some other place selected by its President.

The Conciliation Commission may in all circumstances request the Secretary-General of the United Nations to afford it his assistance.

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to inquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907.

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all members are present.

Article 2. Task of the Conciliation Commission

1. The tasks of the Conciliation Commission shall be to elucidate the question in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of the proceedings, the Commission shall draw up a *procès-verbal* stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the *procès-verbal* of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.

4. The Commission's *procès-verbal* shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

Article 3. Composition of the Arbitral Tribunal

1. The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third States. They must be of different nationalities and must not be habitually resident in the territory nor in the service of the parties.

2. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third State, chosen by agreement between the parties, shall be requested to make the necessary appointments.

3. If no agreement is reached on this point, each party shall designate a different State, and the appointments shall be made in concert by the States thus chosen.

4. If, within a period of three months, the two States so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a national of one of the parties, the nominations shall be made by the Vice-President. If the latter, is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

5. Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

6. The parties shall draw up a special agreement determining the subject of the dispute and the details of the procedure.

7. In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907 shall apply so far as is necessary.

8. Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by either party.

9. If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply, subject to the present articles, the rules in regard to the substance of the dispute enumerated in article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.

The three steps of the proposed procedure—conciliation, arbitration, and judicial settlement—were described in chapter I, section D.

26. The proposed system had three essential features which should perhaps be emphasized. The main feature was that, failing an agreed settlement between the parties at any stage, the system would—without significantly hampering the parties' choices as to other possible settlement procedures—lead to a binding settlement. The two important limitations which, in his view, ought to be placed on the parties' choice were specified in chapter I, section D. The second essential feature of the proposed solution, and surely the most important in terms of feasibility, was the fact that the settlement procedures to be included in the draft articles would not be of such a nature as to curtail directly, in any significant measure, the injured State's prerogative to resort to countermeasures against a State which it believed had acted in breach of one of its rights. The lawfulness of the resort to countermeasures remained, of course, subject to such basic conditions as the existence of a wrongful act, its attribution to a given State and the other conditions and limitations laid down in draft articles 11 to 14 of part 2.¹² Assessing whether a proposed countermeasure was in keeping with such conditions and limitations would, in principle, remain a prerogative to be exercised unilaterally, although at its own risk, by the injured State itself, subject to any agreement to the contrary between the parties. The proposed procedures would be activated only after the injured State had made such determinations and had acted on them, and the purpose would be to settle, in a timely and effective fashion, any differences between the parties to the responsibility relationship, including, naturally, any relevant questions of fact or law under any of the articles on State responsibility. The third feature was that, although the envisaged procedures would only come into play with regard to a dispute arising subsequent to the adoption of a countermeasure, they would inevitably have to cover not just the lawfulness of the countermeasure in a narrow sense, namely under draft articles 11 to 14 of part 2, but any question of law or fact in dispute between the parties. The envisaged procedures would thus deal not just with questions such as prior de-

¹² Ibid.

mand (art. 11), prior notification and prior exhaustion of available settlement means (art. 12) or proportionality (art. 13), but they would also deal with the existence of a wrongful act, its attribution to the wrongdoing State or any circumstances excluding wrongfulness: matters covered by part 1 of the draft.

27. One further point deserved to be stressed so that there was no possibility of misunderstanding. The “triggering mechanism” of the settlement obligations devolving on the parties under part 3 of the draft proposed in the fifth report was neither an alleged breach of a primary or secondary rule nor a dispute that might arise from the contested allegation of such a breach; it could only be a dispute arising from contested resort to a countermeasure by an allegedly injured State or, possibly, resort to a counter-reprisal by the opposite side. The first-instance evaluation of the existence of such a dispute, and consequently of the triggering conditions, would be made by the proposed conciliation commission.

28. The difference between the “triggering mechanism” represented by a dispute in the present proposal, on the one hand, and that represented by the far more difficult concept of “objection” in the 1986 proposal, on the other, was obvious. The recommended system afforded the advantage that resort to a third-party procedure by an allegedly wrongdoing State which had been the target of a countermeasure would not follow upon a mere objection to an intended and notified countermeasure: it could take place only after the countermeasure had actually been put into effect. Thus, although more advanced in conception and more effective in curbing abuses of countermeasures, the proposed solution would in fact be more respectful of customary practices.

29. Another noteworthy feature would be the role that the proposed dispute settlement mechanism would perform within the framework of the State responsibility relationship. Although, as already stated, the mechanism would not directly preclude resort to countermeasures by an injured State at its own risk, the availability of the system was designed to have a sobering effect on an injured State’s decision to resort to countermeasures. At the same time, it would not be the kind of system for suspending unilateral action that was found in other ILC drafts, such as the draft articles on the law of the non-navigational uses of international watercourses.¹³ Within the framework of the dispute settlement system proposed for the present topic, the countermeasure would not be suspended at all, except by an order of a third-party body after the initiation of a settlement procedure. The only disincentive would be, in the mind of the injured or allegedly injured State, which, it was to be hoped, would be induced to exercise the highest circumspection in weighing up the necessity for, and lawfulness of, any countermeasure envisaged.

30. It was indispensable to stress that although the proposed part 3 of the draft envisaged three steps (conciliation, arbitration and recourse to ICJ), all three steps would not necessarily have to be pursued in every case. Arbitration was only envisaged for the case where the parties failed to agree following a conciliation commis-

sion’s report; and ICJ would only come into the picture in case of failure of arbitration or in case of a challenge to the award for important reasons. The Commission should not be misled into fearing that the envisaged procedures would necessarily be protracted. In most cases a solution would be reached more expeditiously than would otherwise be the case.

31. He had gone to some lengths in explaining the object, meaning and implications of the proposed draft articles because, in view of the somewhat “conservative” positions taken on the matter in the Commission in 1985 and 1986, he deemed it indispensable to be as thorough as possible. He would be pleased to provide any clarification still required. He trusted that the discussion would result in improvements to both the form and the substance of the proposed articles and thus modify the choice, motivated by prudence, that he had made in setting aside—as theoretically ideal but too unrealistic—the alternative “maximalist” solution, namely, the one that would consist in subjecting resort to any countermeasure by an injured State to the existence of an arbitral or judicial announcement and the refusal of the wrongdoing State to comply. That would, without doubt, be the best solution, and he hoped that some members might prefer it.

32. Chapter I, section E, of the report contained a brief review of the policy which had thus far prevailed in the Commission with regard to the dispute settlement provisions of its drafts, a policy which he did not approve. The review was followed by an illustration of some of the new trends which were discernible in the attitudes of States and appeared to be more promising, in terms of the United Nations Decade of International Law,¹⁴ than the attitudes manifested by the same States in the relatively recent past. Section E also stressed the need for the Commission to view the elaboration of part 3 of the draft as a valuable opportunity seriously to advance the cause of the rule of law in the inter-State system. By adopting a suitably effective settlement system, the Commission would serve two vital purposes. The first and immediate purpose was to add a correction to the rudimentary system of unilateral reactions represented by countermeasures, however strictly they were regulated. The Commission should make an indispensable contribution to cutting down the inequalities among the members of the “inter-State system”, which term more accurately reflected the current reality than did the term “international community”.

33. Another equally important reason for adopting part 3 was to help bridge a striking legal gap: the absence of real procedural obligations for States in the matter of dispute settlement. At the national level, such problems were covered by the judiciary, but judges were rarely used in the inter-State system.

34. Lastly, the Commission must stop assuming that States would not approve more advanced commitments or make use of procedures for the settlement of disputes. It must tell Governments, which it served *uti universi*, as a whole (and probably with their peoples), but not *uti singuli*, what it considered to be the minimalist require-

¹³ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

¹⁴ Proclaimed by the General Assembly in its resolution 44/23.

ments, and it should let Governments take responsibility for accepting or rejecting them.

35. Mr. PELLET said that in an ideal world, where States were guided by the rule of law not only internally but also internationally, the Special Rapporteur's coherent thesis would appear to be self-evident. As States were bound by law, it would be "normal" that they should accept the judgement of an impartial third party to resolve their disputes. The establishment of an obligatory mechanism in an area of such crucial importance to international law as State responsibility would represent enormous progress.

36. Unfortunately, the international community was not built on the same model as the State, where the judge was the guarantor of the legal order and the State accepted the law as interpreted by the judge. In the international community, on the contrary, each sovereign State assessed the legality of its own conduct and that of its partners. In those conditions, the very principle of State responsibility for internationally wrongful acts, the principle of the prohibition of the use of force and the obligation to seek a peaceful settlement of disputes constituted spectacular advances. He agreed with the Special Rapporteur that such progress was not sufficient, but it was important to distinguish between what was desirable and what was possible.

37. Even if the Special Rapporteur presented his position as being minimalist, he was actually proposing a revolution. States that ratified such an instrument would be bound to accept conciliation, and the conciliation commission would have a number of decision-making powers; if conciliation failed, arbitration would be compulsory, and if the arbitral tribunal in turn failed to issue an award or if the award was not respected, ICJ would then be competent. All that would cause a great upheaval in the international legal order.

38. The idea of binding conciliation was not new, but the proposal to confer extensive decision-making powers on a conciliation commission robbed the distinction between conciliation and arbitration of part of its substance. That would be the case if draft article 2, paragraph 1 (b), of part 3 was adopted, as the result was conciliation that not only would be binding but would also have legally binding results, something that would go against the fundamental principle of the freedom to choose the means of settling a dispute.

39. The Special Rapporteur's proposed mechanism was intended to apply only to the settlement of disputes concerning State responsibility. But as all internationally wrongful acts engaged a State's international responsibility, most legal disputes between States raised the question of responsibility. Therefore, if the Special Rapporteur's proposed mechanism was adopted, notwithstanding his minimalist approach, it would alter the very nature of international law. Every dispute would become justiciable. That again would be a revolution. By seeking to achieve too much at once, even those States that were favourably disposed towards such a mechanism would balk.

40. Incidentally, in chapter I, section E.3, of the fifth report a term was used that he had not noticed during the Commission's discussions: "counter-reprisals". The mechanism would be applicable to the entire law of State

responsibility, and especially to countermeasures. But in reality, most of the report was devoted to countermeasures, especially—and that was particularly serious—draft article 1, despite what was said concerning legal disputes involving the interpretation or the application of any of the articles on State responsibility. The competence of the tribunal and of ICJ was linked to that starting point. Thus, the whole of part 3, as currently drafted, concerned countermeasures. The Special Rapporteur's oral introduction did not dispel his reservations on that point. He was in favour of a part 3 dealing with the settlement of disputes, but that mechanism should cover the entire draft, and it was even possible to imagine making a distinction between different disputes, according to the problem involved. The Commission was not forced to make one draft applicable to all problems of responsibility: some problems were more ripe for a settlement of disputes than were others. In particular, disputes on international crimes, as defined in article 19 of part 1 of the draft,¹⁵ could be subject to a more binding regime than other subjects. On that point, he had his reservations on the title of chapter II of the fifth report: crimes were not a category of delicts. On the contrary, crimes and delicts were two distinct categories of internationally wrongful acts. He shared what appeared to be the Special Rapporteur's intuition that crimes should be the subject of a regime for the settlement of disputes distinct from the regime applicable to delicts.

41. The same should probably hold true for countermeasures. He liked the idea which emerged from draft article 2 that the body before which the dispute was brought should be able to take provisional measures of protection, it being understood, however, that in that case one could no longer speak of conciliation in the strict sense; yet it could be acceptable for a *sui generis* body to have conciliation power for the substance of the problem and decision-making power for the provisional measures of protection. Even such a regime would have little chance of being adopted by States and could only be envisaged in an additional protocol or in a special article subject to the approval of States by an optional declaration separate from the ratification of the future convention. Therefore, it was best not to rely solely on the settlement of disputes to limit and give shape to countermeasures.

42. It was his impression that the Special Rapporteur wanted to balance the relative vagueness on that point in part 2 by binding provisions on the settlement of disputes. In his view, countermeasures must be accompanied by strict rules making it clear that resort could be had to countermeasures only if no other more orthodox method could be used. Envisaging a more binding special regime for the settlement of disputes relating to countermeasures could not act as an excuse for not specifying the rules applicable to countermeasures and especially for not indicating what was meant by the necessity of countermeasures in part 2, in particular in draft article 11¹⁶. If that was not done, he did not see how conciliators or judges could limit excesses. The legislature was not bound by positive law, but that was not true for judges. If resort to countermeasures was not subject to

¹⁵ See footnote 8 above.

¹⁶ See footnote 10 above.

strict conditions under part 2, it was not apparent how even an advanced regime for the settlement of disputes would enable the arbitrator or ICJ to restrict the use of countermeasures.

43. The Special Rapporteur's proposal departed so much from existing law that he doubted whether they were realistic or even compatible with the Commission's mandate of progressively developing the law, rather than changing it radically. Therefore, he did not favour sending the draft articles to the Drafting Committee. In his view, there were limits to what was possible. First, the Commission must attach to the articles on State responsibility proposals on the settlement of disputes. Secondly, concerning international crimes (part 1, art. 19), a regime similar to the one proposed by the Special Rapporteur could be envisaged, although probably only in an optional protocol to the future convention. Thirdly, for other disputes, he did not believe it was possible to go beyond the stage of binding conciliation in the manner provided for under article 66 of the Vienna Convention on the Law of Treaties. That would not be a bad outcome at all, since it concerned international responsibility, namely the fundamental mechanism regulating all international law. Even there, success was not assured. To cite an example, a number of States had fought in CSCE against a mechanism for binding conciliation under the Convention on Conciliation and Arbitration within the CSCE¹⁷ which those States had not signed. That was merely an instance of simple binding conciliation in a regional framework, and it showed how far the international community still had to go before a truly binding mechanism for the settlement of disputes could be agreed upon in such a sensitive and fundamental area. Fourthly, the Commission might envisage drafting another additional protocol or clause on binding arbitration, but it would only be realistic if the protocol or clause was optional. Fifthly, concerning disputes on countermeasures, it might be possible to give the competent organ, whether an arbitral tribunal or a conciliation commission, the power to decide binding provisional measures of protection for the parties to the dispute. But again, he did not think that it could be imposed on States. States must be asked to approve it, either by a declaration or by ratifying a separate protocol.

44. The Commission should draw the attention of the Sixth Committee to that point and should ask Governments to express their views, either in the Sixth Committee or, preferably in writing, not so much on the appropriateness of a regime for settling disputes as on the mechanism proposed by the Special Rapporteur or on alternatives that the Commission might envisage.

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was unacceptable that Mr. Pellet had attributed to him ideas that he had not proposed. He therefore wished to clear up certain ambiguities that might lead other members astray.

46. The reference in draft article 2, paragraph 1, to the conciliation commission "bringing the parties to an agreed settlement" meant conciliation, and nothing more. It was perfectly clear both in draft article 2, in his

report and in his statement that the conciliation commission did not have the power to decide on the merits of the dispute with binding effect. The conciliation commission's report would be no more than a recommendation of a solution for the parties to accept or refuse. A settlement would only come about by an agreement between the parties—as in the most traditional forms of conciliation. The only points on which he proposed a departure from the usual pattern of a conciliation commission was the possibility of its ordering, where appropriate, with binding effect, the cessation of any measures taken by either party, provisional measures of protection, and fact-finding. Mr. Pellet had clearly misrepresented his views.

47. There might be a slight ambiguity in draft articles 1 and 2 proposed in his fifth report, which the Drafting Committee would certainly have to clear up, in that the phrase in draft article 1 "If a dispute which has arisen following the adoption by the allegedly injured State of any countermeasures ..." might seem to suggest that the competence of the international bodies referred to in the later articles was to be restricted to examination of the narrow issue of whether or not countermeasures were lawful, for example, under draft articles 12 to 14 of part 2,¹⁸ that is to say, proportionality, non-violation of the prohibition of force, *jus cogens* and so on. He had none the less made it very clear in more than one paragraph of his report, which had obviously been misread, assuming it had been read at all, and again during his statement earlier, that once the procedure started, although it had been set into motion after the adoption of the countermeasure, namely following the dispute arising from the fact that a countermeasure had been taken, the conciliation commission was, according to draft article 2, paragraph 1 (a), to "examine any question of fact or law which may be relevant for the settlement of the dispute under any part of the present articles". In the discussion of the previous Special Rapporteur's proposals in chapter I, section A, of the report, he had suggested that his predecessor might have failed to make it clear that he had intended the competence of the conciliation commission to cover the whole range of problems that might arise under the law of State responsibility including any question that might be relevant under any provisions of part 1 or 2 of the draft.

48. He had wished to clarify those points so that other members of the Commission should not be influenced by the superficial statement they had just heard.

49. As for the idea of adding the word "necessity", the Drafting Committee had already dealt with it and he failed to see how such an addition would in any way affect a decision by an injured State to adopt a countermeasure.

50. It was perhaps worth specifying the meaning of the term "counter-reprisal", as it was apparently not known. The notion was widely recognized in the literature on international law and referred to a situation in which a State that was the target of reprisals—in other words, of countermeasures—believed it was entitled, in order to defend itself and maintain its position, to resort to counter-reprisals, or counter-countermeasures.

¹⁷ Adopted by the CSCE Council in Stockholm in December 1992 (see document CSCE/3-C/Dec.1 of 14 December 1992).

¹⁸ See footnote 10 above.

51. There might have been a problem with the translation into French of the terminology used in the introduction to the fifth report, in which he had referred to “delinquencies qualified as ‘crimes’ of States under article 19”. If “delinquencies” had been translated as *délits*, that was surely incorrect. But the previous speaker had not been simply taking issue with terminology: he had been accusing the Special Rapporteur of seeking to cause a *bouleversement* in international law, which he felt was ridiculous.

52. Mr. GÜNEY said that, in the fifth report, the Special Rapporteur posited an intrinsic relationship between the settlement of disputes and the responsibility of States and succeeded in illustrating the complexity of the problem. Even if one of his goals had been to win over the legal and academic milieu, however, he could have avoided devoting over half the report to an analysis of the work done by his predecessor and of the discussion in the Sixth Committee. A simple reference to the relevant documents would have sufficed.

53. The main issue the Commission must now resolve was whether the draft articles should include provisions on the settlement of disputes. A number of factors should be taken into account in making that decision. First, States were reluctant about and fearful of submitting themselves to obligatory settlement by third parties. The Commission must therefore tread very lightly in dealing with the issue. Secondly, whatever the mechanisms envisaged for dispute settlement, they must respect the principle of free choice of means for such settlement. Thirdly, the nature of the procedures to be used had to be determined—in particular, whether they were self-executing or not. Fourthly, flexibility must be shown in respect of reservations.

54. He agreed that a convention on State responsibility would be ineffective without an adequate procedure for dispute settlement. Prospects for dispute settlement had been enhanced following the major changes in world affairs recently, and a balanced solution was therefore within sight. Yet in seeking to strike such a balance, the goal should be to avoid diminishing the purpose and effectiveness of the future convention on State responsibility for want of appropriate procedures for the settlement of disputes, and to prevent an unduly rigorous regime in that area from discouraging accession to and acceptance of the convention. Such a balance must also ensure that priority went to the dispute settlement machinery already in force between the parties and that the link between the dispute settlement as outlined in the draft articles and existing systems for achieving the same goal be carefully defined.

55. There remained some doubt about the advisability of envisaging a legal regime of countermeasures within the draft articles. It was still open to question whether countermeasures were the appropriate way of forcing a State that was allegedly guilty of an internationally wrongful act to engage in dispute settlement or to acknowledge and provide compensation for the damage it had done. After all, recourse to countermeasures by an injured State could result in an escalation of countermeasures, and the way to erase the consequences of a wrongful act surely did not lie in the commission of yet another wrongful act. The difficulty was in the international community's failure to establish a system to en-

sure scrupulous respect for the law. Despite the obstacles involved, the Commission should focus on safeguards against abuse of unilateral measures and try to find means of strengthening such safeguards.

56. As for dispute settlement as an essential aspect of any regime governing unilateral actions the subject deserved serious examination by the Commission. The purpose of promoting recourse to dispute settlement as a means of making the use of countermeasures more compatible with the rule of law in relations between States and of minimizing the adverse aspects of their use was to ensure that any unilateral actions were lawful to an acceptable and necessary extent. According to the proposal by the Special Rapporteur, exhaustion of recourse procedures would be a parallel obligation rather than a precondition for resorting to countermeasures. Hence, everything would hinge on the dispute settlement arrangements between the State having committed the internationally wrongful act and the State claiming to have been injured. In that respect, he agreed with Mr. Pellet that a distinction should be drawn between what was desirable and what was possible.

57. It would certainly be realistic to resolve the issue, not within the framework of an innovative system that broke with existing international law, but through a simple and flexible mechanism encouraging States to settle their disputes rapidly. Within such a mechanism, settlement through legal channels would be envisaged only as a last resort, to be used with many restrictions and great prudence. To avoid any negative impact on acceptance of and adherence to the future convention on State responsibility, the mechanism must incorporate an “opt in, opt out” clause.

58. Though it was up to Governments to decide whether to accept or reject obligations for dispute settlement, at the present stage of development of the law in that area, it would be wise to provide guidelines, and leave the task of working out appropriate mechanisms to the plenipotentiary conference at which a convention on State responsibility would one day be adopted.

59. Mr. FOMBA said the report raised a number of fundamental questions, the first being how to justify the common practice of taking countermeasures. The Special Rapporteur suggested two possible routes to follow, both of which were sensible and of great interest: to envelop countermeasures in a sort of strait-jacket by clearly defining the terms and limitations of their use, and to minimize their adverse effects by establishing a system for compulsory peaceful settlement of disputes.

60. The second fundamental question was how far the Commission could and should go in its treatment of the issue. The Special Rapporteur thought a major step forward should be taken in the progressive development of the law on dispute settlement and accordingly proposed two solutions, which were set out in chapter I, section D, of the report. The solution taking the “legislative path” seemed preferable, for the reasons advanced by the Special Rapporteur.

61. A third question was how to protect weak countries from abuses on the part of powerful ones. A clear, rigorous system for dispute settlement—and above all, one that would be accessible for the poorer countries—would have to be developed. The need for such a system was

underscored by a consistent pattern of violation by powerful States of the rights of weaker ones. France's summary expulsion in 1986 of 101 Malians, many of whom had been in possession of valid residence permits, was a case in point. Another case had been that of the Malian workers seeking decent accommodation in Paris, many of whom, including women and children, had recently been subjected to brutal treatment, in flagrant disregard for the most elementary human rights. Such situations would provoke unilateral outcries, were it not for the economic dependence of countries, such as Mali's dependence on France.

62. It was therefore important to provide for a compulsory and effective dispute settlement mechanism under the legal regime for State responsibility. However, hard and fast obligations amounted to nothing if the great majority of States, namely the poorer ones, were unable to apply them for lack of financial resources, among other things. It was no exaggeration to say that lack of funds could result in the denial of justice. So it had been with the problems faced by Mali and Burkina Faso during the settlement of their frontier dispute.¹⁹ The two parties had requested ICJ to appoint three experts to help in mapping out the border between them following the compromise reached through the Court's ruling in 1986. Subsequently, both countries, though accepting the substance of the ruling, had admitted to being unable to meet the expenditure occasioned by the mapping work. A benefactor was finally found in the Swiss Government, which also assisted in the search for hidden deposits in banks in Switzerland of Malian public funds following the fall of the Malian dictator, General Moussa Traoré, in 1991.

63. So, there was clearly an urgent need to give adequate and effective legal aid to developing countries. As far as access to ICJ was concerned, there was a precedent in the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice. The Fund could be used to finance the drafting of legal documents, the payment of fees, the funding of legal research and many other aspects of legal procedure. The only restriction was a major one: the Fund could be used solely in connection with a case brought before ICJ by common agreement between the parties. That meant it could not be used in cases of arbitration or conciliation. And a wealthy State had only to reject such a preliminary agreement in order to prevent a poorer State from preparing its case in the best possible manner. That aspect of the Fund's operations should be revised. It was also necessary for a resolution to be adopted by the General Assembly taking note of the establishment of the Fund and encouraging States to contribute to it.

64. Lastly, draft article 5, on judicial settlement, should be worded in such a way that the right of access of poor countries to the Fund was preserved. Financial assistance to such countries should cover conciliation and arbitration, as well as settlement by mutual agreement. A specific provision should be incorporated concerning aid to developing countries regarding access to and application of dispute settlement procedures. A

number of sources could be taken as references, including the Vienna Convention on the Law of Treaties.

The meeting rose at 12.55 p.m.

2306th MEETING

Friday, 11 June 1993, at 10.10 a.m.

Chairman: Mr. Gudmundur EIRIKSSON
later: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he had taken note of all the observations made by members of the Commission on the draft articles which appeared in his ninth report (A/CN.4/450). He agreed that it would have been useful to incorporate in the chapter on prevention some of the principles and concepts set forth in article 3, paragraph 1, and articles 6 and 8 and also that the concept of prevention should be linked to that of responsibility in article 8, but, since those articles had been referred to the Drafting Committee,² that task now devolved upon the Committee. It had also been said that the procedures provided for should not be too detailed and that States wanted only a general framework of reference. One member of the Commission had even taken the view that the chapter on prevention could be reduced to article 14. Furthermore, several members had said that the question of prevention *ex post facto* should be the subject of different and separate articles, since prevention *ex post facto* went further than prevention proper and consisted of limiting or containing the harm. He had simply followed the terminology used in most conventions on civil liability, in which the word "prevention" in fact signified prevention *ex post facto*. He was, however, ready to accept the principle of separate articles,

¹⁹ *Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554.*

¹ Reproduced in *Yearbook . . . 1993*, vol. II (Part One).

² Sec 2300th meeting, footnote 18.

provided that it did not affect the logical structure of the chapter. He was particularly sympathetic to the idea of special treatment for the developing countries—an idea which had been stressed by several speakers—but he noted that his proposal to devote a general article to the matter in the section on principles had been considered insufficient by some. Mention had also been made of the need to ensure that such preferential treatment did not lead to a waiver of the obligation of prevention for the developing countries. In addition, certain practical difficulties might arise as a result of the increasingly wider gap between the newly industrialized countries and the other developing countries, not to mention the least developed. As to the appeals for the strengthening of the assistance of international organizations, it was difficult to see how specific articles on the question could be drafted, since the Commission could not make those organizations, which would not be parties to the Convention, provide assistance in any particular way. It was to be hoped that those members who had made such appeals would be able to find solutions to the problem within the Drafting Committee. In any event, he would bear their remarks in mind when he revised the articles on prevention.

2. It had been said that, inasmuch as different activities required different measures of prevention, it would be advisable to establish groups of activities according to their characteristics. In his view, that would be difficult, if not impossible, if only because with scientific and technical developments new activities were constantly emerging. The definition of the continental shelf contained in article 1 of the 1958 Convention on the Continental Shelf had, for instance, lost its significance as soon as technological advances had made it possible to exploit natural resources at any depth. Nor should it be forgotten that the Commission was supposed to be producing a framework convention, in other words, an instrument setting forth general obligations for any type of activity. He therefore doubted that it would be possible to group activities by category. In support of that proposition, one member of the Commission had stated that the obligation of information had not always applied and that everything depended on the type of activity: for instance, the Principles Relevant to the Use of Nuclear Power Sources in Outer Space, adopted by the General Assembly in 1992,³ imposed an obligation of information on the State which launched a satellite with a nuclear power source on board, whereas the Convention on International Liability for Damage Caused by Space Objects did not impose such an obligation. That difference, however, was to be explained by the fact that the Convention dealt with liability, not prevention, and it was at the prevention stage that information was involved. The 1992 Principles, on the other hand, were mainly concerned with prevention, and the obligation of information naturally had a place there. Furthermore, principle 4 stipulated that that obligation was in conformity with article XI of the Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies. The regime which applied to satellites with nuclear

power sources on board was therefore no different from the general regime under that Treaty.

3. The question of a system of residual State liability had been relegated to a footnote because it was only a possibility and would remain in abeyance until the Commission had taken a decision on the subject of State responsibility. The possibility had indeed prompted fairly strong reactions among the members of the Commission and had even been rejected by those from developing countries. In any event, it was not his own proposal and it might reassure the members of the Commission who had stated their concern to know that none of the proposed articles and none of his reports indicated that the State had an obligation of reparation or compensation for creating a risk: the State was bound to make reparation only in the case of actual harm.

4. Turning to the draft articles themselves, he recognized that, as some members of the Commission had said, prior authorization (art. 11) would depend on the definition of risk—which amounted to saying that such authorization would be mandatory only if the risk associated with the planned activity was significant or substantial.

5. Opinions were divided concerning article 12 (Transboundary impact assessment), with some members believing that it was the State itself which should make the assessment, and others that it was the operator. In his own view, it was the State which should make the assessment or at least check that it had been properly made by the operator, so that the State would be liable only in the event of harm. Some members also felt that assessment would be too heavy a burden for the developing countries, while others thought that it would even be pointless, for States were after all liable for what happened if they did not take the necessary preventive measures.

6. Article 13 (Pre-existing activities) had prompted several reactions. It had been suggested that the last sentence should be amended by the addition of the words “without prejudice to the liability of the State”. It had also been said that the State of origin was required to investigate the pre-existing activities in order to determine whether they involved risks of transboundary impact. The deletion of the article had also been proposed.

7. For many members of the Commission, article 14 (Performance of activities) constituted the core of the prevention chapter. Most members agreed that the article should emphasize that insurance for the operator was compulsory. Some saw no point in mentioning prior authorization in the article and thought it sufficient to say that the State should not authorize an activity involving risks if no preventive measures had been taken. For one member of the Commission in particular, only article 14 counted. Others thought that the article should be placed first in the series of articles on prevention.

8. Article 15 (Notification and information) had not been judged satisfactory. It had been said that the type of information which the State of origin must give to the affected State—for example, concerning legislative and other measures which it was planning—should be spelled out more clearly and that it should include an assessment of the transboundary impact. It had also been proposed that any mention of international organizations

³ General Assembly resolution 47/68.

should be deleted and that a paragraph should be added to the effect that the State of origin could ask for technical assistance from an international organization in connection with prevention. Some members of the Commission had also suggested that subparagraph (d) should be reworded so as to make it clear that it was for the authorities of the affected State to convey the information to the people likely to be affected. According to others, it was sufficient to indicate that the public must be given an opportunity to be heard.

9. Article 16 (Exchange of information) had not prompted any comment. In contrast, article 17 (National security and industrial secrets) had generated a lively reaction. It had been said that the text reflected a certain inequality, that the terms “national security” and “industrial secrets” should be defined and that it was not sufficient to say that the State of origin “should cooperate in good faith”; and some members even believed that the article might lead to the collapse of the rest of the articles.

10. Article 18 (Prior consultation) had also been criticized, in particular because the term “mutually acceptable solutions” might give the impression that the envisaged activity might have harmful consequences. The term was not intended to give a kind of right of veto to the State which was or was presumed to be affected and he was therefore not against amending the sentence in order to make the meaning clear. The basic idea of the article was in fact that consultation was not compulsory and there could therefore be no right of veto.

11. It had been said that, in article 19 (Rights of the State presumed to be affected), it would be preferable for the State presumed to be affected to request the State of origin or an international organization to make a study.

12. Widely differing opinions had been expressed about article 20 (Factors involved in a balance of interests). Some members were ready to accept it, provided that it was placed in an annex. Others had suggested its deletion, and others had asked that some terms should be changed, for example “shared natural resources”.

13. With regard to the settlement of disputes (art. VIII of the annex),⁴ some members had welcomed the idea of a special procedure for the settlement of disputes relating to consultation, while others were in favour of instituting an inquiry procedure. In general terms, the members of the Commission had accepted the idea of including the principle of non-transference of risk or harm and the “polluter pays” principle in the draft articles.

14. He was very well aware that the “precautionary principle” established in principle 15 of the Rio Declaration on Environment and Development⁵ had been included, for example, in the United Nations Framework

Convention on Climate Change and the Convention on Biological Diversity, but the principle was still controversial and did not seem to be appropriate in the draft articles: they were designed to regulate the question of liability for the actual harm caused by a given activity and for the risk of harm, whereas, in the two Conventions in question, the principle related to problems which were a source of concern to all of mankind. But it would be for the Commission to decide on the point.

15. In conclusion, he noted that a general agreement seemed to be emerging in the Commission in favour of referring the draft articles back to the Drafting Committee, including article 10 (Non-discrimination).⁶ He thanked all the members of the Commission for their comments.

16. Mr. VERESHCHETIN said that he did not agree with the Special Rapporteur’s interpretation of the Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies: in his own opinion, the Treaty did not require the communication of technical information before the launching of satellites.

17. The CHAIRMAN proposed that, in accordance with the recommendation of the Enlarged Bureau, article 10 (Non-discrimination), which the Commission had considered at its forty-second session, and articles 11 to 20 *bis* should be referred to the Drafting Committee to enable it to concentrate its work on the issue of prevention, as the Commission had decided at its preceding session. With the help of the Special Rapporteur, however, the Drafting Committee could perhaps play a larger role and determine whether the scheme of the new articles which had been submitted was logical and complete and, if not, what other provisions might usefully be included. On that basis, it could then start the actual drafting of the articles. Once it had worked out a satisfactory set of articles on the prevention of risk, it could see how the new articles fitted in with the general provisions contained in articles 1 to 5 and the principles embodied in articles 6 to 9 and in article 10.⁷

18. Mr. KOROMA said that he accepted the Chairman’s proposal, provided that it did not affect the decision taken at the preceding session and that the Commission dealt with the regime of prevention first and with the regime of liability afterwards.

19. He thanked the Special Rapporteur for his instructive summary, but stressed that he did not agree with him on two points. In the first place, the 1958 definition of the continental shelf was still valid, even if there were plans to adapt it to technical advances. Secondly, the concept of “shared resources” had no place in the topic.

20. The CHAIRMAN said that the decision the Commission was about to take would not affect the decisions it had taken at its preceding session.⁸

21. Mr. ROSENSTOCK said that he welcomed that clarification.

22. Mr. de SARAM said he agreed that the Commission should abide by the decision it had taken at its pre-

⁴ For the text, see *Yearbook* . . . 1992, vol. II (Part One), document A/CN.4/443, chap. II; see also *Yearbook* . . . 1992, vol. I, 2268th meeting, para. 5.

⁵ Principle 15 reads:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

See A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), p. 6.

⁶ See *Yearbook* . . . 1990, vol. II (Part One), p. 105, document A/CN.4/428 and Add.1, annex.

⁷ *Ibid.*

⁸ *Yearbook* . . . 1992, vol. II (Part Two), p. 51, paras. 344-349.

ceding session as to how it should organize its work on this topic. At a later stage in the Commission's work it would, of course, be necessary, as required by decisions of the General Assembly and the decision taken by the Commission at its forty-fourth session, that preparation of primary rules on compensation for harm caused be undertaken. It was in that spirit that he accepted the Chairman's proposal.

23. Mr. CALERO RODRIGUES said he could understand the Commission did not want to go back on the decision it had taken at its preceding session, but thought it was inevitable at the present stage that it should interpret it to some extent. If the draft articles were referred to the Drafting Committee, what would the Commission do in the meantime? Would it suspend the consideration of the topic? Would the Special Rapporteur have to submit new articles or wait for the results of the work of the Drafting Committee?

24. The CHAIRMAN said that the decision taken by the Commission at its forty-fourth session did not prevent the Special Rapporteur from thinking about the next stage of the work to be done and submitting proposals to the Commission.

25. Mr. BARBOZA (Special Rapporteur), referring to paragraph 345 of the Commission's report on the work of its forty-fourth session,⁹ said that he intended to submit articles on remedial measures and then deal with the question of liability proper.

26. The CHAIRMAN said that the Drafting Committee's discussions on the draft articles would help give the Commission a clearer idea of the direction its work should take, without prejudice to the decision adopted at the preceding session.

27. Mr. TOMUSCHAT said that he agreed with the Chairman and noted that, when the Special Rapporteur went on to the question of remedial measures, he should take account of the Drafting Committee's discussions.

28. Mr. VILLAGRÁN KRAMER said that the decision taken by the Commission at its preceding session was correct, but it should not bind the Commission unduly. The Commission and the Drafting Committee had a set of draft articles to work on and had to make as much progress as possible on the topic. Between now and the end of the current session, the Special Rapporteur could perhaps submit an outline dealing with harm and the corresponding measures to be taken.

29. Mr. GÜNEY said that account should be taken of the fact that it had been agreed that the composition of the Drafting Committee would change depending on the topic.

30. The CHAIRMAN, speaking on behalf of the Chairman of the Drafting Committee, said that the new composition of the Drafting Committee would be announced shortly.

31. Mr. YANKOV said that he agreed with the proposal the Chairman had made on the recommendation of the Enlarged Bureau, but pointed out that the topic under consideration was that of international liability. Referring to paragraph 345 of the Commission's report on the

work of its forty-fourth session,¹⁰ he noted that giving priority to prevention was only a *modus operandi*.

32. The Drafting Committee's discussions at the Commission's next session would be facilitated if the Special Rapporteur explained what direction he intended the work to take, since that would explain the place of prevention in the draft as a whole. Otherwise, the draft articles might be no more than a set of disparate provisions.

33. The CHAIRMAN said it was understood that the Commission would ask for the Special Rapporteur's advice before deciding on the next stage of its work, in accordance with the decision adopted at the preceding session.

34. If he heard no objection, he would take it that the Commission accepted the proposal he had made on the recommendation of the Enlarged Bureau with regard to the work to be done on the topic at the current session.

It was so decided.

35. The CHAIRMAN said that the Commission had completed its consideration of agenda item 5.

Mr. Barboza took the Chair.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹¹ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

36. Mr. MAHIOU expressed congratulations to the Special Rapporteur on his fifth report (A/CN.4/453 and Add.1-3), which was entirely in keeping with his earlier reports. He welcomed the reference to the discussions which had taken place in the Commission and in the Sixth Committee in 1985 and 1986 (*ibid.*, chap. I, sect. A), since it showed that there were already a number of points of agreement on that sensitive issue. Everyone was aware of the past and present hesitations of States to accept procedures for the compulsory settlement of disputes. The world had, however, changed since 1985, it so happened that States were more and more inclined to accept procedures of that kind, including judicial procedures, as demonstrated by the agenda of ICJ in the past 10 years. The Commission must not only go along with such progress, but must also do everything possible to promote it.

37. What was desirable and possible remained to be seen. That was, moreover, the concern of the Special Rapporteur and the members of the Commission who had spoken on the subject. As to what was desirable, the Special Rapporteur indicated that he preferred what was in a way the ideal solution, stating that he was ready to take the necessary steps in that direction if the Commission so wished, although he had no illusions and recognized that what was desirable was not within reach (*ibid.*, sect. D).

¹⁰ *Ibid.*

¹¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

⁹ *Ibid.*

38. There was no alternative but to leave aside what was desirable and fall back on what was possible, namely, the solution recommended in chapter I, section D, of the report. In that connection, he was pleased to note that some areas of agreement had emerged from the discussions held in 1985 and 1986 and probably continued to exist. In his view, there was little or no disagreement on at least two major points. The first related to the need for part 3 of the draft on dispute settlement procedures, which the Commission, if it was not to fail in its task, must not leave in the hands of the future diplomatic conference. The second point was the need to make dispute settlement procedures compulsory. While there was agreement in principle on that point, the exact mechanisms had not been spelled out and that was where the debate stood. The Special Rapporteur was proposing a three-step system, which would become increasingly binding as States moved from conciliation to arbitration and from arbitration to ICJ. The Commission had been invited to discuss that proposal.

39. He noted that the report and the draft articles contained therein¹² were somewhat ambiguous. The Special Rapporteur's analysis was based on disputes relating to the entire set of articles of the future instrument and on those relating to countermeasures in particular. At times, he even seemed to be concentrating exclusively on that second category of disputes. That was particularly apparent in the first paragraph of chapter I, section D.2, which seemed to limit the scope of the topic, and in the next paragraph, which was ambiguous. Fortunately, the subsequent text showed that that was not the case. It was clearly indicated that the Special Rapporteur was considering the issue in its entirety and, even if draft article 1 appeared restrictive, draft article 2, paragraph 1 (a), confirmed that the dispute settlement system covered all questions which might arise from the interpretation or application of the future instrument and that the emphasis had been placed on countermeasures simply because that aspect of the problem was so difficult.

40. It was thus understood that the dispute settlement mechanism had to be comprehensive. It remained to be seen how its application and its acceptance by States could be ensured.

41. In his view, the Commission could come up with rather bold solutions in that respect once it had reached agreement on certain fundamental points. It seemed that consensus had in fact been reached on three points: preventing the escalation of measures and countermeasures; avoiding having the *de facto* inequality of States turn to the legal advantage of the strongest; and establishing a restrictive and binding system for countermeasures, which could unfortunately not be excluded as a means of preventing resort to measures of that kind as far as possible.

42. In his opinion, the appropriate method would be to make the procedure and its conclusions compulsory, while distinguishing between the different steps envisaged. Conciliation would be compulsory in the case of any dispute relating to any provision of the future instrument; however, the conclusions would not be binding, except perhaps in the case of interim measures of protec-

tion, whether directed at the wrongdoing State or the injured State. That was, moreover, what the Special Rapporteur was proposing and which deserved consideration.

43. In the case of arbitration, it was important to avoid two extreme positions: one under which arbitration would be compulsory in the case of any dispute—something that would not be acceptable to all States—and the opposite under which arbitration would be ruled out on the grounds that States must have freedom of choice and of means. In his view, the solution would be to make arbitration contingent on two conditions. First, arbitration would be compulsory in the case of certain disputes. Indeed, parts 1 and 2 of the draft articles took account of many situations where questions of fact or law on which States disagreed could be settled through arbitration, without those States considering that their sovereignty or freedom of choice had been called into question. Secondly, arbitration would be an option open to all States wishing to use it, and that would have the advantage of developing international law on that issue. Arbitration should not be ruled out simply because some States hesitated to resort to it.

44. With regard to judicial settlement, it was best, as with arbitration, to have a flexible mechanism, twofold as it were, corresponding to different situations. Certain disputes might be subject to compulsory jurisdiction by ICJ, for example, when a binding rule of general law was at issue, as suggested by the previous Special Rapporteur, as well as when other rules set forth in the future instrument were at stake, as determined by the Commission. The jurisdiction of ICJ would be optional in the case of disputes relating to other questions. As in the case of arbitration, such jurisdiction should not be ruled out because certain States hesitated to use it. On the contrary, it was appropriate in that situation as well to promote the codification and progressive development of international law.

45. He did not believe that it was possible to have a simple dispute settlement system in the area of State responsibility. It would probably be necessary to set up a rather complex mechanism in order to reconcile moral issues and effectiveness, flexibility and State sovereignty. Yet the Commission should not fail to be bold so that it might overcome its past weaknesses and respond to the criticisms levelled against it. In that regard, the draft articles submitted by the current Special Rapporteur and those which had been submitted by the previous Special Rapporteur and which were before the Drafting Committee would be a good starting point.

46. Mr. de SARAM, introducing the statement he intended to make later, referred to the importance of the fifth report on a topic which was fundamental to the primacy of law and respect for the principles of law in relations between States. The Special Rapporteur had tried to commit the Commission to fulfilling its responsibility with regard to the progressive development of the law, a responsibility which derived directly from the Charter of the United Nations and from which the Commission must not be diverted. The question of the degree of progressive development which the system of relations between States was ready to accept would be for each member of the Commission to decide—until such time as the Commission could request the views of States on

¹² For the text of the draft articles, see 2305th meeting, para. 25.

the issue. Until then, the Commission should not limit itself strictly to its task of codification of the law, but should, as it had done in other areas, such as that of the international criminal court, assume its responsibility, bearing in mind the rules it had to establish on the law applicable to the conduct of States. As Mr. Mahiou had said, it was necessary to throw off the constraints of an earlier time and avoid limiting the issue of dispute settlement procedures to a previously established framework of precedents. In view of some of the statements that had been made immediately following the Special Rapporteur's introduction of the fifth report, he hoped that the Commission would be able to move forward in that area of the progressive development of the law, while being as realistic as necessary.

The meeting rose at 11.30 a.m.

2307th MEETING

Tuesday, 15 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN noted that an informal paper had been circulated to all members of the Commission by the Special Rapporteur in order to clarify some points that had arisen during the debate.

2. Mr. ROBINSON said the Special Rapporteur's fifth report (A/CN.4/453 and Add.1-3) was a passionate and unambiguous plea for the Commission to seize the opportunity offered by its work on State responsibility to propose to the General Assembly an advanced dispute settlement system applicable to countermeasures. It was astonishing that such a plea had to be made in the first place. The Commission was called on to look beyond the existing malaise in international relations and to chart a course guided by the principles of justice and sovereign equality. While not ignoring existing political realities

which in essence sanctioned the rule of the strong over the weak, the Commission must envision its mission in such a way that a system for settling disputes relating to unilateral measures, one that paid due regard to the interests of all States, both weak and powerful, would by no means be inconceivable. The reaction elicited in some quarters by the Special Rapporteur's proposed dispute settlement system was also astonishing, since a reasonable appraisal showed that, while in most respects it represented an advance over previous systems, in some respects it was fairly unambitious.

3. The Special Rapporteur clearly believed that the international climate was now conducive to the creation of a binding third-party dispute settlement system for dealing with countermeasures, and had correctly identified the factors underlying that favourable climate. First, the Manila Declaration on the Peaceful Settlement of International Disputes² had been influential in promoting recognition of the need for effective dispute settlement systems. Secondly, the Eastern European States were taking a new approach to the question of dispute settlement following the end of the cold war. Thirdly, the opinions expressed at the Commission's previous session and in the Sixth Committee showed majority support for a highly developed dispute settlement system to counteract the injustices that could result from unilateral measures, which, in the current disorganized and decentralized state of international relations, had not, regrettably, been outlawed. The Commission was summoned to a leadership role in the codification and progressive development of international law. Therefore, it should not hesitate to make a proposal, even if it felt there might be opposition from Governments. When it believed the proposal would serve the interests of the world community, it should lay the proposal before the General Assembly, where Governments could give their response.

4. The essence of countermeasures was raw power, wielded more often than not to the detriment of the principles of equality and justice. Since the exercise of power was inevitable in present-day international relations, the goal should be to create systems that tested the legitimacy of such power, preferably before it was exercised. Without such systems, countermeasures would always give stronger States an advantage over weaker ones. It was small comfort indeed that, since armed reprisals were outlawed, countermeasures would be mainly economic in nature, for such measures could cripple a country as surely as could the use of force.

5. How, then, could a dispute settlement system be created that would truly assist weaker States, if the system could be called into play only after a countermeasure had been applied? A system that an injured State must necessarily resort to before using a countermeasure, one that would enable the legitimacy of the countermeasure to be determined and other matters resolved, would be preferable. Yet the existence of a binding third-party dispute settlement system that could examine any countermeasure adopted would act as a deterrent to the use of countermeasures. A strong body of opinion was now emerging, both in the Commission and in the General Assembly, in favour of a dispute settlement system for

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² General Assembly resolution 37/10, annex.

countermeasures that gave both the wrongdoer and the injured State the right to set in motion machinery that was binding, and not merely recommendatory. It was that body of opinion the Commission must now seek to reflect: a norm that tied the right to take countermeasures to certain conditions, including a binding third-party dispute settlement system.

6. As to the draft articles and the annex of part 3³ article 1 would have to be better aligned with article 12 of part 2⁴ to ensure consistency in the references to the time-frame for setting the dispute settlement system in motion. He could agree to the Special Rapporteur's compromise solution regarding the timing for activation of the system, but the proposal was unambitious, for it failed to reflect the emerging trend in favour of recourse to a binding third-party dispute settlement system before countermeasures were undertaken. The proposal was therefore less far-reaching than the one made by the previous Special Rapporteur in 1986.⁵

7. It was explained in chapter I, section D, of the report that the triggering mechanism for the dispute settlement system was neither an alleged breach of a primary or secondary rule of customary or treaty law nor a dispute that might arise from a contested allegation of such a breach. It was, rather, a dispute arising from a contested resort to a countermeasure on the part of the allegedly injured State, or resort to a counter-reprisal from the opposite side. Yet while a dispute following the adoption of a countermeasure usually related to that measure, it could also go further and involve the allegation of a breach of a primary or secondary rule, where such a breach might not have given rise to a dispute before the adoption of the countermeasure. Article 1 should be adjusted to make that point more clearly. That purpose might be served by using the words "on account of" or "because of" to replace the word "following", which could have an exclusively temporal connotation rather than a causal one.

8. A legitimate question had been raised as to whether the Commission should design a dispute settlement system to deal with any question that arose about the interpretation or application of the entire set of articles on State responsibility. He believed it should, and that the system should be similar to the one proposed to deal with countermeasures. The question of whether the proposed dispute settlement system for countermeasures could be given a broader application to cover all aspects of implementation of the articles on State responsibility would have to be taken up at a later date. The Commission should submit a clear recommendation on that subject to the General Assembly: it should not leave the decision to the plenipotentiary conference to be convened to adopt a convention on State responsibility. In his view, the conciliation commission to be established as part of the dispute settlement system should be empow-

ered to examine only questions arising in connection with the adoption of countermeasures.

9. With reference to article 2, he could see no reason why the conciliation commission should not be authorized to order the cessation of measures taken by either of the parties or to institute any provisional protective measures it considered necessary. Such powers were not normally given to a conciliation commission, but they were appropriate in order to make sure that certain interests were not prejudiced. Protective measures were also needed, pending the implementation of a non-binding recommendation of a conciliation commission, as were such measures before a binding decision of an arbitral tribunal was implemented. The fact-finding faculty, provided for the conciliation commission in article 2, paragraph 1 (c), was most useful.

10. With regard to article 3, on arbitration, and article 5, on judicial settlement by ICJ, both methods of settlement entailed binding decisions and each party should therefore be entitled to submit the dispute directly to the forum of its choice. Article 5, as drafted, allowed only submission to ICJ.

11. Lastly, he wished to congratulate the Special Rapporteur on the courage shown in producing a report with epochal significance and in urging the Commission to grasp the favourable opportunity now within its reach for the progressive development of international law by establishing an advanced dispute settlement system for countermeasures that was responsive to the principles of sovereign equality and justice.

12. Mr. BENNOUNA said that, in reading the Special Rapporteur's fifth report, he had had the feeling of being in a confessional with a very honest individual who had committed a sin that weighed heavily on his conscience. The sin was to have proposed in the second part of his draft articles a number of provisions in connection with countermeasures. The Special Rapporteur found it painful to be reminded by members of the Commission and speakers in the Sixth Committee of the inherent defects of countermeasures, and believed the criticism levelled against him was more intense than that to which his predecessor had been subjected. Let the Special Rapporteur be reassured: if the criticism was stronger now in 1993 than in 1986, it was because a radical change had taken place in international relations since the end of the cold war. The checks and balances of that period had disappeared, and greater vigilance was required today.

13. The decision, made by both the current Special Rapporteur and his predecessor, to centre the dispute settlement system on ways of handling countermeasures, was motivated by the fact that such a system itself was closely bound up with countermeasures and unilateral acts. The substantive rules and procedural rules in that area formed an organic whole; one type of rule could not exist without the other. Without an adequate and somewhat restrictive dispute settlement system, the use of countermeasures would result in parties taking the law into their own hands—the very negation of the rule of law—and in elemental power struggles.

14. The draft articles and annex of part 3 proposed by the Special Rapporteur⁶ were thus in every sense a pack-

³ For the text, see 2305th meeting, para. 25.

⁴ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook... 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

⁵ For the texts of draft articles 1 to 5 and the annex of part 3 proposed by the previous Special Rapporteur, see *Yearbook... 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

⁶ For the text, see 2305th meeting, para. 25.

age deal, comprising substantive provisions on countermeasures and procedural rules for the settlement of related disputes. He hoped the Commission would accept the fairly restrictive dispute settlement system proposed; for his part, he could not endorse the use of countermeasures if it was not accompanied by such a system.

15. Countermeasures could not be dealt with in the same way as disputes in general, since the highly conventional field of obligations and procedures for the settlement of disputes was involved: the substantive rule violated might derive from an international instrument which already provided for an appropriate means of settlement, and the debate on the consequences of such a violation could be resolved under the existing means of settlement or under Article 33 of the Charter of the United Nations or under a special agreement between the parties.

16. In the final analysis, all the substantive rules of international law were involved in the law of responsibility and it would be a delicate matter to provide for a specific method of settlement for responsibility in general. A countermeasure, on the other hand, was an exceptional derogation from international law in that it authorized a State to violate the law in reaction to what it deemed to be an unlawful act that had caused it harm. An exceptional situation called for a special settlement procedure. He fully agreed with the Special Rapporteur that the Commission should display a measure of boldness. Audacity could not be acceptable when legalizing countermeasures yet unacceptable when providing for procedures whose purpose was not only to test the good faith of the allegedly injured State but also to dissuade it from acting rashly. Indeed, as rightly indicated in the title of section C.1, an adequate dispute settlement system was "an indispensable complement to a regime governing unilateral reactions".

17. In regard to sections D, E and F, he noted that the Special Rapporteur had said the ideal solution would be to make the lawfulness of countermeasures dependent on a prior binding decision by a third party. In such a case, the subjective assessment of the allegedly injured State would be removed by, as it were, inserting between the unlawful act and the countermeasure a definitive decision by an impartial third party. While that might be an ideal solution, it was also Utopian. It would be tantamount to subjecting the whole of the law of responsibility and, indirectly, the evaluation of compliance with all the substantive rules, to an international arbitral or judicial body. As the Special Rapporteur agreed, that seemed to be wholly out of keeping with the stage of development of modern international society which still consisted of sovereign States and where justice was optional.

18. It was necessary, therefore, to retain the general obligation laid down in Article 33 of the Charter of the United Nations, whereby States had the right to choose from among the available procedures. Should a State take the law into its own hands and resort to unilateral measures, however, it would inevitably have to submit to increasingly restrictive legal controls.

19. As to conciliation, he wondered whether the ordering of cessation of measures or of provisional measures of protection should not be confined to the arbitral or judi-

cial phase, with conciliation retaining its original aim, namely, to propose a report at the end of the proceedings which the parties were free to accept or refuse. Of the two models for a conciliation commission, suggested by Mr. Riphagen, the previous Special Rapporteur, and the present Special Rapporteur respectively, the latter model seemed to be the more complicated, but it could perhaps be simplified in the Drafting Committee. In the case of arbitration, provision should be made for the intervention of a third party—possibly the President of ICJ—to act if one of the States failed to appoint an arbitrator.

20. The various procedures should be shortened somewhat and simplified to prevent extensions being used as a delaying tactic. Such questions could be discussed in the Drafting Committee. However, the Commission, for its part, should decide on the question of principle, namely, whether or not to accept the system proposed by the Special Rapporteur. His own response was unreservedly positive and he was grateful to the Special Rapporteur for his fifth report, which would facilitate the acceptance of a package deal. If that deal was not accepted, however, he would feel bound to enter a reservation to all countermeasures as a whole.

21. Mr. VILLAGRÁN KRAMER said that useful legal material was available to the Commission for its consideration of the present topic. The Vienna Convention on the Law of Treaties, for instance, which had been adopted on the basis of work completed in the Commission in 1969, contained clear and objective provisions with respect to disputes arising in that area of the law. In 1985, the previous Special Rapporteur had introduced a new element in his sixth report, namely, a system of conciliation that could pave the way for a compulsory procedure for the peaceful settlement of disputes arising out of unlawful acts.⁷ The current Special Rapporteur, for his part, had referred in his third report,⁸ to a resolution of the International Law Institute according to which reprisals could not be taken so long as recourse had not been had to existing procedures for the peaceful settlement of disputes, and in his fourth report, to the position taken by the Swiss Government in 1928 concerning the direct relationship between reprisals, prohibition of reprisals and the duty to settle any problem that arose by arbitration.⁹ He had likewise referred to the legal arrangements which had obtained at the time of the League of Nations, and which showed that there had always been a close link between those elements.

22. The Special Rapporteur had perhaps come closest to pinpointing the complexity of the issue when he had stated, in his fourth report, that unilateral measures were bound to remain the core of the legal regime of State responsibility for a long time and that consequences such as cessation and reparation would, in the final analysis, rest on reprisals. The Special Rapporteur had, however, perhaps prejudged the approach the Commission would adopt, which was simply to recognize that, like it or not, reprisals did exist under customary law and the existing

⁷ See *Yearbook*... 1985, vol. II (Part One), p. 15, document A/CN.4/389, section II.

⁸ See *Yearbook*... 1991, vol. II (Part One), p. 19, document A/CN.4/440 and Add.1, para. 56.

⁹ See *Yearbook*... 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3.

legal regime was imperfect. The Special Rapporteur's dilemma, therefore, was to decide which solution to propose within that imperfect system of regulation: an imperfect solution, or a solution that would represent a step forward. In his own view, the Special Rapporteur's proposal was not revolutionary and would not cause an upheaval in the existing international order; rather, it was pragmatic and deserved recognition for its lucidity and sound legal argument. A problem did arise because the Special Rapporteur had proposed that the reaction to an unlawful act, and not the unlawful act itself, should operate to set in motion the compulsory dispute settlement procedure. In that connection, it was worth noting that, apart from Article 2, paragraph 3, and Article 33, the Charter of the United Nations did not provide an adequate basis on which an unlawful act could be held to operate as a trigger, whereas customary law and international practice did offer a means, by way of reprisals, whereby compulsory machinery for the settlement of disputes could be established and promoted.

23. On balance, he believed that the Special Rapporteur's proposal deserved serious consideration, particularly in the light of the discussion that had taken place in the Drafting Committee on article 12 (Conditions of resort to countermeasures).¹⁰ The Commission could not now act inconsistently with what it had discussed in the context of its consideration of that article. Also, it should not be unduly concerned about the formula proposed by the Special Rapporteur, since it was clear from a manual prepared by the secretariat on dispute settlement procedures that a wide range of options was available, including conciliation, arbitration and other procedures.

24. He congratulated the Special Rapporteur on his work and looked forward to a further chapter of the report dealing with crimes and delicts.

25. Mr. VERESHCHETIN said that the Special Rapporteur was right to note in his fifth report that the Commission had not contributed very significantly to the law of dispute settlement. In its drafts, the Commission did not as a rule go beyond proposing non-binding conciliation procedures that were consigned to optional protocols or annexes. Clearly, however, that had not been due to any lack of either concern or skill on the part of previous members of the Commission. Rather, in considering whether or not to incorporate binding settlement provisions in the body of the text they had been guided first and foremost by the desire not to risk rejection of the draft as a whole because of settlement provisions that were unacceptable to many States.

26. The same problem, unfortunately, still arose today, and he doubted whether the position of States on the question of compulsory arbitration had changed sufficiently to warrant optimism about the likelihood of the Special Rapporteur's proposals being widely accepted. The doubt was all the more legitimate as the draft on State responsibility was not concerned with just one aspect of international relations, like the majority of the Commission's drafts, but touched on all aspects of international relations and international law. The Special Rapporteur acknowledged the existence of all those

problems, in the fifth report, but nevertheless advocated greater boldness.

27. Perhaps it was because the Special Rapporteur himself was not entirely convinced of the acceptability of his proposals that he confined himself to outlining a procedure designed not to prevent countermeasures from being taken but only to determine the lawfulness of a countermeasure already taken. While appreciating that such limitation of the scope of the proposed dispute settlement mechanism was motivated by the wish to satisfy the "conservatives", he could not help wondering whether the proposal was really as bold or revolutionary as had been claimed. What was so very bold about a proposal whose acceptance would not affect the *faculté* of States to take countermeasures, or even temporarily delay the application of countermeasures? In his view, the proposal was not "revolutionary" enough to represent a genuine breakthrough in international law; at the same time, it was excessively complicated, as Mr. Bennouna had pointed out earlier.

28. The law of dispute settlement was a separate, major topic for the Commission to consider. It went beyond the scope of the topic of State responsibility and could not be dealt with in passing, as it were. In that connection, he disagreed with the argument advanced by the Special Rapporteur to the effect that, in the light of the numerous ineffective general dispute settlement treaties, there was little point in undertaking any further efforts towards the progressive development of dispute settlement procedures of a general character, and that it would be more appropriate to engage, in the context of the draft on State responsibility, in substantial progressive development of dispute settlement procedures by providing for a more effective arbitration clause. Actually, the two approaches were not mutually exclusive. Furthermore, recent developments in the field of dispute settlement, in particular the Convention on Conciliation and Arbitration within the CSCE,¹¹ suggested that general dispute settlement treaties did not necessarily have to be ineffective.

29. The foregoing remarks did not mean that the draft on State responsibility should not include provisions on the settlement of disputes. Like some other members, he thought that, in drafting such provisions the Commission should draw very extensively on the Special Rapporteur's proposals. However, the scope of those future provisions should not be confined exclusively to the problem of countermeasures, but should relate to the application and interpretation of the whole of the future convention on State responsibility. If, however, the dispute settlement provisions were to be connected specifically with countermeasures, then they should surely be considered together with the articles on countermeasures already referred to the Drafting Committee.

30. The introduction to the report spoke of a chapter II, dealing with the consequences of delinquencies qualified as "crimes" of States under article 19 of part 1 of the draft,¹² and stated that the chapter—which was not yet

¹¹ Adopted by the CSCE Council in Stockholm in December 1992 (see document CSCE/3-C/Dec.1 of 14 December 1992).

¹² For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

¹⁰ See footnote 3 above.

before the Commission—did not contain any draft articles. Furthermore, the Special Rapporteur indicated that he was not yet ready to make definite suggestions with regard to the additional rights and obligations attaching to the internationally wrongful acts contemplated in article 19 of part 1. Consequently, in what sequence was the Commission to consider the sections of the draft still outstanding? Should it embark on the consideration of the draft articles of part 3 before considering a most important section of part 2, namely the substantive and instrumental consequences of crimes of States? Would that not be putting the cart before the horse? Again, he wondered why it was that the Special Rapporteur had found it necessary to include a chapter on the consequences of crimes in a report on dispute settlement procedures. Did the Special Rapporteur perhaps not intend to propose any articles at all on the substantive and instrumental consequences of international crimes? The question seemed to be fundamental, for in previous reports the Special Rapporteur had always stressed that he was only dealing with delicts, not crimes, and the Drafting Committee, in considering the draft articles on State responsibility, had proceeded on that assumption. He would appreciate an answer before the Commission in plenary took a decision on the articles of part 3 of the draft.

31. Mr. ARANGIO-RUIZ (Special Rapporteur) remarked that it was not the first time Mr. Vereshchetin had asked about his intentions in connection with the subject of crimes. The preparation of chapter II—which, he assured the Commission, was indeed forthcoming—involved a great number of very difficult problems. He trusted that the debate scheduled for early July would assist him in preparing a satisfactory report on the subject for the Commission's next session.

32. As he had often said in the past, crimes were wrongful acts of a more serious nature. Whatever suggestions he might advance on the subject of delicts—whether on countermeasures, substantive or instrumental consequences, or dispute settlement—should be viewed as containing some indication of future proposals, *mutatis mutandis*, with regard to crimes. It would be recalled that his predecessor, in article 4, subparagraph (b), proposed in 1986,¹³ had envisaged the possibility of direct recourse to ICJ. For his own part, he envisaged such recourse only as the third stage of the settlement procedure. It should be recalled that article 19 of part 1, adopted by the Commission on first reading, had met with strong reservations within the Commission and the Sixth Committee, as well as in the literature. The problem was a most difficult one and called for a step-by-step approach. He did not believe that the Drafting Committee was in difficulties because it did not have the whole report before it, and he would enjoin Mr. Vereshchetin to be patient for a little longer. Once again, he deprecated the suggestion that his proposals on dispute settlement were an attempt to “cause an upheaval” in international law.

33. Mr. KOROMA said that he did not subscribe to the view that the Special Rapporteur was trying to “cause an upheaval” in international law. He did, however, very much hope that there was no intention to dismiss, rewrite

or water down article 19, on international crimes and international delicts, already adopted by the Commission on first reading and overwhelmingly supported in the Sixth Committee. Presumably, the question of whether to uphold or delete article 19, problematic as the article undeniably was, would be taken by the Commission as a whole and not by the Special Rapporteur alone.

34. Mr. ARANGIO-RUIZ (Special Rapporteur) said Mr. Koroma could rest assured that, notwithstanding the problems and difficulties he had mentioned, it was not his intention to drop article 19. On the contrary, precisely because of that article's importance, he considered it his duty to treat the matter with the seriousness and care it deserved.

35. Mr. RAZAFINDRALAMBO said that the work on State responsibility, well on the way to completion thanks to the untiring and exemplary efforts of the Special Rapporteur, constituted a significant contribution to the progressive development of international law. He joined others in congratulating the Special Rapporteur on his excellent fifth report, his clear proposals and his courageous conclusions, which had set the stage for a particularly fruitful debate.

36. The scope of application of the procedures for the settlement of disputes in part 3 of the draft and the nature of the solution proposed by the Special Rapporteur called for some observations. The scope of application of the procedures discussed in the fifth report had raised questions that were well-founded, particularly with regard to the titles of the draft articles. It had been stressed that the Special Rapporteur, like his predecessor, Mr. Riphagen, had displayed the intention of respecting the approach adopted by the Commission in which a first part, on the origin of the rules of responsibility, called primary rules for simplicity's sake, and a second part, on the legal consequences of a breach of those rules, that is to say, secondary rules, would be followed by specific provisions on implementation and on the settlement of disputes arising out of the application and interpretation of those primary and secondary rules.

37. It would appear that the fifth report, in particular proposed article 1 of part 3, was not fully in keeping with the initial intention and the desire of most members of the Commission. The report focused almost exclusively on arguing the need for procedures for the settlement of disputes in respect of countermeasures. The Special Rapporteur had not evaded the problem, as he himself had made clear in the informal note circulated earlier. In the fifth report, he had pointed to the need to identify the provisions (substantive or instrumental) to which the application or interpretation of the envisaged procedures should apply, and he had recalled that in Mr. Riphagen's view, the two parts of the draft were interdependent. The Special Rapporteur clarified his position in that respect; nevertheless, the six articles of part 3, which formed a coherent and indissociable whole, only dealt with disputes which had arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly law-breaking State and which had not been settled by one of the means referred to in article 12, paragraph 1 (a). One had to conclude that part 3 only concerned articles 11 *et seq.* of part 2,¹⁴ and excluded ar-

¹³ See footnote 4 above.

¹⁴ See footnote 3 above.

ticles 6 to 10.¹⁵ Hence, the Special Rapporteur had apparently departed from the approach of his predecessor, whose article 1 of part 3¹⁶ had referred to article 6, which corresponded to the current Special Rapporteur's articles 6 to 10. The Special Rapporteur had sought to clarify that lacuna in his note. In his own view, that gap might also be closed later, for example by drafting another article of a general nature on the scope of application.

38. The Special Rapporteur had undertaken a complete and thorough examination of the structure and nature of the proposed dispute settlement procedure, taking into account the need to restrict resort to countermeasures or at least to curtail their adverse aspects, and had tried to reply to the serious concerns about including countermeasures in the draft. In that regard, he agreed with the perspicacious comments in the report on the need for an adequate dispute settlement system as an indispensable complement to a regime governing unilateral reactions. On the other hand, in the framework of the solution recommended, the explanations about the application of article 12, paragraph 1 (a), of part 2, concerning the exhaustion of all the amicable settlement procedures available before resorting to countermeasures, were not always very clear. That provision, in the wording contained in the fourth report,¹⁷ mentioned a whole range of means of such settlement, in sources other than the future convention on State responsibility. In its present form, the provision would appear to be a condition for resort to countermeasures, whereas the procedures in part 3 for the settlement of disputes would only take effect, as stated in article 1 of part 3, following the adoption of countermeasures. It was a simple and feasible system. However, the Special Rapporteur's interpretation of article 12, paragraph 1 (a), considerably weakened the scope of the provision, in that, according to him, it only referred to settlement means without directly prescribing them and did not directly set forth the obligation to exhaust given procedures as a condition for resorting to countermeasures. He thus hoped that the Drafting Committee would eventually adopt a wording for article 12, paragraph 1 (a), that was more precise and more consistent with that restrictive interpretation.

39. The Special Rapporteur's desire to strengthen the procedures for the settlement of disputes in respect of countermeasures was understandable. In that regard, the Special Rapporteur proposed two solutions: either to make the lawfulness of any resort to countermeasures conditional on the existence of a binding third-party pronouncement, or to strengthen the non-binding procedure by adding arbitration and judicial settlement procedures. The former solution would appear to be more suitable for significantly restricting the use of countermeasures and would have been unthinkable while international relations had been dominated by East-West antagonism. But it did not seem to be the most realistic choice at present, even if it was the only one that really took into account the situation of weak countries. The latter solution was the one recommended by the fifth report and which

Mr. Pellet (2305th meeting) had termed revolutionary. That was something of an exaggeration, because the solution had simply been based upon the approach taken in recent conventions, for example, in the United Nations Convention on the Law of the Sea. Furthermore, it did not in any way seek to prejudice the injured State's "prerogative" of taking countermeasures or even suspending countermeasures once they had been taken, unless a settlement procedure had been submitted to a third party and the latter had ordered suspension of the countermeasures.

40. The dispute settlement procedures in part 3 were in many ways reminiscent of similar models in international trade law, except that they had three phases: conciliation, which could only give rise to recommendations and only had binding effect with regard to provisional measures of protection; arbitration, which was binding, if conciliation failed; and, lastly, judicial settlement by ICJ, particularly in the event of failure to set up the arbitral tribunal. Although it might be argued that the system was complicated and unwieldy, he agreed with the Special Rapporteur that it could have a deterrent effect and strengthen guarantees against abuse of unilateral reactions. Making it non-binding would leave the way open for powerful States to take justice into their own hands, as many unfortunate examples in recent history had shown.

41. As to the actual articles, the word "measures", in article 1, was ambiguous and should be replaced by "countermeasures". In the French version of article 3, the word *compromis* (special agreement) should be replaced by *clause compromissoire*, because it was the right to submit the dispute to arbitration that was at issue, not the drafting of a document determining the object of the dispute and the procedure to be followed once the dispute had been submitted for arbitration. That would be more in keeping with the "special agreement" referred to in article 3, paragraphs 6 to 9, of the annex. Lastly, the last part of article 5, subparagraph (a) (i), should be altered to read "... within six months of the submission of the report of the Conciliation Commission".

The meeting rose at 12.25 p.m.

2308th MEETING

Wednesday, 16 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

¹⁵For the texts of draft articles 6 to 16 of part 2, referred to the Drafting Committee, see *Yearbook... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

¹⁶See footnote 4 above.

¹⁷See footnote 7 above.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA said that basically the fifth report on State responsibility (A/CN.4/453 and Add.1-3) was devoted exclusively to the question of the lawfulness of countermeasures or, in other words, the reasons for conditions of implementation and modalities of operation of the regime established by article 12, which had been referred to the Drafting Committee in 1992.² That showed the importance of the topic and the originality of the report, which described not only the arguments of the discussion on the complementarity of the general regime of countermeasures and a special system for the settlement of disputes, but also the specific recommendations and proposals put forward by the Special Rapporteur.

2. The proposed system reflected the boldness and ingenuity of its author and, with regard to substance, namely, the formula to be devised in order to put an end to the legal void resulting from the mutual violation of the law by two States, it was not unrealistic, whatever might have been said. By putting a premium on impartiality through the impartial intervention of a third party, it skilfully combined the advantages of political settlement and judicial settlement. Unfortunately, the concern to respect sovereignty was not always to be found in the structure proposed by the Special Rapporteur, but the structure's effectiveness depended on it because, in the event of the breach of the legal order by a wrongful act, the problem of returning to normal was above all one of means. It must therefore be asked whether the theoretical formula proposed by the Special Rapporteur was feasible. When the Commission had considered the reports by Georges Scelle on arbitration, it had criticized him for devising a system which was *de lege ferenda*.³ Was the "Arangio-Ruiz system" open to the same criticism?

3. At a time when a new international order appeared to be taking shape against a background of the right of interference, the settlement of disputes continued to be subject to the sovereignty of States, of which countermeasures were precisely the secular arm. However, the practice of interference—meaning less sovereignty and more solidarity—was international law in the making, but it was not being criticized as being *de lege ferenda*. Accordingly, why would written rules limiting the sovereignty of States in their propensity to manipulate international legality be regarded as *de lege ferenda*? The risks of intransigence pointed out in the fifth report contained the seeds of the risk of war and the Commission, whose duty it was to wage war on war by means of the law, should not hesitate to make States face up to their re-

sponsibilities. Whatever criticisms might be levelled against the Special Rapporteur, it had to be recognized that his system was in conformity with the spirit of the times. Drafting work still had to be done and some points had to be clarified.

4. The report raised a substantive problem relating to the operation and effectiveness of the proposed system. A countermeasure in itself did not give rise to a dispute, since it was by definition the exercise of a right: the dispute which existed was, according to article 1 proposed by the Special Rapporteur, the dispute which has arisen following the adoption by the allegedly injured State of any countermeasures. In that case, how could the conciliation commission be entrusted with the task of first determining the existence of the dispute—or, in other words, be empowered to say, if need be, that there was no dispute at all—when the injured State had already resorted to countermeasures? That was the substantive problem, the problem of effectiveness, and it related to the triggering of the proposed system. The characterization of the dispute depended mainly on whether the act in question belonged to a particular legal category. In the first stage of the system, it was thus the parties' difference of opinion about the legal characterization of the factual situation that gave rise to the dispute. The characterization by the conciliation commission could be made only after the dispute had arisen following the conflict of characterizations between the States concerned. In other words, it was States that created the dispute, not the conciliation commission. That misunderstanding had to be dispelled.

5. Turning to the proposed provisions,⁴ article 2 also gave rise to a substantive problem as a result of the fact that conciliation was nothing more than a method of political settlement. The conciliator was not a judge. He proposed and States, which were sovereign because they were the original subjects of international law, disposed. The conciliator therefore had to convince without being able to impose anything. That was the price to be paid for the effectiveness of the system. The word "order" should therefore be replaced by the word "propose" in article 2, paragraph 1 (*b*), and the words that followed the words "settlement of the dispute" in paragraph 1 (*a*) should be deleted.

6. Article 3 should also be brought more into line with an orthodox approach to arbitration in order to forestall the objections that were bound to be raised in the name of national sovereignty. The question did not, moreover, appear to have been given enough attention, as shown by the contradiction between the establishment of an arbitral tribunal "without special agreement" (art. 3) and the existence of a "special agreement determining the subject of the dispute and the details of procedure" (annex, art. 3, para. 6); that contradiction was all the more regrettable in that the system made provision for possible recourse to ICJ against an arbitral award vitiated by an abuse of power or by a procedural defect.

7. With regard to the role of ICJ, he recognized the need to reconcile effectiveness with free choice of procedures and to give effect to the distinction between crimes and offences and considered that, since the con-

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook*... 1992, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

³ See *Yearbook*... 1953, vol. II, pp. 201-202, para. 15.

⁴ See 2305th meeting, para. 25.

cept of abuse of power was subject to interpretation in the present state of the text, the jurisdiction of ICJ should be more limited. Moreover, bearing in mind the slowness of proceedings in ICJ, its intervention might have serious consequences for the interests at stake, especially those of the injured State.

8. In conclusion, he said that the bases of the "Arangio-Ruiz system" were sound, but the proposed structure was still incomplete and the Commission should therefore take the necessary time to build it on the basis of the materials which it had assembled.

9. Mr. KABATSI pointed out that, while some found the fifth report somewhat timid, others saw in it the makings of a revolution or, in other words, a description of the ideal rather than what was possible. The Special Rapporteur had clearly stated that the ideal situation would be one in which no State would be authorized legally to take the law into its own hands and in which, in the event of a dispute, the injured State, or rather the allegedly injured State, would request a third party to settle the dispute, while reserving the right to resort to countermeasures, but only for the purpose of leading the wrongdoing State back to the path of legality. Many States—and many past and present members of the Commission—had long been advocating making that ideal a reality and yet, in the 40 years during which the Commission had been considering the question, it had not made any progress. The reason was simple: there were also many States—and many members of the Commission—who preferred that States should remain free to take whatever action they wished when they considered that a unilateral wrongful act had been committed and that procedures for the settlement of disputes should be resorted to only at a later stage if the injured State considered that to be in its interest. There could be no better proof that legal techniques were still in the first stages of their development and that the international legal order was still inadequate. It was not that the dangers of the situation were not clearly understood. Everyone knew that unilateral measures and countermeasures were counter-productive because they encouraged the intransigence of the parties and the escalation of violence, ultimately endangering international peace and security. Quite often, that situation was envisaged only as between strong and weak States, but it could be even more dangerous when the two parties were equal or almost equal in strength. However, as the report clearly showed, the advocates of unilateral remedies, as opposed to the pacific settlement of disputes before resort to countermeasures, had apparently won the day.

10. The report dealt only with a dispute settlement regime that attempted to correct or to ameliorate the negative aspects of what it called the unilateral reaction system. That was the purpose of the three-step dispute settlement system—conciliation, arbitration and judicial settlement—which had been proposed by the Special Rapporteur and did not provide that special conditions would be imposed on the States concerned and, in particular, the injured State, requiring it to refrain from any countermeasure before the exhaustion of available dispute settlement procedures or even those established by the future instrument on State responsibility. Article 12, paragraph 1 (a), as originally proposed by the Special

Rapporteur⁵ would have imposed an obligation of that kind on the injured State, but, as the recent trend in the Drafting Committee had been showing, that idea had had to be abandoned, at least for the time being.

11. He therefore did not believe that much progress could be made on the basis of the fifth report. That was not because the Special Rapporteur lacked ideas on ways of achieving a breakthrough in the development of international law. He had even proposed the theoretically ideal solution, which was to establish the principle that countermeasures were prohibited except in the event of a binding third-party pronouncement, and had said that, if the Commission so wished, he would be prepared to submit the necessary draft articles. Naturally, however, and notwithstanding the trends which he pointed out, the Special Rapporteur indicated that he was all too aware of the Commission's general reluctance to consider bolder provisions in the area of dispute settlement in previous drafts, but stated that the Commission should not miss the opportunity to make a significant contribution to the development of the law of dispute settlement, particularly during the United Nations Decade of International Law.⁶

12. In conclusion, he agreed with the opinion expressed in the last paragraph of chapter I, section E, of the report. He even believed that the time had come for international lawyers to distance themselves from their Governments in order to say what was right and fair, rather than what was acceptable. He thanked the Special Rapporteur for his proposals, which although not revolutionary, were nevertheless bold because of the prospects they held out.

13. Mr. CALERO RODRIGUES expressed his thanks to the Special Rapporteur for his fifth report, which offered much food for thought and would, as the debate had shown, be of great assistance to the Commission in its study of the question of the settlement of disputes.

14. While the Commission had often hesitated to include dispute settlement provisions in its draft articles, it seemed to have had no difficulty in concluding that the draft articles on State responsibility should contain such provisions.

15. In contrast to the usual reasons generally given for not including such provisions, there was one very specific one which led to the opposite conclusion. After defining an internationally wrongful act and its substantive legal consequences—cessation, reparation, guarantees of non-repetition—the draft articles on State responsibility recognized the right of the State which considered itself injured by what it regarded as an internationally wrongful act not to comply with one or more of its obligations towards the State it considered as the wrongdoer or, in other words, to apply countermeasures. However, if it was later determined that the assessment of the situation was wrong, the countermeasures themselves would turn out to be an internationally wrongful act and would trigger the responsibility of the State which had applied them; there was thus an obvious risk of escalation. A solution would have to be found at some stage, but preferably as soon as possible, in order to avoid the perpetu-

⁵ See footnote 2 above.

⁶ Proclaimed by the General Assembly in its resolution 44/23.

ation of a system of countermeasures and counter-countermeasures and, if that solution was not arrived at by agreement between the States concerned, it would have to be sought through a third-party decision.

16. Moreover, it seemed to be the common view that countermeasures were an ineffective means of solving the problem because they put the injured State, at least temporarily, in the position of being both judge and party, maintaining the application of international law at a primitive stage that had long disappeared from organized systems of national law. Also, countermeasures resulted in the accentuation of inequality among States, in violation of the basic principle that States, like men, were all equal before the law.

17. As an example of the injustice inherent in the system of countermeasures, he would take the case mentioned by Mr. Fomba (2305th meeting). State A expelled a number of nationals of State B, in contravention, according to State B, of a treaty in force between the two States. State B, a weak State, protested, alleging the illegality of the act. State A maintained its position, insisting on the legality of its action. The treaty in question provided only for negotiation as a means of settling disputes. The only recourse left to State B was to apply countermeasures, for instance, by ordering the expulsion of the same number of nationals of State A. State A might then consider that such countermeasures were not lawful and decide to apply counter-countermeasures. The escalation could only further harm State B so that it would be entirely unprotected, perhaps until such time as the aggravation of the dispute led to some more effective means of settlement than that provided for in the treaty, or relations between the two States might suffer to the detriment of the weaker State, namely, State B, which, being unable to resort to countermeasures, would have to give in. One day, perhaps, it might be vindicated. In the meantime, it would be hurt in its pride and its interests simply because it was weak and countermeasures always operated in favour of the strong. The injustice in such a case, as in many others, would be eliminated if an effective system of settlement were applied from the very beginning in disputes involving the international responsibility of States.

18. One central question in matters of responsibility was precisely the relationship to be established between the right to apply countermeasures and the obligation to submit disputes to a system of peaceful settlement. Since the Commission had decided to maintain the resort to countermeasures because it wished, having regard to existing international law, to remain in the realm of what was possible, it should at least give countermeasures a moral content (*moraliser les contremesures*) and, to that end, should, as the Special Rapporteur stated, "make the lawfulness of any resort to countermeasures ... conditional upon the existence of the said, binding, third-party pronouncement". That would not, as had been said, cause an upheaval in international law, but, rather, in the words of the Special Rapporteur, a breakthrough—a modest one, in his own view—in the development of international law and justice and equality would surely be better safeguarded.

19. The Special Rapporteur was not sure that the Commission was ready to accept that concept, but he said that he was ready to submit draft articles along those

lines if the Commission so wished. He himself was very much in favour of it and he trusted that the Commission would follow that line.

20. The Special Rapporteur suggested a three-tiered system for the settlement of disputes—a well-conceived though rather conventional scheme—which started with conciliation and moved on, if necessary, to arbitration and then, again if necessary, to judicial settlement. That system might be satisfactory in the case of disputes relating to the application or interpretation of the articles of the future instrument. It would be less so, however, particularly in view of the delays involved, in the case of disputes involving countermeasures which would then be allowed to continue for a long time without any external control. The Special Rapporteur was aware of the problem and had tried to solve it by grafting on to the draft articles on conciliation⁷ a provision entitling the conciliation commission to order, where appropriate, the cessation of countermeasures and provisional measures of protection. In so doing, he had of course attributed to the conciliation commission powers usually reserved for arbitral or judicial bodies. It was true that an impartial determination of the lawfulness of countermeasures was necessary and should come at an early stage in the dispute settlement procedure. While he was not as opposed as some to the granting of such powers to the conciliation commission, he wondered whether that departure from traditional rules was indispensable. One could, for instance, conceive of the question of the legality of countermeasures being submitted, from the outset, to arbitration. Admittedly, that would do away with the conciliation stage, which might be regarded as a very useful first step on the road to binding third-party procedures.

21. The matter could perhaps be solved by separating the determination of the lawfulness of countermeasures from the settlement of disputes concerning the application or interpretation of the provisions of the future instrument. As he saw it, such a separation would have a dual advantage. On the one hand, there would be an early and impartial determination of the admissibility of the countermeasures, something that would be to the benefit both of the wrongdoing State, which might be suffering the effects of unjustified countermeasures, and of the injured State, which would thus have the assurance of not being penalized later for having acted *ultra vires*. On the other hand, recourse to procedures for the settlement of disputes concerning the application or interpretation of the articles of the future instrument would be enlarged and would not be made dependent—as was the case under article 1 as proposed by the Special Rapporteur—on the application of countermeasures. Intentionally or not, the whole system proposed was triggered if a dispute had arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly law-breaking State (art. 1). If no countermeasures were applied, the provisions on the settlement of disputes could not be invoked even in the case of a dispute concerning the application or interpretation of the future instrument.

22. Matters would be easier to handle, in his view, if the same provisions did not deal, in the same way, with

⁷ For the text, see 2305th meeting, para. 25.

two different questions, namely, the need for a general system for the settlement of disputes arising out of the application or interpretation of the articles of the future instrument and the need for specific provisions on the settlement of disputes concerning the legitimacy of countermeasures. In the case of the first kind of dispute, it would suffice if a few changes were made to the system proposed by the Special Rapporteur, in particular with a view to guaranteeing greater freedom of choice, though he doubted whether such a broad application of binding third-party procedures was feasible at that stage. So far as the second kind of dispute was concerned, a system along the lines of arbitration could be envisaged. Such provisions should take full account of the fact that a solution to the dispute must be secured without delay. The choice of arbitrators should be simplified, the installation of the arbitral tribunal should be expedited and its rules should be as simple as possible to allow for a speedy conclusion of the task. That task would consist exclusively of determining whether the countermeasures were lawful and whether or not they should cease. Only by express agreement of the parties would the tribunal be empowered to go any further. He even thought that, instead of referring to an arbitral tribunal and to arbitration, just to stay within the framework of existing procedures, it would be preferable simply to speak of a "commission" or a "countermeasures commission". That commission could also be authorized to try to bring the parties to a mutually satisfactory compromise solution before exercising its power to deliver a binding decision. In fact, it could embody elements of arbitration, mediation and, of course, fact-finding. It should not be too difficult to draw up provisions to that effect and he was confident that the Special Rapporteur would be able to do so.

23. Many references had been made to the need to strike a balance between what was desirable and what was possible, as also to the need not to propose provisions that States would not accept. There was, however, no guarantee whatsoever that States would accept the articles the Commission produced and, unfortunately, it was States, not the Commission, that made international law. In the past, the Commission had prepared articles tailored to what it supposed to be the wish of States, only for the General Assembly to put them aside, even when a majority of the States represented there were not opposed to those articles. He, like other members, was firmly convinced that the Commission had a responsibility of its own and that it could contribute to the progressive development of international law only if it acted, particularly in the area of State responsibility, with that rational audacity which Mr. Mahiou had mentioned earlier.

24. Mr. YANKOV said that, before examining in detail the proposed draft articles on conciliation and arbitration, he had two general remarks to make on the system for the settlement of disputes envisaged by the Special Rapporteur. In the first place, he noted that, apart from some considerations of a general nature in favour of a third-party settlement procedure, the Special Rapporteur placed the emphasis above all on the need for a binding settlement procedure as a counterweight to possible countermeasures and to minimize the negative aspects of unilateral measures. The deterrent, and perhaps preventive, effect which the establishment of a dispute

settlement system would, of course, have on the ill-considered adoption of countermeasures was undeniable and the Special Rapporteur's fifth report provided convincing arguments to that effect. But, as the Special Rapporteur himself admitted, effective third-party settlement procedures should be envisaged in part 3 of the draft. Since part 3 was not confined to countermeasures alone, there was the problem of the scope of the dispute settlement system, which, logically, should apply to all the issues dealt with in part 3. As Mr. Bennouna had observed (2307th meeting), the Special Rapporteur might have thought that, in the case of many of those issues, reference could be had to established practice. At all events, it seemed that, at the current stage, he had considered it preferable to concentrate his efforts on the role of third-party dispute settlement in the case of unilateral action. That was apparent from his report, in which he stated that the disputes that would be covered by that procedure were those legal disputes arising as a consequence of countermeasures or counter-reprisals resorted to by parties in an international responsibility relationship.

25. Having regard to the numerous general treaties on the settlement of disputes which were not applied and which were ineffective, the Special Rapporteur was not to be reproached on that score; it should even be recognized that it would be more appropriate to engage in a substantial progressive development of dispute settlement procedures by providing for a more effective arbitration clause. But international developments and the increasing number of international treaties and other instruments which recognized the practical significance of third-party dispute settlement provided favourable grounds for the progressive development of international law in that field. Of course, expectations should not be exaggerated. The end of the cold war did not signify an end to conflicts between States; and environmental, religious and ethnic problems were the source of even more complex discord. The aim was not, of course, to produce texts that would go down in the history of the work of the Commission without ever being put into effect.

26. His second general remark concerned the question of whether the dispute settlement procedures in the case of countermeasures should be brought into operation before or after the adoption of countermeasures. With all due respect, he would have liked the Special Rapporteur to ask himself whether there were not areas in which recourse to binding procedures for the settlement of disputes before the adoption of countermeasures would be useful and conceivable.

27. Turning to the draft articles,⁸ he said that he did not altogether agree with the Special Rapporteur when he stated in respect of conciliation, that the non-binding character of the outcome of conciliation made that procedure inadequate for the purpose of correcting the negative aspects of unilateral countermeasures. Everything depended on what was expected of conciliation. It had been generally established—and reference could be had in that connection to the Handbook on the Peaceful

⁸ For the text, see 2305th meeting, para. 25.

Settlement of Disputes between States⁹—that the functions of conciliation were to elucidate the facts in dispute and to bring the parties to an agreement by suggesting to them mutually acceptable solutions.

28. In his view, an attempt should not be made to reform the institution of conciliation by assigning it functions that were more appropriate for arbitration or judicial settlement. It was, however, quite conceivable for conciliation to be made compulsory, subject to an agreement by the parties to the dispute to proceed in the event of failure to arbitration or some other third-party settlement. There were three advantages to such an approach: any confusion between conciliation and arbitration would be avoided; the task of the parties would be simplified by enabling them to proceed directly to arbitration without having to go through the intermediate and hypothetical phase of the conciliation commission; and the progressive development of the law would require less effort, as there would be an institution soundly rooted in State practice.

29. The opinions of the conciliation commission should, moreover, retain their recommendatory nature: if States did not come to an agreement, the other mechanisms for settlement would be set in motion. Indeed, the Special Rapporteur proposed the insertion of the words “where appropriate” before the word “order” in article 2, paragraph 1 (b), although the word “order” could perhaps have been replaced by the word “recommend” for the sake of greater clarity. He would also like some wording along the following lines to be added at the end of article 3, which dealt with arbitration: “However, the parties concerned may agree to submit the dispute to arbitration without prior recourse to conciliation”. That would pave the way for a speedier method of settlement. Perhaps some qualifying word should also be added to the article to make it clear that the “decision” delivered by the arbitral tribunal would be of a binding nature, even if that was already understood.

30. Notwithstanding those comments, he was in general agreement with the Special Rapporteur’s conclusions, which had undoubtedly helped work on the topic to advance.

31. Mr. THIAM expressed his congratulations to the Special Rapporteur both on the quality of his report and on his generosity and courage. Having acknowledged in chapter I, section E, of the report the failure of the international community to develop third-party lawmaking comparable to that of the national community, the Special Rapporteur added that international lawyers could not escape their responsibility by resorting to the outdated argument that Governments would not accept more adequate settlement commitments. The Commission might make that statement its motto, for its task was to open up new avenues for the progressive development of international law. The first of the reasons usually cited against a mandatory regime for dispute settlement was a restrictive interpretation of the Commission’s terms of reference: that its task was to codify international law and not to develop it. He was not of that opinion. The Commission must develop the law at the same time as

codifying it. Moreover, the very fact of codifying topics which thus far had fallen within the scope of customary law already amounted to progressive development.

32. Another argument often advanced was the fear that Governments would not accept the substantial obligations which might result from a dispute settlement system. But it was the Commission’s role to convince others and move forward. Everyone agreed that countermeasures were repugnant. However, they could not be combated with timid attempts at codification. The international community must be made to face up to its responsibilities. Countermeasures were dangerous from all standpoints, even regardless of the balance of power, for they ran counter to the principle that no one had the right to dispense his own justice.

33. The draft articles¹⁰ proposed a well-crafted system, with the successive steps of conciliation, arbitration and judicial settlement. However, at present, conciliation was hardly practised in Africa, which had long had recourse to the political settlement of disputes at inter-State conferences. That did not mean that an organized conciliation system was unthinkable, but it would have to be established with a degree of caution. For example, the functions of the conciliation commission might be too hybrid in nature and covered both conciliation and arbitration. He was particularly troubled by the commission being empowered to order the suspension of any countermeasures resorted to by either party. In his view, the conciliation commission should do no more than make recommendations.

34. Nor was it clear why countermeasures had to be taken before the conciliation procedure could be set in motion. That approach seemed too restrictive and, in his view, it ought to be possible to initiate the procedure from the moment that a wrongful act existed which gave rise to a dispute.

35. Nor could he see why the three steps of settlement should necessarily be successive. The parties should be free to choose the means of settlement which suited them. Lastly, the provisions of article 6 concerning the possibility of recourse to ICJ in the case of an *excès de pouvoir* by the arbitral tribunal did not appear to add anything new.

36. He proposed that the draft articles should be referred to the Drafting Committee, if that was the wish of the Special Rapporteur. Even if some members of the Commission disagreed, that stage was part of the normal conduct of the Commission’s work. The Drafting Committee dealt with both form and substance, although that did not mean, of course, that the draft articles would be adopted.

37. Mr. TOMUSCHAT said that he did not want to dwell on the ambiguities in the report which had been highlighted by Mr. Pellet (2305th meeting) and Mr. Mahiou (2306th meeting), but he did think that those ambiguities were real and not merely the result of a superficial reading.

38. One thing was for sure: the scope of the draft articles must be crystal clear and there were three ways of achieving that. The first was to draft articles dealing ex-

⁹ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 33 (A/46/33), annex.

¹⁰ For the text, see 2305th meeting, para. 25.

clusively with the settlement of disputes relating to countermeasures. The Special Rapporteur had made it clear that that was not his wish, and he agreed with him. In addition, article 12, which dealt with the question, was being considered by the Drafting Committee, so that it was useless to conduct a plenary debate on it. It was of course difficult to support the idea of a unitary regime. There were many different situations in international life which must all be dealt with in an adequate fashion. For example, in the case of an armed conflict, the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977 did indeed ban countermeasures in many fields, but not in all. It was inconceivable that, before being entitled to take reprisals in reaction to a breach of the rules of warfare, the victim party must first have to go through a lengthy procedure of dispute settlement. Unfortunately, the Commission was caught in a kind of trap—which might be called the “Ago trap”—for it had accepted that it was incumbent on the Commission to draft articles which were the same for all imaginable disputes between States. Although he was resolutely in favour of establishing a system of third-party settlement in the case of countermeasures, he thought that the Commission should not be afraid to differentiate according to the subject-matter at issue. In that connection, he would like to know why the sophisticated system provided for dispute settlement in the Vienna Convention on the Law of Treaties had never been set in motion during the many years of its existence. In any event, he agreed with many other members of the Commission that the dispute settlement machinery for countermeasures should be separated from the general system of dispute settlement in the field of State responsibility. A special system for countermeasures was particularly necessary when the measures were carried out by third parties that were not directly injured. Despite what several other speakers had said and whatever the Special Rapporteur might think, he himself was of the opinion that a distinction must be made between a directly injured State and a State acting as a kind of agent of the international community. That was what Georges Scelle had described as *dédoublement fonctionnel* (duplication of functions) when speaking of cases in which a measure was taken by a State—and thus constituted an act of national sovereignty—but where in reality the State was acting to assert the interests of the international community. That was an important difference which ought to have a number of consequences with regard to procedural machinery.

39. The second way of defining the scope of the draft articles would be to confine the settlement system to disputes concerning the interpretation and application of the future convention, following the usual model of dispute settlement clauses in treaties, which, strictly speaking, applied only to disputes within the framework of the treaty concerned. Nevertheless, it was doubtful whether that was a viable or recommendable solution. If a convention on State responsibility ever did emerge from the Commission's work, it would set forth secondary rules and would constitute, as it were, the general part of the law of State responsibility. That being so, was it possible or advisable to separate the general question of State responsibility from the question of the primary rules at issue, the breach of which gave rise to State responsibility? That was doubtful, for there were many issues regulated by the draft articles which were intimately tied

up with the primary rules: for example, separating the obligation of result from the obligation of means. Article 19 of part I of the draft,¹¹ on international crimes was another case in which the so-called secondary rules crossed the artificial boundary between primary and secondary rules, requiring a thorough examination of the substantive rule alleged to have been breached by the alleged wrongdoing State to the detriment of the alleged victim State. The conclusion must be that a settlement system confined to disputes concerning the interpretation and application of the future convention would make little sense: on that point his conclusion differed from that of Mr. Yankov.

40. There remained the third means of defining the scope of the draft articles, which seemed to be the one favoured by the Special Rapporteur, and which amounted to prescribing a compulsory dispute settlement system for all breaches of an international obligation, whatever the subject-matter, in accordance with the “Ago philosophy” set out in part I, article 1, to the effect that no account was to be taken of the substantive importance of the rule in question. Mr. Pellet (2305th meeting) had said that the utilization of such a design would mean a revolution in international law. The Special Rapporteur, to judge by his response, did not like that proposition. The correctness of Mr. Pellet's observation could hardly be doubted, however, for he did not mean by “revolution” the overthrow of international law, but a great leap forward towards the actual realization of the concept of international community. To date, States had always defended their right to select the dispute settlement mechanism which best suited their needs. But that principle, although enshrined in Article 33 of the Charter of the United Nations, emphasized in the Manila Declaration on the Peaceful Settlement of International Disputes,¹² and still regarded as one of the cornerstones of the international legal order, had serious defects in its application, if only because powerful States invariably preferred negotiations, where they enjoyed a privileged position as a fact of life. The system must therefore be improved. But was it possible to prescribe a rigid mechanism for the settlement of any international dispute, whatever its nature, its importance for the country concerned or its long-term repercussions? At present, the subject-matter concerned played an important role. For example, States were generally more prepared to accept binding dispute settlement in technical areas—and they still carefully examined the possible consequences for their interests before submitting to third-party settlement. That was the reason why the landscape of dispute settlement clauses was an extremely variegated one containing a wide spectrum of formulas. Was it possible to replace that complicated structure by a uniform model? Should negotiation be excluded or invariably reduced to the first stage of a process which in each and every instance would lead to ICJ? Nothing was certain in that regard and he thought that the Commission should deliberate further before making up its mind. If it decided to introduce a legal revolution, then—contrary to the usual practice in revolutions—it should carefully weigh the ar-

¹¹ For the texts of articles 1 to 35 of part I, provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*

¹² General Assembly resolution 37/10, annex.

guments for and against and the feasibility and viability of its proposals. It would also, of course, have to give some attention to the question of costs. Negotiation was usually the cheapest mechanism and any other mechanism might entail costs which the developing countries might not be able to bear. In conclusion, he emphasized that, as a question of principle was involved, only a plenary debate could show the Commission which route it should take.

41. Mr. SZEKELY recalled that during the recent work on State responsibility, some members of the Commission had warned that the draft articles should not encourage the use of countermeasures. That balance had been the single factor responsible for closing the gap between the members of the Commission who were reluctant to mention countermeasures in the draft and those who were in favour of doing so. The Special Rapporteur's excellent fifth report contained suggestions for the progressive development of the law which could help advance the work, but the balance in question might be upset by the close link established in the report between countermeasures and dispute settlement. In fact, according to the report, a State that was victim of an internationally wrongful act could make use of the procedures envisaged only if it had resorted to countermeasures, thereby giving the impression that it was the countermeasures that had given rise to the dispute, whereas they were only the result of the original wrongful act. While endorsing the system of successive obligations going from cessation of the wrongful act to reparation, he considered that the procedures envisaged in the draft should be available whether or not countermeasures had been applied. In that case, article 1¹³ would have to be amended. Comparing the fifth report with the fourth one,¹⁴ there appeared to be an important contradiction: in the fourth report, States were encouraged not to take countermeasures until they had exhausted the settlement procedures.

42. In view of Article 33 of the Charter of the United Nations, he also thought that the clause dealing with the exhaustion of settlement procedures in article 12 should be deleted.

43. The proposed system should thus operate in stages: first, the injured State would request the cessation of the act in question. If the wrongdoing State did not respond, a second stage would be initiated, during which the injured State had in good faith to exhaust all possibilities of engaging the wrongdoing State in amicable settlement procedures. In case of failure, the injured State would move into the third stage by exercising its right to go before a conciliation commission and then to implement the procedures provided for in articles 3 to 5 of part 3 of the draft. The question was where countermeasures would fit into that system. If the first stage was successful, involving cessation of the wrongful act and reparation granted to the injured State, those measures were hardly appropriate. The same held true if the injured State managed to bring about the application in good faith of an amicable settlement procedure. During those two stages, the injured State should have the right only

to take interim measures of protection, including provisional countermeasures, for the sole purpose of protecting its interests and encouraging the wrongdoing State to participate in the first stage or the second. As soon as the injured State had won its cause, any countermeasure had to be suspended.

44. In the event of total failure, the injured State would have to go on to the third stage, which made sense only if the basic structure and foundations of the system proposed by the Special Rapporteur were accepted. If the Commission were to engage in a simple exercise of codification, without progressive development of the law, its work would not be adequate to meet the challenge of establishing an effective mechanism for ordering international relationships.

45. Thus, in case of failure, it was important that the injured State should be able to turn to a conciliation commission and that the wrongdoing State should accept that procedure. If that commission did not have the means proposed by the Special Rapporteur to obtain cessation of the wrongful act and order interim measures of protection, the injured State would not be motivated to seek out that type of settlement.

46. If, after the conciliation procedure, it was necessary, as proposed by the Special Rapporteur, to proceed to arbitration and then to judicial settlement, the proposals contained in the report seemed to provide the elements needed to get the wrongdoing State to cease the wrongful act and to grant reparation; that would encourage the peaceful settlement of disputes and could only strengthen the primacy of law in international relations.

47. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was grateful to the members of the Commission who had spoken on the subject, regardless of their views on his proposals. It was obvious that a special rapporteur's proposals were always provisional and open to criticism, but, on the whole, the impression seemed to be favourable. Before leaving Rome with his draft, he had discussed it with young lawyers and some of them had been rather pessimistic about the way his proposals might be received. He had decided to submit them anyway, in the hope, above all, that they might be supported by some and also because, even if the draft was definitely rejected in the end, it would have none the less served to transmit a message to the next generation of international lawyers who would be considering the issue under conditions more favourable than those now prevailing which were already an improvement on those of 10 years ago or less.

48. He was grateful to Mr. Bennouna, Mr. Calero Rodríguez, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Szekely, Mr. Thiam, Mr. Tomuschat and Mr. Yankov for the positive interest they had shown in the topic, even though they had not unanimously endorsed the report.

49. He was sorry to have to omit from his general tribute one member of the Commission, who had spoken first, for the very simple reason that that member had clearly read the report only very partially or very superficially. It was possible in that connection that a misunderstanding had arisen from the paper that he himself had had distributed on 14 June. That brief paper was neither

¹³ For the text, see 2305th meeting, para. 25.

¹⁴ *Yearbook... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3.

a correction to the report nor an addition: it contained literal quotes from the report in order to demonstrate that the report had made it perfectly clear that the measures he was proposing would apply after a countermeasure had been resorted to and after a dispute had arisen as a result of that countermeasure. The same held true for the role of the conciliation commission: nowhere was it contested that the outcome of the commission's work should be strictly in the nature of recommendations, mediation or conciliation, except that the commission should also have the authority to order the suspension of any countermeasures that one of the parties might have taken against the other or to order interim measures and/or fact-finding, also *in loco*.

50. He also wished, on an equally provisional basis, to give a more detailed explanation of certain points in reply to Mr. Tomuschat, who had raised three questions which warranted consideration. First, how was it that the provisions on dispute settlement contained in the Vienna Convention on the Law of Treaties had not been used thus far? The point was well taken and the issue had been raised by a French scholar, who had submitted an article to him on dispute settlement and the Commission's policy in that regard which he had referred to several times in his report. However, as pointed out in particular by Mr. Bennouna and Mr. Calero Rodrigues, the basic idea was to arrive at a balance between, on the one hand, the fact of allowing countermeasures and, on the other, the consequences arising from them, namely, the need to provide in one way or another for a corrective to such unilateral countermeasures. That was the basic idea, even if he had had to add some details so as not to be superficial; the details could be left to the Drafting Committee if the articles were referred to it. With that idea as a starting-point, his impression was that the situation was not the same in the Vienna Convention on the Law of Treaties and the convention on which the Commission was working, assuming, as Mr. Tomuschat had said, that there would one day be a convention on State responsibility. In that respect, he was confident: there would one day be a convention or a treaty on State responsibility, even if he was no longer around to see it adopted. Furthermore, he would prefer not to be around when a good convention was adopted rather than live to see a convention which would not make much sense from the viewpoint of the progressive development of international law.

51. With regard to the *dédoulement fonctionnel* to which Mr. Tomuschat had also referred, he was not a supporter of that concept, but would gladly discuss it with Mr. Tomuschat, at the International Law Seminar round table, for instance.

52. As to negotiation, Mr. Tomuschat had said that, while conciliation, arbitration and judicial settlement were discussed in the report, it did not mention negotiation. As a perceptive lawyer, however, Mr. Tomuschat knew quite well that negotiation would surely come even before resort to the conciliation commission and that it would continue throughout the conciliation process, since the primary role of the commission was to serve as an intermediary between the parties and try to get them to agree—and that was obviously negotiation. Negotiation would then continue in the event that conciliation failed, since it was always possible that an agreement be-

tween the two parties might be reached on the basis of the commission's recommendations, even after the establishment of an arbitral tribunal and during the arbitration procedure, and that the agreement would be confirmed in the arbitral award.

53. As to the question of revolution, Mr. Calero Rodrigues had kindly confirmed that there was, in fact, nothing of the sort in the draft. In contrast, Mr. Tomuschat, while agreeing that what was involved was not an upheaval, as it had been called by one speaker, whose viewpoint—as expressed in his statement—he himself (the Special Rapporteur) did not endorse, considered that there was nevertheless such a great leap forward that, for all practical purposes, it meant a change. His proposals would nevertheless not give rise to any change whatever in the structure of the inter-State system. States would continue to be the "makers" of international law and each State individually would be the first to decide whether a wrongful act had been committed. The only applicable systems of third-party settlement would be conciliation, with non-binding results, except for procedural questions, arbitration, which had been used for centuries, and judicial settlement, which was nothing new, since ICJ had been in existence for about 75 years.

54. It was true, as Mr. Tomuschat had said, that, in some areas, particularly technical ones, there were more extensive dispute settlement obligations. But, outside those areas, there were non-technical fields which were covered by a great many General Assembly resolutions, including the Manila Declaration,¹⁵ and all of which, without exception, involved general obligations to seek out an agreement in the event of a dispute. That was the basic point and that was why he had stressed the need to consider arbitration clauses as a possible way of making progress, in particular in the convention on State responsibility which might one day be concluded, in order to go beyond resolutions, declarations, treaties—general, bilateral or multilateral—and other agreements relating to arbitration or judicial settlement which had obvious limitations. He had thought it appropriate to make those comments and stress once again the need to grasp properly the contents of the paper distributed on 14 June, which was not a correction, but simply an explanation of his ideas; whoever failed to realize that could not claim to have read his report.

55. Mr. GÜNEY noted that, in replying to Mr. Tomuschat, the Special Rapporteur had tried to convince the members of the Commission that since negotiation was an integral part of the conciliation procedure which he was advocating, there was no need to include it in the draft as an independent means of dispute settlement. Negotiation had a major role no matter what system was envisaged, as stated in Article 33 of the Charter of the United Nations which established negotiation as the first means of dispute settlement. If the parties had not exhausted the most effective method, namely, negotiation in good faith, what were the chances that they would decide or agree to move on to other dispute settlement procedures?

¹⁵ See footnote 12 above.

Organization of work of the session (concluded)*

[Agenda item 1]

56. The CHAIRMAN recalled that, in accordance with the principles adopted at the preceding session, the membership of the Drafting Committee would vary according to the topic under consideration. In respect of international liability for injurious consequences arising out of acts not prohibited by international law, Mr. Güney, Mr. Sreenivasa Rao, Mr. Razafindralambo and Mr. Tomuschat had been appointed to replace the outgoing members. The Drafting Committee was thus composed of Mr. Al-Baharna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Güney, Mr. Kabatsi, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Tomuschat, Mr. Vereshchetin and Mr. Villagrán Kramer.

57. He himself would serve as Special Rapporteur and Mr. de Saram as Rapporteur of the Commission.

58. Mr. EIRIKSSON said that Mr. Yamada should be added to the list of the members of the Planning Group.

The meeting rose at 1.05 p.m.

* Resumed from the 2298th meeting.

2309th MEETING

Friday, 18 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (continued) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. YAMADA said that, whereas the fifth report (A/CN.4/453 and Add.1-3) might have been expected to

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

cover dispute settlement procedures of a broad general nature, it was instead confined primarily to dispute settlement procedures relating to the regime of countermeasures, and it also considered dispute settlement procedures relating to "crimes" of States under article 19 of part 1.² As to the latter, until the relevant draft articles had been presented, he would reserve his comments. He would, however, request clarification, or perhaps modification, of the expression "international delicts qualified as crimes of State" used in the title of chapter II of the fifth report,³ inasmuch as the Commission had already decided to distinguish between "crimes" and "delicts" in part 1 of the draft.

2. The Special Rapporteur devoted a significant part of his carefully conceived report to arguing the importance of making effective dispute settlement procedures available in the framework of State responsibility in general, and focused in particular on the need to ensure that unilateral measures and reactions by States were appropriately controlled. Despite laudable intentions, the report did not necessarily present a convincing argument for the proposed procedures. The Special Rapporteur seemed to be trying to create two parallel restrictions for the control, under international law, of unilateral reactions: by defining a legal regime if the injured State resorted to countermeasures (part 2, arts. 11-14)⁴ and by establishing the obligation of an injured State to exhaust all effective dispute settlement procedures before resorting to countermeasures.

3. It was certainly desirable to create effective dispute settlement procedures, in particular compulsory procedures, as one of the measures for controlling unilateral reactions to wrongful acts. In that sense, he saw significant value in the Special Rapporteur's devoting such a large portion of his report to describing why such procedures were important. Furthermore, as the Special Rapporteur himself had reiterated, it was appropriate for the Commission to foster third-party dispute settlement procedures on the occasion of the United Nations Decade of International Law.⁵

4. Nevertheless, the fundamental problem in regard to the report was the overall structure of such procedures. First of all, the sense of the fifth report was not sufficiently clear, especially as to whether the proposed procedures related to State responsibility in general or to countermeasures alone. That ambiguity had given rise to criticism now found to be based on an inaccurate understanding of the Special Rapporteur's intention, for the Special Rapporteur's paper of 14 June 1993, which had been circulated among members of the Commission, pointed out that the envisaged third-party procedures would cover not just the interpretation/application of the articles on countermeasures but the interpreta-

² For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook*... 1980, vol. II (Part Two), pp. 30 *et seq.*

³ Original title of chapter II as it appeared in document A/CN.4/453 (mimeographed) and which had subsequently been changed.

⁴ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook*... 1992, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

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

tion/application of any provision of the future convention on State responsibility. If the fifth report had been clearly written in that respect, questions would not have been raised as to the applicability of the proposed procedures to State responsibility. The fact that only one third of the report was about the substantive issues in respect of the proposed procedures might be the reason for the lack of clarity. He was confident that in his future work, the Special Rapporteur would make his arguments more precise.

5. Even after reading the paper of 14 June, a number of questions none the less remained. Article 1 proposed for part 3⁶ appeared to suggest that the procedure described in the annex would be set in motion only after the amicable settlement procedures stipulated in part 2, article 12, had been exhausted. If that understanding was correct, it would seem that the envisaged third-party procedures would cover only the interpretation/application of articles on countermeasures. If the paper in question was to be taken as the proper basis, the Drafting Committee should alter article 1 to bring it into line with the Special Rapporteur's real intentions.

6. The Special Rapporteur's approach in making the resort to countermeasures contingent upon exhaustion of all available third-party dispute settlement procedures was an attempt to impose on injured States conditions external to the regime of countermeasures. Such an approach would result in a further obligation limiting resort by injured States to countermeasures, thereby creating new primary rules. It was doubtful whether States would agree to placing such strict limits on countermeasures and the scheme might jeopardize not only the success of dispute settlement procedures but also the very regime of countermeasures itself.

7. As to the proposed three-step dispute settlement system, under current international law the freedom of States to choose the means of dispute settlement was well-established, and there was also the obligation to settle disputes peacefully. The proposed three-step system would be too rigid and would undermine such freedom of choice. The restrictive approach taken by the Special Rapporteur was likely to give rise to strong opposition from States. He did not deny the utility of a compulsory hierarchical three-step settlement regime. Some types of dispute might be suited to a hierarchical procedure, but in the final analysis, such a system was extremely novel, if not revolutionary, as Mr. Pellet (2305th meeting) had put it, given the present state of international society and international law. As such, the system went beyond the progressive development of international law, and sovereign States were not likely to subscribe to it. As he saw it, the Commission was expected to try and strike a balance between the well-established freedom of choice of settlement procedures and a firmly structured compulsory settlement mechanism.

8. It would appear that each step was designed to be compulsory and to be followed in strict sequence. Such a system was attractive in the sense that it could settle disputes in an impartial manner and purely on the basis of facts and law. But the reality was that most disputes be-

tween States were not referred for judicial settlement, and that less than one third of the States parties to the Statute had accepted the compulsory jurisdiction of ICJ. The difficulties of the proposed system were a very rigid structure based on a three-step sequence; the extensive power of the conciliation commission; and the fact that ICJ was at least partly qualified as an appeal court for an arbitration award.

9. With regard to the first level of the proposed system, conciliation, the wording of article 1 could be interpreted to mean that the procedure was applicable only in the case of countermeasures and not of State responsibility in general. There seemed to be a clear need for the Drafting Committee to recast the article to make it generally applicable to disputes relating to State responsibility.

10. Furthermore, the proposed conciliation procedure was compulsory for disputes when all amicable settlement procedures had been exhausted and the conciliation commission could order, with binding effect, the suspension of countermeasures or any provisional measures of protection. Those compulsory or binding features of the procedure were not yet established in general international law. Again, the conciliation commission would not be able to settle the entire dispute itself with binding effect, and such partly binding conciliation did not seem to enjoy wide acceptance among States.

11. Article 6 provided for unilateral submission to ICJ of a decision tainted with *excès de pouvoir* or departure from arbitral procedure. It appeared to make ICJ an appeal court of sorts. ICJ's function as a court of appeal could be found in some conventions, such as the Convention on International Civil Aviation, and such a proposal was quite appropriate as part of the progressive development of international law, but a wider appeal jurisdiction not limited to cases of *excès de pouvoir* or violations of procedure would be desirable for ICJ.

12. Regarding the importance of fact-finding in the dispute settlement procedure, the first question that must be answered in a dispute on State responsibility was whether or not an allegedly wrongdoing State had in fact committed a breach of an international obligation. He referred in that context to the examples of the *Dogger Bank* case⁷ or Additional Protocol I to the Geneva Conventions. In the Special Rapporteur's draft, the fact-finding function would be performed by the conciliation commission. However, in view of the extensive competence of the conciliation commission, as proposed by the Special Rapporteur, a kind of commission of inquiry with competence limited to fact-finding would be more acceptable to States and thus easier to establish.

13. The present report and the draft articles were an innovative and ambitious proposal. In his view, the Commission should not remain in the realm of codification. It should try to secure progressive development of international law by strengthening the rule of law, while remaining fully aware that, if the results of its work were not accepted by what the Special Rapporteur called the "inter-State system", the untiring efforts of both the

⁶ For the text, see 2305th meeting, para. 25.

⁷ *The North Sea or Dogger Bank case*, *The Hague Court Reports*, J. B. Scott, ed. (New York, Oxford University Press, 1916), pp. 403-413.

Commission and the Special Rapporteur would have been wasted. Regrettably, the Special Rapporteur's three-step settlement procedure contained too many difficulties to win the approval of the great majority of States. Such an innovative system was not the only way to bring States to accept a binding third-party settlement procedure. The dispute settlement system would surely be improved, not immediately in the framework of the codification of State responsibility, but through various means of persuasion, such as General Assembly resolutions or multilateral diplomacy. It was therefore essential for the Commission to continue to try to establish the rule of law in international society little by little, even if it seemed to be the long way round. Rome had not been built in a day.

14. Mr. ARANGIO-RUIZ (Special Rapporteur), expressing the hope that completion of the Commission's work on the topic would not take as much time as had been needed to build Rome, said he wished to provide the clarification requested by Mr. Yamada. The term "delicts" had inadvertently been used. He had meant to say that he would deal later with internationally wrongful acts, which in article 19 were qualified as international crimes of States. In keeping with long-standing practice, he employed the term "delinquencies" as a synonym for "internationally wrongful acts".

15. Mr. AL-BAHARNA, commending the Special Rapporteur on a thought-provoking report, said its main thesis was that the inclusion of an adequate and reasonably effective dispute settlement system would be of decisive help in minimizing or eliminating countermeasures and that the need to strengthen existing dispute settlement procedures in connection with the regime of countermeasures had been stressed by many speakers in the course of the Sixth Committee's debate on the Commission's report. It was also argued that there had been perceptible changes in international relations with regard to third-party settlement, and the Commission was therefore encouraged to reverse its tendency to interpret narrowly its competence with respect to dispute settlement procedures and to overemphasize the reluctance on the part of Governments to accept more advanced dispute settlement commitments. Was the Special Rapporteur's thesis correct? What, if any, were the overall implications of the dispute settlement system in State responsibility for the substantive rules regarding countermeasures? What was the empirical basis for the assumption that the time was propitious for a more advanced regime of dispute settlement procedures? Those questions called for a dispassionate inquiry. However desirable the third-party settlement procedures might be, they must be acceptable to the international community of States. The Commission should be aware of what had befallen the Model Rules on Arbitral Procedure, proposed by the Commission in 1958.⁸

16. As to the Special Rapporteur's thesis, he might be right in arguing that the regime of unilateral reaction by the injured State would place powerful and rich countries at an advantage over weaker States. But did the third-party settlement procedure stop the more powerful States from resorting to unilateral countermeasures? As-

suming that the countermeasures centred on political questions, would third-party procedures be of any avail in such a case? Did the Special Rapporteur's thesis hold good if the State committing the internationally wrongful act and the State taking the countermeasures were States of more or less equal power? Indeed, there must be a strong check on disproportionate and excessive countermeasures, but the dispute settlement procedure was not a viable means to that end. Rather, a clear and positive statement of the limits of countermeasures was the answer. The Commission should therefore concentrate on the clarification of the substantive law rather than on dispute settlement mechanisms.

17. The topic of State responsibility, in a sense, covered the whole spectrum of international law. Any settlement provision in respect of State responsibility would affect both the primary and secondary obligations, regardless of the subject-matter. For example, the legality of both armed attack and self-defence, assistance to insurgents or to counter-insurgents, or international delicts *vis-à-vis* acts of retortion, such as an economic embargo, suspension of treaties and other similar unilateral measures, would all fall within the purview of the dispute settlement system. If the system was to be binding, those questions, by definition, became justiciable. That would probably be the unintentional effect of the rules on dispute settlement in the articles on State responsibility. But such a result was inevitable. The Special Rapporteur attempted to respond to critics who viewed third-party settlement obligations as an intolerable burden by saying that to allow a general prerogative (*faculté*) of resort to countermeasure without an adequate check would be even more intolerable. Yet the explanation was not convincing. States were not likely to have recourse to compulsory third-party procedures on questions such as the ones he had indicated earlier. Admittedly, ICJ had ruled in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*)⁹ that the mining of Nicaraguan ports by the United States had not constituted an act of collective self-defence under customary international law and had also denied that there was an armed attack by Nicaragua to give cause for the plea of collective self-defence by the United States. However that case had dealt with the question of the lawfulness of the United States action after, rather than before, the incidents had happened. At any rate, it was a unique judgment in many respects and did not warrant the conclusion that States were prepared to submit questions of "armed attack", "self-defence", "retortion" or "economic embargo" to compulsory third-party settlements. For that reason, the Commission should focus its attention on the clarification and, indeed, on the development of the substantive rules governing countermeasures. In short, the question called for legislative rather than judicial clarification. The Commission should define the norms and principles governing international delicts and crimes and the corrective countermeasures instead of relegating that task to a compulsory third-party settlement through a lengthy and complicated three-step settlement procedure.

18. The Special Rapporteur had relied on the Manila Declaration on the Peaceful Settlement of International

⁸ See *Yearbook* . . . 1958, vol. II, document A/3859, p. 83, para. 22.

⁹ *I.C.J. Reports* 1986, p. 14.

Disputes¹⁰ and the Convention on Conciliation and Arbitration within the CSCE.¹¹ However those instruments were not a sufficient empirical basis for concluding that the time had come to include compulsory third-party settlement procedures in the draft articles. The cold war suspicions about the impartiality of third-party mechanisms were on the wane and more and more States were having recourse to ICJ, but it was still premature to embark on compulsory dispute settlement procedures. Only about one third of the States Members of the United Nations had become parties to the optional clause system of ICJ, and scores of States had made reservations in respect of arbitration clauses in a multilateral treaty. In the face of such incontrovertible evidence, it could not be held that the time was ripe for a bolder approach to compulsory third-party procedures. It was not what the Special Rapporteur called "theoretically ideal solutions" that the Commission should provide, but solutions that were practical and realistic.

19. As to the suggested three-step settlement system,¹² as far as the conciliation procedure was concerned the Special Rapporteur proposed in article 1 that either party could under certain conditions unilaterally institute conciliation proceedings against the other. Consequently, the conciliation commission would be set up on the initiative of either party, in conformity with the provisions of the annex which meant that the conciliation commission was constituted by a unilateral action. His central objection related to the compulsory aspect of the procedure. Under article 2, the conciliation commission could order provisional measures of protection with "binding effect", and objected to assigning a conciliation commission the task of ordering such measures. The compulsory nature of the procedure and its functions might prove to be counterproductive. In any event, it ran counter to the normal understanding of conciliation. Moreover, if the final report that the conciliation commission was to submit to the parties was merely recommendatory, as stated in article 2, paragraph 2, it stood to reason that the conciliation process should be voluntary.

20. On the other hand, although the report of the conciliation commission was recommendatory in nature, the Special Rapporteur none the less imparted a compulsory element to it by saying that a State could have recourse to compulsory arbitration when no settlement had been reached after submission of the report. It was doubtful whether States would accept the appointment of their candidates to the conciliation commission by lot, as provided in article 1 of the annex, or agree to such complicated conciliation procedures. He concurred with Mr. Bennouna and others that the proposals by Mr. Riphagen, the previous Special Rapporteur, on the conciliation procedure were less complicated. They simply entrusted the task of establishing the conciliation commission to the Secretary-General and, unlike the current articles, Mr. Riphagen's conciliation procedure¹³ had not been binding on the parties. The arbitration procedure de-

scribed in articles 3 and 4 suffered from the same defect as did conciliation: its compulsory aspect. The matter was further complicated by the fact that the functions of the arbitral tribunal were tied in with those of the conciliation commission.

21. The disadvantages of the draft articles and annex were that, if States parties to a dispute were to use the three-step system, they would need no less than three years to exhaust the settlement procedures. Meanwhile, any countermeasures imposed by the allegedly injured State would have had time to do immense harm to the economy of the State accused of wrongdoing; if that State had weak economic resources, the results could be catastrophic. Another disadvantage of the three-step process was the exorbitant fees to be borne by the States parties to the dispute. Mr. Fomba (2305th meeting) had even spoken about a special fund to assist economically weaker States in paying such fees.

22. Some members of the Commission had suggested reducing the complicated three-step system to two steps, namely conciliation and adjudication, bypassing arbitration, but it was an unsatisfactory solution, as it would neither cut down on the lengthy conciliation procedures proposed in the draft nor minimize the fees that such procedures would entail.

23. Judicial settlement by ICJ was described in the report as a last resort, yet any State could unilaterally institute proceedings in the Court. Consensual jurisdiction thus became compulsory in respect of a number of questions, some of which might not even qualify as legal matters. Such an approach amounted to a radical revision of the system of adjudication at the international level, particularly that of ICJ.

24. The proposals for dispute settlement procedures went against the letter and spirit of Article 33 of the Charter of the United Nations, which gave Member States the freedom to choose from a number of means of dispute settlement. A great many treaties—both bilateral and multilateral—prescribed modes for the settlement of disputes. The system described by the Special Rapporteur might affect the regime under those treaties, and a problem would arise of reconciling pre-existing treaties with the draft articles on judicial settlement.

25. With a view to developing a simpler system for compulsory third-party dispute settlement than the one proposed in the draft articles and the annex, the Special Rapporteur should seek guidance from the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, adopted by the United Nations Conference on the Law of the Sea in 1958. The same goal could also be achieved by conferring compulsory jurisdiction on ICJ in respect of the articles on State responsibility and countermeasures.

26. A number of steps should be taken with respect to countermeasures. When a State had allegedly committed an internationally wrongful act which gave rise to a dispute, the allegedly injured State should communicate with that State for the purpose of conducting negotiations for the settlement of the dispute. Settlement by peaceful means should be sought in accordance with the procedure provided for in Article 33, paragraph 1, of the Charter. If no settlement was reached by such means within six to eight months of the date of initiation of

¹⁰ General Assembly resolution 37/10, annex.

¹¹ Adopted by the CSCE Council in Stockholm in December 1992 (see document CSCE/3-C/Dec.1 of 14 December 1992).

¹² See 2305th meeting, para. 25.

¹³ See annex to part 3 of the draft articles, *Yearbook... 1986*, vol. II (Part Two), p. 36, footnote 86.

those procedures, either party to the dispute would be entitled to have recourse, by a unilateral application, to ICJ. Either party could also apply to the Court to adopt interim or provisional measures. Two months should be allowed for parties to refer the dispute to ICJ after expiry of the six to eight month period.

27. The allegedly injured State would be prohibited from taking any countermeasures during the six to eight months provided for amicable settlement of the dispute. It could, however, decide to apply countermeasures any time after the expiry of that period, provided such countermeasures were not taken before ICJ was actually seized of the dispute. If countermeasures were applied, the allegedly wrongdoing State could contest them by a unilateral application to the Court and could request a judicial ruling by the Court on provisional protection measures against the countermeasures.

28. The two States could be given a choice between recourse to compulsory arbitration or to ICJ, especially in cases where a countermeasure was wrongfully taken by the allegedly injured State before the dispute was brought before the Court, provided the arbitration system was made much less cumbersome than the one proposed in the draft articles. In such cases, there would be a two-step system to choose from: arbitration or adjudication by ICJ, both of which would be binding. The system would still allow recourse by either party to the Court concerning implementation of the award of the arbitral tribunal, and the President of the Court might have a role in appointing the members of that tribunal. The Commission could finally qualify countermeasures as meaning lawful ones only, and it could do so simply by adopting article 13, on proportionality, and article 14, on prohibited countermeasures. Both were now before the Drafting Committee.

29. The steps he had outlined represented a much easier, cheaper and speedier procedure, one which did not break any traditional or customary rule of international law. It would also be more acceptable to both the allegedly wrongdoing State and the allegedly injured State. It provided a neutral background for impartial dispute settlement in relation to countermeasures and avoided introducing a system of conciliation as a binding procedure for such settlement. If conciliation was to be used at all, it would be in the context of Article 33, paragraph 1, of the Charter of the United Nations, as was appropriate.

30. Like Mr. Vereshchetin (2307th meeting), he regretted that the Special Rapporteur had not yet seen fit to consider the matter in connection with the consequences of delinquencies qualified as crimes of States under article 19 of part 1 of the draft.¹⁴ That issue, together with countermeasures and the dispute settlement system, formed an organic whole, and all the relevant material should be put before the Drafting Committee for its consideration.

31. Mr. KOROMA said that the topic of State responsibility was central to international law, encompassing as it did every aspect of State activity. It was more than 40 years since it had been identified as suitable for codification by the Commission and, in view of the topic's sig-

nificance, the gestation period had been understandably long. Breaches of international obligations were the main facet of the topic, and the Special Rapporteur's fifth report was therefore concerned with how to resolve peacefully claims for reparations of such breaches. As far back as the Middle Ages, treaties had laid down duties and specified procedures to be followed in the event of a breach. In more modern times, the prohibition on private reprisals and the development of rules restricting forcible self-help had contributed to a conception of international responsibility from the standpoint of the rule of law. The Special Rapporteur was thus proposing, not a revolution, but a renaissance.

32. The fundamental objectives pursued in the system put forward by the Special Rapporteur were to minimize the adoption of unilateral measures involving harmful consequences, to prevent the violation of international obligations, and to deter future violations and repair unlawful conduct. He was proposing a three-tier system of dispute settlement, involving binding conciliation, arbitration and judicial settlement. His reasons for espousing a third-party settlement system, as well as the imaginative proposals therefor, were cogent and compelling. An adequate dispute settlement mechanism was indispensable if the regime of State responsibility was to be effective. It would not only guard against unilateral measures, but would also provide the allegedly injured State with an opportunity to test its claim before embarking on countermeasures.

33. The inclusion in the draft of the regime on countermeasures had been deplored by many members of the Commission as being somewhat retrograde, especially if it could be used to legitimize unilateral measures as well as the inequality of States. Yet it had been judged necessary in order to make the text acceptable to the entire international community and to prevent the automatic use of countermeasures when a breach of an obligation was alleged to have taken place. Understandably, therefore, the dispute settlement proposals submitted by the Special Rapporteur had commanded near-unanimous support. By adopting them, the Commission would not be breaking new ground, but merely following current trends in bilateral and multilateral treaties. It had been objected that some of the proposals went too far, exceeding the Commission's mandate and implying that a State accepting the draft articles would be accepting binding conciliation, arbitration and judicial settlement, which would deny it free choice of means.

34. His reading of the proposals was that they were in line with the recommendations made by members of the Sixth Committee that dispute settlement procedures should be expanded to include innovative approaches. In providing that the recommendations of the conciliation commission would be binding, the Special Rapporteur's proposals did break new ground, but they were not unprecedented. In modern times, conciliation had been successfully used in distributing the joint assets of the East African Community comprising Kenya, Uganda and the United Republic of Tanzania, once the Community had been dissolved. Although the original recommendation by the conciliator had not been accepted by the parties, it had formed the basis of negotiations which had eventually led to the settlement of the dispute. Another precedent was the successful intervention of a conciliation

¹⁴ See footnote 2 above.

commission in the Jan Mayen Island dispute,¹⁵ resulting in a recommendation on a joint development agreement for an area with significant prospects of hydrocarbon production. Those cases, though dissimilar, illustrated the flexibility of the conciliation procedure.

35. Conciliation involved aspects of institutionalized negotiation, encouraging dialogue and inquiry and providing information as to the merits of the positions taken by the parties, resulting in a suggested settlement corresponding to what each party deserved, not what it claimed. Though the proposed conciliation procedures were described as binding, they nevertheless retained the distinctive feature of conciliation, namely the development of proposals. The report also seemed to suggest that the regime would be binding only when certain measures had been taken, whereas arbitration and judicial settlement procedures applied to the entire spectrum of State responsibility. In that connection, certain ideas expressed in the report seemed to contradict article 12, now before the Drafting Committee. While he welcomed the explanatory note circulated by the Special Rapporteur, which addressed those contradictions, the circumstances under which it would be possible to resort to third-party dispute settlement procedures should be clearly spelled out in the draft. Such clarification would help to allay the concern that the procedures might result in an escalation of countermeasures or a deterioration of relations among the parties. A clearly drafted provision on third-party dispute settlement would not be a panacea for all evils, but it would at least discourage expensive resort to countermeasures.

36. As to the fears that the incorporation of provisions on third-party dispute settlement might discourage States from adopting the draft on State responsibility, he would point out that a former member of the Commission, Sir Ian Sinclair, had written favourably about the automatic procedures for dispute settlement incorporated in the Vienna Convention on the Law of Treaties.

37. Mr. ROSENSTOCK said the report before the Commission reflected great learning and vision. The Commission should no longer decline, as a matter of general practice, to deal with dispute settlement. As Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses, he intended to press for the inclusion of specific provisions on that subject in the draft articles he was developing.

38. It was one thing to consider dispute settlement in a finite context, however, and quite another to envisage it for the whole of international law. States had demonstrated increased willingness to accept third-party dispute settlement in specific areas, including the environment. Yet even within the relatively homogeneous world of CSCE, States had been less than willing to accept third-party dispute settlement in all cases. Accordingly, a certain modesty of approach seemed to be called for, particularly in view of the relatively small number of States that accepted the jurisdiction of ICJ under Article 36, paragraph 2, of its Statute, and the even smaller number that accepted such jurisdiction without making substantial reservations. An analysis of the acceptance of

that provision by States suggested that poor countries were as unenthusiastic as were rich ones. Simultaneously, the Court's increased case-load indicated that States were willing to accept a third-party involvement in specific areas, as distinct from accepting them right across the board. Dispute settlement in the context of State responsibility would be dispute settlement right across the board. The fact that the mechanism was focused on countermeasures did not narrow the potential scope of application, except perhaps in an erratic manner, and a system whereby access to the trigger mechanism for the settlement process was limited to States ready to take countermeasures did not seem entirely rational. Furthermore, the settlement process seemed more complex than necessary, with its combination of arbitration and judicial settlement.

39. Whatever the attitude of States to the procedures, it was questionable whether the Commission should engage in detailed work on part 3 of the draft until the first reading of parts 1 and 2 had been completed. While significant progress had been made, much remained to be done. One of the outstanding issues to be resolved was that of State crimes as described in article 19 of part 1.¹⁶ A serious re-examination of that article should precede the elaboration of other provisions relating to wrongful acts.

40. Mr. Mahiou's suggestion (2306th meeting) of limiting obligations to certain categories was interesting, but identification of the categories might reopen debate on whole portions of parts 1 and 2. It might be advisable for the Commission to allow some time for reflection before referring part 3 to the Drafting Committee. A further report by the Special Rapporteur, dealing in depth with issues raised by Mr. Mahiou and Mr. Tomuschat (2308th meeting), would surely assist the Commission in grappling with the difficult problem before it.

41. The Commission should also consider seeking the views of States on dispute settlement in the context of State responsibility, including their views on whether some or all of the dispute settlement procedures should be subject to some form of opting in or opting out. In its work on a statute for an international criminal court, the Commission had prudently sought guidance from the General Assembly before beginning to draft the articles. Caution seemed to be called for on the present topic as well, lest parts 1 and 2 be tied irrevocably to a part 3 that would not float and would consequently sink the whole project.

42. Mr. AL-KHASAWNEH said that credit for the stimulating debate which had taken place in the Commission on the important question of the settlement of disputes was due above all to the Special Rapporteur and his scholarly fifth report and thought-provoking introductory statement. The discussion had brought into sharp focus some of the most fundamental questions relating to the role of the Commission, and indeed to the role of law, in what the Special Rapporteur aptly described as the unstructured inter-State system.

43. It was a central and undeniable fact that if, in a codification convention, the Commission expressly sanctioned unilateral resort to countermeasures, it would by

¹⁵ *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment*, I.C.J. Reports 1993, p. 38.

¹⁶ See footnote 2 above.

so doing open the door to many probable abuses and would also consecrate a rule capable of widely differing interpretations, even in cases where good faith could safely be assumed. The Commission was, of course, aware of those adverse consequences and had sought to minimize them through absolute prohibitions in certain areas enumerated in article 14 and also through the rule of proportionality proposed in article 13. At the forty-fourth session, he had had occasion to express the view¹⁷ that there was little comfort to be gained from the rule of proportionality, which gave the impression of providing a yardstick against which the lawfulness or otherwise of countermeasures in a given situation could be objectively verified, when in fact no such yardstick existed. He continued to hold that view, and it therefore seemed to him that regarding the applicable law—the very idea on which the whole codification concept was based—required the draft articles to establish effective machinery for compulsory third-party settlement of disputes. In using the term “effective” he meant that the machinery should be both prompt and it should be binding on the States involved in the dispute. Failure to provide for such machinery would result in elastic substantive rules and would leave wronged States without any means of redress; in other words, the present draft, far from realizing the many hopes invested in it, would lead to the unmaking of the law of State responsibility.

44. The problem was indeed extremely delicate, but surely it was no wild flight of fancy to think that States should be required to agree to submit to third-party settlement in matters pertaining to their behaviour with regard to a treaty. Nor could he subscribe to the view that compulsory third-party settlement with regard to a future convention on State responsibility would constitute a revolution or “metamorphosis” in international law, as Mr. Tomuschat had termed it in the 1986 debate.¹⁸ After all, similar obligations had been accepted, although in respect of far smaller areas of dispute, in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The fact that the procedures set out in those instruments had not been resorted to was immaterial for the purpose of establishing whether or not States could accept the concept of third-party settlement of disputes.

45. The Special Rapporteur had in mind a conservative evolutionary process which members of the Commission, as lawyers, were duty-bound to foster as a matter of professional commitment. Like any other system of law, international law was not, and could not, afford to be static. Its ultimate aim, by definition, had to be the establishment of the rule of law in inter-State relations, however inorganically structured those relations might be. The alternative to evolution was not preservation of the status quo but stagnation and decline.

46. The main argument against that approach appeared to be based on the prospects of acceptance by States of the draft as a whole. The argument was a weighty, if often exaggerated, one. Obviously, the Commission

should not produce drafts doomed to certain rejection by the majority of States. But there was nothing in the debates in the Sixth Committee from which it might be concluded that such a tragic fate awaited the present draft. As a matter of fact, there was little correlation between the inferences to be drawn from debates in the Sixth Committee and the final acceptance given to treaties in terms of ratification and accession. Why treaty A was more widely ratified than treaty B sometimes depended, at least in part, on whether there was what could be described as a “marketing agency” to promote that treaty. For example, the wide adherence to conventions relating to humanitarian law could largely be ascribed, notwithstanding the inherent merits of those conventions, to the efforts of ICRC. Other treaties, such as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, were gaining acceptance because an influential State or States had the interest and the means to persuade other States to accept them. As the Special Rapporteur put it, the draft’s prospects of acceptability would require a gifted mathematician, if not a magician, to ascertain.

47. That being so, the uppermost consideration in members’ minds should be to produce a draft that was morally and logically defensible. The quality and integrity of the Commission’s work was the ultimate test. Nor should it be forgotten that the work of successive Special Rapporteurs on the topic of State responsibility had often been cited in the relevant literature and in judicial pronouncements.

48. A second argument against the inclusion of third-party settlement procedures along the lines suggested by the Special Rapporteur was more technical in nature. It was that, by providing for a compulsory settlement procedure, the Commission ran the risk of moving from the general part of the topic, where secondary rules were codified and progressively developed, to the realm of primary rules. That argument was very similar to the one advanced by the representative of France in the Sixth Committee of the General Assembly at its forty-seventh session¹⁹ and referred to by the Special Rapporteur in the fifth report. Although the argument was not without force, he did not think that by providing a set of procedural rules on dispute settlement the Commission would be going beyond its mandate, for the division into primary and secondary obligations was no more than a logical tool designed to make sure the draft was coherent. Adopting such a course would not involve questions of treaty interpretation any more than, say, article 5, paragraph 2 (f), of part 2,²⁰ already adopted by the Commission at an earlier session. In his view, the division of rules into primary and secondary rules should be approached with measured flexibility, allowance being made, in particular, for obligations existing in what might be described as the “twilight zone”.

49. In so far as it existed at all, the problem arose in connection with countermeasures as much as with dis-

¹⁷ See *Yearbook* . . . 1992, vol. I, 2278th meeting, paras. 14-24.

¹⁸ See *Yearbook* . . . 1986, vol. I, 1955th meeting, para. 23.

¹⁹ *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 26th meeting, para. 5.

²⁰ For the text of articles 1 to 5 of part 2 provisionally adopted on first reading at the thirty-eighth session, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 38-39.

pute settlement procedures. Claiming a right to resort to countermeasures under the draft, yet objecting to compulsory settlement of disputes on the technical grounds that settlement of disputes could lead to a definition of primary rules or to questions of treaty interpretation in sensitive areas, was untenable because the same logic applied with equal force to countermeasures.

50. A third argument against the development of compulsory third-party settlement procedures was that the procedures would encompass disputes ranging from the mainly technical to the politically sensitive. Unlike some members, he found that feature rather attractive. It meant that no State could be sure in advance that it would always—or, alternatively, never—benefit from the inclusion in the draft of a set of articles on third-party settlement. In that connection too, it should be remembered that States had already accepted obligations on third-party settlement of disputes in the Vienna Conventions he had already mentioned (para. 44).

51. As to the draft articles,²¹ although the Special Rapporteur's approach was on the whole balanced and realistic, some improvements might be desirable. First, a role should be found in the draft for the advisory opinions of ICJ, along the lines suggested by the President of the Court, Sir Robert Jennings, in his statement before the General Assembly in 1991.²² Secondly, the Special Rapporteur might consider, as Mr. de Saram had suggested (2306th meeting), giving a more prominent role to the chambers procedure of ICJ, a procedure which was considerably cheaper than arbitration.

52. A more general point was whether disputes concerning the interpretation and application of articles involving resort to countermeasures should be regulated by a special, and presumably more rigorous, system of settlement procedures than disputes on the interpretation and application of articles not involving countermeasures, where presumably the traditional system would apply. The suggestion made in that connection by Mr. Calero Rodrigues (2308th meeting) had a great deal of merit. More thought should be given to whether the two systems could be neatly separated. Mr. Yamada's suggestion that appeal against the findings of an arbitral court should not be confined to cases of *excès de pouvoir* was worth considering, and he also agreed that the fact-finding aspect of the procedure should be strengthened.

53. Lastly, he was in favour of referring the draft articles to the Drafting Committee. Mr. Rosenstock's suggestion that the Commission should first seek clearance from the General Assembly was difficult to accept, not only because the matter had already been debated in the Assembly but also because of the point of principle involved. The Commission surely did not have to refer back to the General Assembly each time it completed a small portion of its work. The Commission was, of course, accountable to the General Assembly, but it was a body of independent experts and, as such, ought not to abdicate its responsibilities.

54. Mr. BENNOUNA said that, although he was not a member of the Drafting Committee, he had attended a

recent meeting and had noted that the discussion on article 12 was temporarily blocked because the draft articles on the related subject of dispute settlement²³ were not yet before the Committee. Now the Commission was being told that the time was not yet ripe to refer the dispute settlement articles to the Drafting Committee, notwithstanding the Special Rapporteur's explicit recommendation to that effect and notwithstanding the fact that the articles in question were complementary to others already before the Committee. It would be recalled that, at the previous session, not all members had been in agreement with the provisions on countermeasures but had nevertheless agreed to refer those articles to the Drafting Committee. The same approach was needed in the present instance. Progress in the Commission's work on the topic depended on the referral of the articles of part 3 to the Drafting Committee.

55. Mr. ROSENSTOCK said that while some members of the Drafting Committee did, as Mr. Bennouna suggested, see a link between article 12 and the articles of part 3,²⁴ others, including himself, did not think that it would be prudent to establish such a link. As for the point just raised by Mr. Al-Khasawneh, he wished to make it clear that his suggestion was not to refer the question of part 3 to the General Assembly so as to obtain the Assembly's permission to go ahead but only to ascertain its views. A survey of opinion in the Assembly concerning the proposals made in 1985 and 1986 by the previous Special Rapporteur had revealed a general lack of enthusiasm. He believed that part 3 had long-range implications for the rest of the Commission's work on the topic, and referral back to the Assembly would therefore be warranted.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Rosenstock ought to make it clear that, of all the members of the Drafting Committee, he was the only one who wanted to eliminate article 12. As for the suggestion that the whole of part 3 should be referred to the General Assembly, it would be appreciated that the whole issue of countermeasures and their *correctifs* had developed considerably since 1985. Lastly, on the subject of State responsibility for crimes, he had already made it clear that his proposals in that respect would be in keeping with article 19 of part 1,²⁵ with the addition of compulsory recourse to ICJ.

Closure of the International Law Seminar

57. The CHAIRMAN observed that the twenty-ninth session of the International Law Seminar was coming to a close that day. Reviewing the activities of the Seminar, he expressed the hope that the participants would return home greatly enriched by the experience and wished them a safe journey and success in their professional activities.

58. Mrs. NOLL-WAGENFELD (Director of the Seminar), speaking on behalf of the Director-General, who was unfortunately prevented from attending the meeting, expressed the hope that the session which was coming to

²¹ For the text, see 2305th meeting, para. 25.

²² See *Official Records of the General Assembly, Forty-sixth Session, Plenary Meetings*, 44th meeting.

²³ For the text, see 2305th meeting, para. 25.

²⁴ Ibid.

²⁵ See footnote 2 above.

a close had achieved its twofold aim of enabling the participants to familiarize themselves with the work of the Commission and establishing lasting links and contacts among themselves. The programme for the twenty-ninth session of the Seminar had focused principally on Europe and, more particularly, on the former Yugoslavia. Participants had also attended the annual Gilberto Amado Memorial Lecture and had enjoyed the gracious hospitality of the Permanent Missions of Brazil and the United States of America. She had no doubt that the experience gained at the Seminar would prove useful to the participants in their future careers.

59. Mr. CANCHOLA, speaking on behalf of the participants in the International Law Seminar, said that the opportunity to follow the work of the Commission at the present moment in history had been particularly instructive. Thanking the members of the Commission for their teaching and advice, he said that it was the participants' hope one day to follow in their footsteps.

The Chairman presented participants with certificates attesting to their participation in the twenty-ninth session of the International Law Seminar.

The law of the non-navigational uses of international watercourses (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,²⁶ A/CN.4/451,²⁷ A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

60. The CHAIRMAN invited the Special Rapporteur to introduce his first report on the topic of the law of the non-navigational uses of international watercourses (A/CN.4/451) and in that connection drew attention to articles 1 to 10, as adopted on first reading,²⁸ which read:

PART I

INTRODUCTION

Article 1. Scope of the present articles²⁹

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

2. The use of international watercourses 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 2. Use of terms³⁰

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3. Watercourse agreements³¹

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse 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 or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

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, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4. Parties to watercourse agreements³²

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse 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 5. Equitable and reasonable utilization and participation³³

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6. Factors relevant to equitable and reasonable utilization³⁴

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

²⁶ Reproduced in *Yearbook*... 1993, vol. II (Part One).

²⁷ Ibid.

²⁸ See *Yearbook*... 1991, vol. II (Part Two), pp. 66-67.

²⁹ Initially adopted as article 2. For the commentary, see *Yearbook*... 1987, vol. II (Part Two), pp. 25-26.

³⁰ Subparagraph (c) was initially adopted as article 3. For the commentary, *ibid.*, p. 26. For the commentary to subparagraphs (a) and (b), see *Yearbook*... 1991, vol. II (Part Two), pp. 70-71.

³¹ Initially adopted as article 4. For the commentary, see *Yearbook*... 1987, vol. II (Part Two), pp. 27-30.

³² Initially adopted as article 5. For the commentary, *ibid.*, pp. 30-31.

³³ Initially adopted as article 6. For the commentary, *ibid.*, pp. 31-36.

³⁴ Initially adopted as article 7. For the commentary, *ibid.*, vol. II (Part Two), pp. 36-38.

- (c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;
- (d) existing and potential uses of the watercourse;
- (e) conservation, protection, development and economy of use of the water resources of the watercourse 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 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Article 7. Obligation not to cause appreciable harm³⁵

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

Article 8. General obligation to cooperate³⁶

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9. Regular exchange of data and information³⁷

1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

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

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10. Relationship between uses³⁸

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

61. Mr. ROSENSTOCK (Special Rapporteur) said that, as the Commission had wanted to complete the second reading of the draft articles on the topic by 1994, he had therefore submitted 10 articles, most of which were identical to those elaborated on first reading. None of the changes he was suggesting would fundamentally alter the thrust of the draft adopted on first reading; for the most part, the changes were made in response to comments by Governments (A/CN.4/447 and Add.1-3).

62. One question raised in some comments received concerned the form the Commission's work should take: model rules or a framework convention. Whatever deci-

sion the Commission might ultimately take in that respect, the very least it should do in response to those comments was to consider the matter in its debate on the topic.

63. He suggested that the words "flowing into a common terminus", in article 2, should be deleted, for two reasons. In the first place, it was not easy to see the *raison d'être* for that somewhat artificial limitation in something intended as model rules or a framework convention. Secondly, deletion of the words in question was one of the simpler ways of starting to deal with the problem of "unrelated" confined groundwaters. While he would not insist on his suggestion if there was no broad support for it, he would point out that it had received the endorsement of ILA's prestigious Committee on Water Resources, which also took the view that the exclusion of unrelated confined groundwaters was not based on sound hydrogeology. The same Committee also agreed with his recommendation that, in article 3, paragraph 2, the word "appreciable" should be replaced by the word "significant", for the reasons stated in paragraph 12 of his report.

64. On a point of drafting, he proposed to move the definition of pollution from article 21³⁹ to article 2.

65. For the reasons stated in paragraphs 21 to 23 of the report, he strongly recommended that article 7 should be revised as proposed in paragraph 27. Although some Governments and experts had urged that article 7 should be deleted in its entirety, on the ground that it was either inconsistent with article 5 or redundant, that would, in his view, be going too far. His proposed text was therefore a compromise designed to give full meaning both to optimal utilization and to sustainable development while recognizing the dangers of certain kinds of irreparable injury. A move away from the essentially simple text adopted in 1991 to a more complex approach would none the less create greater potential for disagreement and disputes. Accordingly, acceptance of his proposed changes to article 7 implied reconsideration of the decision—an unwise decision, in his opinion—not to include material on dispute settlement. In that connection, his predecessor, Mr. McCaffrey, had proposed that there should be a conciliation procedure followed by arbitration, but the problem would be that States would then, in effect, be required to consider arbitration rather than be placed under a clear obligation to go to arbitration. He trusted that it would be possible for any dispute settlement process to have a binding component, but at the very least, a reasonably developed third-party process seemed to him to be essential.

66. It was also his intention to give consideration to strengthening the institutional relations between watercourse States and to draw on what he had learned with regard to the situation between the United States of America and Canada and between the United States and Mexico. Many potential disputes were resolved, long before they developed into full-blown ones, at the technical level.

67. He hoped that as many members of the Commission as possible would take another look at his predeces-

³⁵ Initially adopted as article 8. For the commentary, see *Yearbook... 1988*, vol. II (Part Two), pp. 35-41.

³⁶ Initially adopted as article 9. For the commentary, *ibid.*, vol. II (Part Two), pp. 41-43.

³⁷ Initially adopted as article 10. For the commentary, *ibid.*, vol. II (Part Two), pp. 43-45.

³⁸ For the commentary, see *Yearbook... 1991*, vol. II (Part Two), pp. 72-73.

³⁹ See footnote 23 above.

sor's last two reports⁴⁰ which had not been considered as carefully as they might have been.

68. Mr. AL-BAHARNA, congratulating the Special Rapporteur on his first report, said that the general thrust of the draft articles was acceptable, though they could benefit from some "fine tuning".

69. As rightly stated by the Special Rapporteur in paragraph 6 of his report, the Commission would be well advised to expedite its work with a view to resolving the question of the form the draft articles should take at the earliest practicable stage. For his own part, he would be inclined to favour a convention rather than rules, for in an era of growing environmental awareness the importance of the matter warranted the conclusion of a multilateral treaty; model rules were more in the nature of guidelines.

70. As to issues concerning part I of the draft, article 2 could be improved, but he did not favour the proposal that the words "flowing into a common terminus" should be deleted. Failure to refer to a common terminus, would be a failure to identify a central element in a river system that would almost certainly comprise a number of tributaries flowing in from different States. A common terminus criterion would, moreover, help to distinguish between two watercourses flowing alongside each other. If any change was to be made to article 2, it should be with respect to groundwater, which made little or no significant contribution to surface waters and should therefore be excluded from the concept of watercourse systems. It would thus be preferable to limit the scope of the draft articles to underground waters that were central to the system as a whole. He agreed, however, that the definition of pollution set forth in article 21, paragraph 1, should be transferred to article 2.

71. The paragraphs concerning article 3 deserved close examination. In particular, the word "appreciable" as used in article 7 was not as broad in effect as the word "appreciable" used in article 3, paragraph 2. Since there was little reason why different formulas should be used for harm, in the draft articles, in similar sets of circumstances, the Special Rapporteur's proposed alternative B to article 3, paragraph 2, whereby the words "adversely affect, to an appreciable extent" would be replaced by "cause significant harm" was clearly an improvement over article 3, paragraph 2, as now drafted. Furthermore, he agreed that a similar formula might well have to be used in article 4, paragraph 2, articles 7 and 12, article 18, paragraph 1, article 21, paragraph 2, article 22 and article 28, paragraph 2.

72. The Special Rapporteur referred, in paragraph 15 of his report, to a suggestion by some Governments that the future instrument should contain a provision to the effect that, if a State became a party to the convention, that in itself would not affect existing watercourse agreements. The Special Rapporteur considered that such a provision would not be without problems and had therefore attempted to resolve the matter by referring to the

concept of *lex posterior* and to the principle of successive treaties. It was none the less a principle that raised intricate questions of law, and the Commission would have to apply it in connection with its consideration of the status of earlier watercourse treaties and of principles relating to the degree of modification, termination and suspension of those treaties. The Commission would also have to look into the question of preserving the rights and obligations acquired by States under earlier treaties as well as the Special Rapporteur's suggestions with regard to individual declarations made by States at the time of signature and ratification. In particular, it would have to determine the legal implications of such declarations and decide whether rights acquired in a bilateral or multilateral diplomatic process could be unilaterally altered by declarations. All those issues would have to be thoroughly examined by the Commission before firm answers could be given.

73. He agreed only partly with the Special Rapporteur about re-ordering articles 8 and 26. The provision in article 8 should indeed come before article 3, but there was no need to move article 26. What was more, a duty to cooperate might not always be realistic for watercourse States, many of which were bedevilled by disputes. For that reason, the words "endeavour to" should be added before the word "cooperate" in article 8 to underline the importance of cooperation, but without making it obligatory for States to cooperate.

74. Both paragraphs 1 and 2 of article 4 should be retained, since they dealt with two different aspects of participation in watercourse agreements. Paragraph 1 created a general right of participation in agreements relating to the entire watercourse, whereas paragraph 2 was concerned with participation arising under an agreement that dealt with part of an entire watercourse or a particular project.

75. While he agreed that articles 5 and 7 provided a key element of the entire draft, he failed to see any convincing reason why they should be reformulated. It was essential to recognize that, although they embodied related concepts, each had its own particular scope. Article 5 related to the equitable and reasonable utilization of a watercourse in both the domestic and the international context, while article 7 imposed an obligation on a State not to cause appreciable harm to other watercourse States in its utilization of the watercourse. Admittedly, the concept of equitable and reasonable utilization of a watercourse could overlap the concept of appreciable, or significant, harm, but the different circumstances of particular cases would justify separating the two. It might be more reasonable, from the standpoint of availability of resources, for two riparian States to undertake a joint watercourse utilization programme rather than for either of them to attempt such a project alone. The proposal to make "equitable and reasonable use" the determining criterion, except in cases of pollution, would require careful re-examination. There was little justification for creating rules when neither the norms nor the circumstances reflected any need to do so. Indeed, in paragraph 23 of the report, the Special Rapporteur noted the difficulty of providing detailed guidance on the matter: many bilateral agreements reflected facts that were specific to a particular problem and could not be reduced to general principles.

⁴⁰ These reports are reproduced as follows:

Sixth report: *Yearbook*... 1990, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

Seventh report: *Yearbook*... 1991, vol. II (Part One), p.45, document A/CN.4/436.

76. If equitable and reasonable use was made the predominant criterion, however, any significant harm caused to a watercourse State would be excusable as long as it was also equitable and reasonable. It was that fact which constituted the major difficulty in the Special Rapporteur's proposed new article 7. For similar reasons, he found it difficult to accept the new formulation on pollution, which would radically alter the balance in regard to pollution and would disturb the whole equilibrium of the draft articles themselves. The Special Rapporteur's formulation would appear to provide a useful handle whereby polluting States could seek to continue their activities by invoking the terms of subparagraphs (a) and (b) of the proposed new article 7. The simplicity of the former article 7 was far more preferable.

77. He would hesitate to endorse any attempt to revise article 8, in regard to which the Special Rapporteur stated, in paragraph 28 of the report, that a general formulation would be more appropriate. Greater precision could perhaps be achieved, but it might be at the cost of sacrificing the general nature of the provision. He none the less agreed that the concepts of good faith and good neighbourliness, although salutary in themselves, had no place in the draft articles.

78. Mr. EIRIKSSON said that the Commission's main task should be to stick to the goal of completing the second reading of the draft articles by the end of the next session, in 1994. Any suggestions in the next report about the elaboration of provisions on management and the introduction of a system of dispute settlement should take that into account.

79. He was concerned about the proposal to replace the word "appreciable" by the word "significant", which could be interpreted as a substantive change and as raising the threshold of the draft articles. If the word "appreciable" was ambiguous in English, that point could perhaps be covered in the commentary. The same problem had in fact arisen in the Drafting Committee in connection with the draft articles on the topic of international liability. The Special Rapporteur might therefore wish to seek advice from other sources before the matter was taken up in the Drafting Committee.

80. Mr. KOROMA, congratulating the Special Rapporteur on an excellent report, noted that the Special Rapporteur had resisted the temptation to "tinker", to use his own word, with the draft articles, except where absolutely necessary. That was a sure sign of a good rapporteur.

81. He would be loath, at the present stage in international relations, to choose between model rules or a framework convention, but the ultimate decision would, he believed, depend on the quality of the Commission's work. If the draft articles were balanced and authoritative, they would inevitably recommend themselves to the international community.

82. The word "significant", as opposed to "appreciable", perhaps posed a problem for those not conversant with the common law, but it would make the text clearer. As the Special Rapporteur explained in his report, the word "appreciable" had two distinct meanings, whereas the word "significant" pinpointed the issues involved. He agreed with the recommendation that the definition

of pollution should be brought forward to article 2, on the use of terms. The sooner that was done the better.

The meeting rose at 1 p.m.

2310th MEETING

Tuesday, 22 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (continued) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. de SARAM said that the Commission, in plenary and in the Drafting Committee, was addressing at the same time two closely related matters: the first was the situation in which a countermeasure had not as yet been taken (the "pre-countermeasure" stage considered in the fourth report of the Special Rapporteur,² currently being discussed in the Drafting Committee); and the second was the situation in which a countermeasure had already been taken (the post-countermeasure stage considered in the fifth report of the Special Rapporteur, currently before the Commission in plenary).

2. The overall approach advocated by the Special Rapporteur in his fourth and fifth reports was the following: any State which intended to take a countermeasure should notify, in advance, its intention to the State against which that countermeasure was to be taken, requesting that recourse should be had promptly to a dispute settlement procedure which did not necessarily need to be a binding third-party one. However, whatever the settlement procedure might be, if the dispute was not resolved and if a countermeasure was taken, it was essential that there should be a prompt and binding third-party settlement—at least as a matter of final recourse, should negotiation or conciliation fail—whereby the legitimacy of the countermeasure would be determined.

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² Reproduced in *Yearbook*... 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3.

3. It was an approach with which, in the overall interest of reaching a consensus in the Commission, he would agree, albeit regretfully. In his view, it should be possible to interpose a binding third-party settlement procedure prior to the taking of a countermeasure in a manner that could be designed both to remove any possibility of the procedure being frustrated by deliberate recalcitrance and, as well, to put into place the necessary interim measures until the question of whether there had in fact been a wrongful act, and, if so, what the reparations should be, had been decided. Whatever the delays such an interposition of a binding third-party settlement requirement prior to the taking of a countermeasure might entail in the observance of the law, such delays would be of far less magnitude, far less disruptive of the law, than what a reactive breach of the law (a countermeasure) might entail. Moreover, there would always be a possibility of a countermeasure being taken in haste, without full appreciation of all the circumstances; a countermeasure that might be unnecessary, disproportionate or that might cause loss to those to whom no loss should be caused. It should be pointed out, in that connection, that the previous Special Rapporteur, Mr. Riphagen, had proposed in article 10³ that recourse to dispute settlement processes should be a precondition for the taking of countermeasures other than by way of reciprocity. Nor should the Commission forget that, should it not require the interposition of dispute settlement procedures prior to the taking of a countermeasure, it would be placing its imprimatur on and would preserve for decades to come a relic of earlier times when the taking of the law into one's own hands, by way of reprisal for a wrong believed to have been committed, was the prevalent doctrine and practice—a doctrine and practice from which the inter-State system had decided in other spheres that it was time to move away.

4. The reasons why the law turned, on occasion, to binding third-party settlement required no restatement. Yet there was one reason which, above all others, needed to be underlined. It was that the law had surely to provide not only for cases where States in dispute were more or less of equally persuasive weight; but also for cases where there was an inequality. It was the presence, then, of the third party and the requirement of a binding third-party settlement, that sought to ensure that, whatever the other inequalities might be, there was (at least as far as legal procedures could provide) equality before the law. Such a responsibility could not confidently be entrusted to the voluntary recommendatory processes of negotiation, mediation or conciliation, whose essential purpose was the achievement of amicable settlement.

5. Accordingly, in his view, the draft articles proposed by the Special Rapporteur in his fifth report for the "post-countermeasure" stage of a dispute should be referred to the Drafting Committee for consideration in conjunction with the proposals that were currently in discussion in the Drafting Committee with reference to the "pre-countermeasure" stage of a dispute. Alternatively, the Drafting Committee should at least be advised that it should not conclude its work on the draft articles for the

pre-countermeasure stage of a dispute, until it had decided how the draft articles dealing with the post-countermeasure stage were to be formulated. If the Commission did not provide for a binding third-party settlement procedure, at the very least immediately after a countermeasure was taken, it would seem to him inevitable that the entire question of the inclusion of provisions on countermeasures in the future instrument on State responsibility would, once again, be called into question.

6. Turning to the draft articles proposed by the Special Rapporteur in his fifth report,⁴ he said that, before dealing with the formulation of specific articles, the Commission should address two matters. In the first place, it should consider the nature of the issues to be resolved after a countermeasure had been taken and, secondly, having regard to the importance of promptitude in a post-countermeasure situation, it should consider the stage at which a binding third-party settlement should be invoked. The first matter raised essentially factual issues: what were the facts prior to the countermeasures; what were the legal obligations; was there in fact a breach of obligation and, if so, whether the countermeasure had been necessary and proportionate. These were essentially issues of a factual nature, requiring findings as to the facts and to what the applicable legal obligations were; and as such were not issues for which the processes of negotiation, mediation, conciliation—whose overall objective was voluntary amicable settlement—were well suited. He therefore concurred in the conclusions of Mr. Calero Rodrigues, namely, that no meaningful purpose would seem to be served in disputes at the post-countermeasure stage by prescribing that there should be conciliation before binding third-party settlement; that the nature of disputes at the post-countermeasure stage required that they be handled separately from other disputes relating to the interpretation or application of the future convention on State responsibility; and that consideration might need to be given to creation of a special body to which those disputes could be speedily referred.

7. It would also be unfortunate if the Commission were to foreclose—as too cumbersome, or otherwise inappropriate, or too unlikely to be acceptable to States—any possibility of ICJ serving as the third party to which a State, in a post-countermeasure dispute, may require recourse. As was known, as part of a continuing United Nations effort to encourage greater use by States of the Court's facilities, an effort that included the approval by the General Assembly of the Manila Declaration on the Peaceful Settlement of International Disputes,⁵ the Court had revised its rules on the composition of its ad hoc chambers, leading to the ad hoc chamber procedure receiving far greater attention than it had in the past. Moreover, the administrative and other facilities which a permanent United Nations institution, such as the Court, could routinely provide parties made, at least in terms of comparative costs, resort to an ad hoc chamber of the Court the obviously sensible course.

³ For the texts of articles 5 to 16 proposed by the previous Special Rapporteur in his fifth report, see *Yearbook... 1984*, vol. II (Part One), p. 2, document A/CN.4/380, sect. II.

⁴ For the text, see 2305th meeting, para. 25.

⁵ General Assembly resolution 37/10, annex.

8. A governing consideration in deciding on the appropriateness of particular dispute settlement procedures must, of course, always be that a procedure should be expeditious, and the least costly possible. It was necessary to avoid the situation where a State subjected to a countermeasure decided that it would be preferable to abide by the countermeasure rather than contest its legitimacy through a costly dispute settlement procedure. The Commission might therefore wish to consider whether it would not be right for a State, the subject of a countermeasure, to be accorded the ability to choose, from among a number of binding third-party settlement procedures, the one it deemed most appropriate from its own point of view.

9. One possibility would obviously be to give States an opportunity to have a fact-finding inquiry carried out by or under the auspices of an international authority, along the lines of the mission entrusted to the Secretary-General of the United Nations in the *Rainbow Warrior* case;⁶ though there the Secretary-General was entrusted with more than a fact-finding responsibility.

10. There remained the question whether, for the broader range of possible disputes relating to the interpretation or application of a convention on State responsibility, the Commission should also recommend that, as a matter of ultimate recourse if other voluntary and recommendatory dispute settlement processes should fail, the draft articles should provide for resort to a binding third-party settlement procedure. At the present preliminary stage, he shared the view of other members of the Commission that, as a matter of final recourse, provision ought to be made in part 3 of the draft for the possibility of a binding third-party settlement procedure, for two main reasons: first, because it was the presence of a binding third-party settlement requirement that would ensure, in so far as legal procedures could possibly do that, whatever the other inequalities may be, there would at least be equality before the law; and, secondly, because it was the Commission's role to advise the General Assembly in the exercise of the Assembly's responsibilities under Article 13, paragraph 1 (a), of the Charter of the United Nations to "encourage the progressive development of international law and its codification". It was, thus, the responsibility of the Commission to advise the Assembly on the standards that should, in the Commission's view, be recommended to Governments for best ensuring the "progressive development of international law and its codification". It was from that responsibility that the Commission derived its considerable prestige in the international legal community. The Commission had been structured with such a responsibility in view.

11. In conclusion, he thanked the Special Rapporteur and congratulated him on the frankness and clarity with which he had advised the Commission on the course to be followed on an important topic.

12. Mr. IDRIS said that the Special Rapporteur's fifth report and his oral explanations were not a dream or the result of a wild imagination in the field of legal thinking,

but a progressive innovation and a new and courageous view of a complex question which did not claim to provide ready-made solutions, especially with regard to the general regime of the settlement of disputes. The basic problem was that countermeasures would always have the main defect of being based on a unilateral assessment of the right which had been violated and of the legitimacy of the countermeasures, which could in turn lead to a reaction by the allegedly wrongdoing State in the form of counter-reprisals. By its very nature, a countermeasure could lead to an injustice if the States parties to the conflict were in a situation of inequality. Hence the need to look closely, before going on to consider the proposed system for the settlement of disputes, at the legal regime of countermeasures and its relationship with the draft on State responsibility.

13. In that connection, the Special Rapporteur should give in-depth consideration to the question of whether countermeasures should necessarily precede third-party dispute settlement or, in other words, whether that was the only means of bringing the allegedly wrongdoing State to settle the dispute. Or could third-party dispute settlement precede countermeasures and still be acceptable to the international community? It must be taken into account that there was no means of speedily and impartially determining the existence of a wrongful act and that the extent of the harm and the exhaustion of means of settlement were questions to be decided exclusively by the victim State.

14. Without going into the background of the question, he had five comments to make. The first was that means other than countermeasures would have to be found or resort to countermeasures would have to be curtailed in order to avoid abuse by one of the parties—and that was the approach taken by the Special Rapporteur in his fifth report.

15. Secondly, he endorsed the principle of third-party settlement of disputes if it was a substitute for countermeasures and for unilateral measures, as a means of mitigating the consequences of the inequality of States.

16. Thirdly, third-party dispute settlement was an improvement over the practice of countermeasures because it guaranteed that the State which claimed to be the victim of a wrongful act would comply with the conditions and criteria defined in the draft articles for the application of that type of measure.

17. Fourthly, the presence in the draft of an effective dispute settlement regime would strengthen all rules of international law, including past and future agreements. Many international legal instruments had been mentioned in that connection, such as Chapter VI of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States,⁷ the Manila Declaration,⁸ the Charter of the Organization of American States,⁹ the Pact of Bogotá¹⁰ and the Charter of the Organization of

⁷ General Assembly resolution 2625 (XXV), annex.

⁸ See footnote 5 above.

⁹ Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324).

¹⁰ American Treaty on Pacific Settlement (United Nations, *Treaty Series*, vol. 30, p. 55).

⁶ Ruling of 6 July 1986 by the Secretary-General (United Nations, *Reports of International Arbitral Awards*, vol. XIX (Sales No. E/F.90.V.7), pp. 197 *et seq.*).

African Unity and its Protocol.¹¹ Moreover, he did not entirely agree with the Special Rapporteur's view that, since those instruments were too vague to provide effective protection against breaches of international obligations, there was no point in developing them. The OAU Charter and its Protocol had made it possible to settle a number of conflicts peacefully on the basis of the principle of conciliation. In any case, even if those international instruments were generally not the best possible solution to the problem of the settlement of disputes in the draft on State responsibility, their existence was far from incompatible with the establishment of a settlement regime such as that proposed by the Special Rapporteur.

18. Fifthly, the three-step dispute settlement system—conciliation, arbitration and judicial settlement—suggested that the third-party dispute settlement procedure could be set in motion only after the adoption of countermeasures. That was an innovation compared to article 12, paragraph 1 (a), which made the exhaustion of the available procedures for amicable settlement a condition for resort to countermeasures, whether those procedures had existed prior to the dispute or had been created subsequently, without, however, imposing any particular settlement procedure.

19. In conclusion, he expressed the hope that the Special Rapporteur would reply to two questions which he considered important. First, why must the binding third-party dispute settlement procedure not begin before the use of countermeasures? Secondly, must it be concluded from the three-step system proposed by the Special Rapporteur—on the basis of the assumption that the mechanism that triggered the settlement obligation was the dispute that had arisen as the result of the use of a countermeasure by the State which considered itself injured against the allegedly wrongdoing State—that the basic question of fact and of law related to countermeasures or that the allegedly injured State could invoke, as a matter of fact and of law, the allegedly wrongful act which had given rise to the conflict?

20. Lastly, he thanked the Special Rapporteur for having explained in the paper distributed on 14 June that the proposed third-party settlement procedures would relate not only to the interpretation and application of the articles on countermeasures, but also to the interpretation and application of all of the provisions of the future convention on State responsibility.

21. Mr. EIRIKSSON said that the fifth report on State responsibility contained draft articles¹² which were in some respects a novel scheme for the settlement of disputes. It nevertheless seemed to him that the proposed system had not been endorsed fully enough in the Commission to be used as the only point of departure for future work. The question even arose in a more general way whether provision should be made for the settlement of disputes in respect of State responsibility. Only at its forty-fourth session had the Commission decided to make its best efforts to ensure that the draft articles included a part 3 on the settlement of disputes. He had noted a tendency towards Government-bashing in recent discussions in the Commission and other bodies,

whereas the premise should at least be that States represented their people and might have legitimate reasons for the views they held on various questions, including dispute settlement. The Commission should also not be afraid that its work would be disapproved of by States and should try to provide some leadership on that question and on others.

22. There was a clear link between article 12, currently before the Drafting Committee, and the proposals which were contained in the fifth report and were, according to the Special Rapporteur, meant to be applicable to all of parts 1 and 2. That did not change the fact that countermeasures were the most important aspect of the dispute settlement issue. Although he was opposed in principle to the use of countermeasures as a means of settling disputes, he had agreed that the Commission should try to establish a legal regime for countermeasures in order to make them less unacceptable. Since one step in that direction would be to set up a dispute settlement system to be used when countermeasures were being contemplated or had already been taken, he had endorsed the Drafting Committee's work on article 12. There was, however, some uncertainty as to whether article 12 would be adopted at the current session and its discussion might be postponed until after the consideration of part 3. In that connection, Mr. Calero Rodrigues (2308th meeting) had made a very interesting proposal relating to a special mechanism to be used when countermeasures were being contemplated, and the Commission should give further attention to that proposal. In his view, part 3 should be referred to the Drafting Committee, not for the purpose of an article-by-article review of the proposed system, but so that the Committee could determine how much of part 3 it could consider in a reasonable period of time and, accordingly, how much of the first reading of the articles on State responsibility could be accomplished.

23. Mr. Sreenivasa RAO said that, unlike other topics considered by the Commission, State responsibility encompassed the entire field of international law and the aspect of the topic covered in the fifth report, namely, the settlement of disputes, touched on the very fabric of the rule of law in international relations. Given its mandate, the Commission must, at the risk of being criticized for taking so much time, do everything possible to establish a clear, uniform and universal body of law. As stated at the preceding session with regard to countermeasures, the rule of law in international relations could not allow States to decide unilaterally what was right or wrong and to turn that unilateral decision into a legal basis for countermeasures. He therefore saw a contradiction in the fact that it might be said, as it had been in the report, that countermeasures were part of customary international law and that dispute settlement procedures belonged to the progressive development of international law. Countermeasures were undoubtedly part of reality, but no State, not even a State which applied such measures, inferred that they meant the right to determine and to enforce the law unilaterally. In his view, the use of countermeasures did not justify the value judgement that such measures were part of customary international law. Article 2 of the Charter of the United Nations ruled out the unilateral use of force and linked that provision to the obligation to settle disputes peacefully. It was on that basis that the Commission should work to promote the rule

¹¹ United Nations, *Treaty Series*, vol. 479, p. 39.

¹² For the text, see 2305th meeting, para. 25.

of law. The peaceful settlement of disputes was an existing fundamental international obligation. That obligation, and the obligation not to resort to force, were two sides of the same coin and one could not be classified as customary international law while the other was classified as the progressive development of international law.

24. Affirming the rule of law meant not only that the international community could neither tolerate nor lend legitimacy to a unilateral interpretation of the rights of each State, and much less to a unilateral implementation of such rights, but also that there was a need for a new element, namely, the settlement of disputes by a third party. However, neither the objections to which that ideal solution gave rise nor the practical difficulties it involved should be underestimated in a world where the dividing line between the rule of law and the law of the jungle was somewhat blurred by the actions of the big and powerful States. Hence the need to be innovative and to adopt other strategies. In that connection, he recalled that Article 33 of the Charter, as referred to in the Handbook on the Peaceful Settlement of Disputes between States,¹³ made a wide range of means available to States for fulfilling in a democratic and egalitarian manner the obligation to settle disputes peacefully and that, in practice, States settled 90 per cent of their disputes through the free choice of means. Given those circumstances, the Commission must avoid at all costs giving the impression that anything but third-party settlement would be the law of the jungle because, otherwise, it would be discouraging States from settling their disputes peacefully and denying itself even the possibility of imposing that fundamental obligation: States should be given the choice of how to fulfil that obligation, although they must be encouraged to choose third-party settlement.

25. The obligation to settle disputes peacefully should not function solely to test the legality of countermeasures already taken, but should extend to the entire spectrum of State responsibility, as countermeasures were by definition an abuse of law; and since they were inevitable, countermeasures must be subject to some preconditions, foremost among them the prior obligation to seek a peaceful settlement procedure; and it was to be hoped that the big and powerful States and those which applied countermeasures would place their membership in the international community above their self-interests. Yet, it seemed that, in the work done thus far, a narrow conception of the obligation to settle disputes peacefully had prevailed, whereby States with the necessary means were able to judge their own cases. If that was true, he thought that it would be best to leave countermeasures aside and end the draft articles with provisions on the peaceful settlement of disputes. The fact was, as the Special Rapporteur had said, that, while third-party settlement was clearly the only way to place the rule of law on a firm footing, it was for the time being only a theory.

26. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had demonstrated in his fifth report that two conditions were essential for the correct implementation of the chapter on

countermeasures: the convention itself had to establish means of dispute settlement and must not limit itself to referring to such means as might exist between the parties; and the chosen means must lead without fail to the solution of the controversy. In other words, the use of third-party settlement must be compulsory if other means failed. For his contentions, the Special Rapporteur had been seen either as a dangerous revolutionary who intended to upset the foundations of international law or as a timid reformer who proposed nothing new. He was in reality neither one nor the other.

27. The Commission could not fail to realize that the adoption of the proposals in the fifth report would mean important changes, but that should not prevent it from supporting the report's basic ideas, in particular the two capital points just mentioned. Not being a political body, the Commission had to propose a system that States might or might not adopt, but that would improve on the existing system, which was unacceptable. At the same time, the Commission must endeavour to design as practical a system as possible. He could not endorse a system that would be unacceptable to States.

28. The Special Rapporteur was proposing a rather complicated system, which consisted of: first, maintaining the general lines of article 12 of part 2, which required prior resort by the States concerned to the means of settlement available to them, while amending paragraph 1 (a) so as to make the lawfulness of any resort to countermeasures conditional upon the existence of the "said binding third-party pronouncement"; and, secondly, strengthening, in part 3,¹⁴ the non-binding conciliation commission without affecting the prerogative of the injured State to take countermeasures.

29. The Special Rapporteur had argued in favour of maintaining article 12, despite having shown convincingly, in his fifth report, that what really mattered was a more or less organic system of third-party settlement procedures ultimately leading, failing agreement, to a binding third-party pronouncement. In fact, part 3 contained much more than "a more or less" strengthened conciliation procedure: if conciliation failed, compulsory arbitration would follow; if that failed, recourse could be had to ICJ. In that respect, the Special Rapporteur seemed to have a peculiar notion of the fragility of settlement mechanisms, proposing as he did an apocalyptic scenario in which the conciliation commission failed to perform its duty and the arbitral tribunals failed to constitute themselves or to give timely awards, so that the case had to be brought before ICJ. If an automatic procedure were established for that purpose, the bodies concerned should not encounter any insurmountable difficulties in constituting themselves and performing their functions. OAS had, moreover, a complete and organic system of dispute settlement, which was provided for in one of its three constituent instruments, the Pact of Bogotá.¹⁵

30. The system proposed by the Special Rapporteur seemed too complicated and its implementation excessively long: if all the different time-limits were added together, it might take two or three years, or even more.

¹³ *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 33 (A/46/33), annex.*

¹⁴ See 2305th meeting, para. 25.

¹⁵ See footnote 10 above.

Moreover, it was difficult to see the advantage of a conciliation procedure, by definition non-compulsory, followed by a compulsory third-party settlement procedure. Why not be content with a third-party procedure? It might also be asked whether countermeasures warranted such a cumbersome machinery: after all, a countermeasure was not a declaration of war.

31. To his mind, a method which fulfilled the two conditions regarded as indispensable by the Special Rapporteur would be sufficient, particularly if it found a consensus in the Commission. It might be a very simple method, established perhaps in part 2, which would ensure the solution of the controversy. The maintenance of the rather confused system of article 12, in the version proposed by the Special Rapporteur or in a modified, but essentially identical version, might hinder the proper functioning of the draft articles.

32. The Drafting Committee had examined an idea which warranted the Commission's attention, for it seemed to fulfil the Special Rapporteur's conditions and would make it possible to settle disputes concerning countermeasures through a method provided for in the convention itself: the injured State would be authorized to take countermeasures provided that it offered at the same time to have recourse to a third-party settlement procedure. By ensuring an impartial assessment of the legality of the countermeasures, such a system would represent a great improvement over the present situation. Of course, that applied only to the main elements of the system discussed in the Drafting Committee and not to the accessory clauses which might accompany them.

33. He could accept a system based on those general lines provided that the arbitration procedure was absolutely automatic and its implementation could not be obstructed by any of the parties. For that purpose, part 3 should clearly determine the different steps and modalities of the procedure, so that the establishment and functioning of the arbitral tribunal—appointment of the arbitrators and the president, drafting of the *compromis* by the tribunal if the parties failed to reach an agreement, and so forth—were entirely automatic. The arbitral tribunal should also be given the power to order the immediate cessation of the countermeasure or the adoption of the measures of protection or other measures which it considered necessary for the fulfilment of its mandate.

34. He agreed with Mr. Eiriksson that there was nothing to be gained by continuing the discussion of the question in plenary. The draft articles could be referred to the Drafting Committee, perhaps with the proviso stated by Mr. Eiriksson.

35. Mr. VERESHCHETIN said that he had the impression, confirmed by Mr. Eiriksson's statement, that there was some uncertainty about the need to add to the draft articles a part 3 on implementation and dispute settlement which would be independent and just as important as parts 1 and 2. He therefore wondered whether the Commission had taken a formal decision on the point; if the answer to that question was affirmative, he would like to know when the decision had been taken and whether the scope of part 3 had been defined.

36. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in 1985 and 1986, in particular, the Commission had referred to the Drafting Committee all the proposals

made by the previous Special Rapporteur, Mr. Riphagen. That was why Mr. Mahiou (2306th meeting) had been able to recall quite rightly that the Drafting Committee had regularly considered a draft text for part 3 and that it must in any event work on it. But the Commission was, of course, free to take any decision it wished in that regard.

37. The CHAIRMAN pointed out that the report on the work of the forty-fourth session of the Commission¹⁶ stated that, since 1986 the Commission assumed that a part 3 on the settlement of disputes and the implementation (*mise en œuvre*) of international responsibility would be included in the draft articles. Therefore, the question no longer arose.

38. Mr. EIRIKSSON said that, in 1992, the Commission had sought to remove the ambiguity of the words "a possible part 3, which the Commission might decide to include, could concern the question of the settlement of disputes and the 'implementation' (*mise en œuvre*) of international responsibility", which had until then appeared in the introduction to the chapter on State responsibility in the Commission's report, by deciding to replace them with the words which the Chairman had just read out.

39. Mr. YANKOV, supported by Mr. VILLAGRÁN KRAMER and Mr. THIAM, said that, for several years in its work on the topic, the Commission had assumed the existence of a part 3, which had, moreover, been the subject of various proposals.

40. Mr. TOMUSCHAT said that the Commission ought to complete the articles on substantive issues before producing the procedural rules of part 3 of the draft articles.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the present case, it was very difficult to distinguish between substantive and "procedural" questions. For methodological reasons, of course, he had had to distinguish between the substantive consequences of the wrongful act, namely, the obligation of reparation, and the "procedural" consequences, namely, countermeasures, but the result was that part 2 of the draft articles on countermeasures contained many procedural provisions. It was important not to be too formalistic; he did not think he could clearly separate substance from procedure and was not convinced that such a distinction was very wise in the present case.

42. The CHAIRMAN said that the Commission was now entitled to take it that the draft articles included a part 3 concerning the implementation of the future convention and dispute settlement, without thereby prejudging the content of such a part 3.

The meeting rose at 11.45 a.m.

¹⁶ See *Yearbook* . . . 1992, vol. II (Part Two), p. 17, para. 108.

2311th MEETING

Thursday, 24 June 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,¹ A/CN.4/451,² A/CN.4/L.489)

[Agenda item 4]

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

1. Mr. TOMUSCHAT expressed appreciation to the Special Rapporteur for a succinct report which dealt with all the issues without unnecessary circumlocution. He agreed with the Special Rapporteur that the Commission owed a great deal to the previous Special Rapporteur, Mr. McCaffrey, under whose guidance the draft articles had taken shape within a relatively short time.

2. He had a clear preference for a draft convention rather than model rules. That was because many of the provisions dealt with procedural mechanisms which could become fully effective only within the framework of a treaty. Moreover, the draft articles could realize their full potential only if they were embodied in an instrument having binding force.

3. He agreed with the Special Rapporteur that no change was needed in article 1.

4. With regard to article 2, subparagraph (b), he had no objection to the "flowing into a common terminus" and did not understand why the Special Rapporteur had suggested that they should be deleted. He agreed, however, that the definition of pollution in article 21³ should be transferred to article 2. Indeed, if his recollection was correct, that had always been the intent.

5. A more serious issue concerned the proposed replacement of the word "appreciable" by the word "significant". It had always been his conviction that the word "appreciable" did not indicate the desired threshold. In the first place, it was marred by a certain ambiguity. Also, as had already been suggested, it could be taken to mean "not negligible". A word which carried

that meaning did not correctly designate the point at which the line should be drawn. That line was crossed when significant harm was caused—harm exceeding the parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit. While he thus agreed that the word "appreciable" should be replaced by the word "significant", he considered that the reference in article 3 to "extent" should stand. He was also not fully persuaded by the argument that articles 3 and 7 should be harmonized.

6. He did not endorse the suggested amendment to article 3, paragraph 3, since, in his view, there was no need to refer to existing watercourse agreements. If the parties to an existing agreement were to ratify the future convention, they would have to be convinced that the two instruments were fully consistent. There was no need to tell them that they might have to review their earlier agreement. The Special Rapporteur was well aware of the position, as was apparent from the statement made in paragraph 16 of his report.

7. He did not feel that the Special Rapporteur's proposed rewording of article 7 would improve the quality of the rule it laid down. That article could be criticized for being far too rigid, particularly since a superficial perusal might lead to the conclusion that the occurrence of harm could of itself make the use unlawful. That, however, would be the wrong interpretation. What article 7 required States to do was to exercise due diligence, the requirements of which varied according to the degree of danger inherent in a given activity. Accordingly, he could endorse the first part of the Special Rapporteur's proposed reformulation, reading: "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States". The remaining, and additional, elements merely qualified the rule in a manner he found confusing. It was clear to him that equitable and reasonable utilization would always remain below the threshold of significant harm. No coordination between articles 5 and 7, by means of an explicit reference, was necessary.

8. It was gratifying to note that the Special Rapporteur had, on the whole, deferred to the decisions of principle taken by the Commission on first reading. It remained to be seen whether, in so far as the Special Rapporteur wished to introduce any innovations, he could convince the Commission that his own wisdom was to be preferred to the collective wisdom underlying the adoption of the draft articles on first reading.⁴

9. Mr. CALERO RODRIGUES said that the form of the Special Rapporteur's first report, which was short and did not invoke authorities and instruments in support of self-evident truths, was very refreshing. It did not try to disturb the delicate balance that existed between the various concepts reflected in the articles and would greatly facilitate the Commission's second reading. The articles had in general been well received by the General Assembly and the Commission was on the right track. The Special Rapporteur was following in the steps of Mr. McCaffrey, the previous Special Rapporteur, to

* Resumed from the 2309th meeting.

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² Ibid.

³ See *Yearbook*... 1991, vol. II (Part Two), p. 68.

⁴ See *Yearbook*... 1991, vol. I, 2231st meeting, para. 71.

whom the Commission was much indebted for the way in which he had conducted the first reading.

10. The Special Rapporteur had raised two general questions in his report, the first of which was whether provisions should be included in the draft on the settlement of disputes. In that connection, he would point out that the fact that such provisions had not been included in the draft on first reading did not mean that the Commission had rejected the idea. In point of fact, they had been included in Mr. McCaffrey's sixth report,⁵ but there had not been sufficient time to examine them. For his own part, he favoured the inclusion of provisions on the settlement of disputes. There was no need for an elaborate system. It would suffice to indicate at some point that there was an obligation to accept a third-party procedure. There would, of course, be a choice between conciliation, arbitration and judicial settlement, each of which had advantages and disadvantages. The Special Rapporteur would, however, not even have to draft provisions, since those prepared by Mr. McCaffrey, who had wisely opted for mandatory conciliation, could serve as a basis for the Commission's work.

11. The second general question raised by the Special Rapporteur was whether the draft should take the form of a framework convention or model rules. Although the Commission had not taken a formal decision on the matter, his own understanding was that it had always worked on the basis that there would ultimately be a framework agreement. The framework agreement approach had also been broadly endorsed both in the Commission and in the Sixth Committee of the General Assembly. None the less, the Special Rapporteur had put forward two possible arguments in favour of model rules, but without endorsing that approach. The first of those arguments was that there would be little point in advocating the framework convention approach, without some expectation of widespread acceptance. That was not a very convincing argument, for States had indeed demonstrated a widespread acceptance of the articles as the basis of a framework agreement. The Special Rapporteur's second observation was that the model rules would require very strong endorsement by the General Assembly. Such endorsement would, however, be no stronger than the support given to the framework convention. The Special Rapporteur also stated that model rules would facilitate including more specific guidance but that seemed problematic given the wide variety of rivers and situations involved. Only a general instrument could provide general guidance.

12. Turning to the draft articles, he disagreed with the Special Rapporteur that they set a standard which was more an aspiration than achievable, but agreed that what was necessary at that stage was, in large measure, fine tuning. Since most of that fine tuning could be done in the Drafting Committee, he would confine his comments to five main points.

13. In the first place, he did not agree with the Special Rapporteur's proposal for the deletion of the words "flowing into a common terminus", which appeared in article 2, subparagraph (b). In the Special Rapporteur's

view that notion did not seem to add anything beyond possible confusion and risked the creation of artificial barriers to the scope of the exercise. As the Commission had explained in paragraph (7) of its commentary to article 2,⁶ however, the requirement of a common terminus had been included to introduce a certain limitation upon the geographic scope of the articles: the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purpose of the articles. In France, for example, almost all the rivers were connected by canals. If the common terminus element were deleted, all watercourse systems in France would therefore be reduced to one; in other words, the Rhône and the Rhine would be in the same system, and that was clearly absurd. The term "common terminus" was therefore necessary in his view.

14. Secondly, the Special Rapporteur's statement that he would be inclined to include "unrelated" confined groundwaters in the concept of "watercourse" as defined in article 2, subparagraph (b), did not seem very logical. How could "unrelated" groundwaters be envisaged as part of a system of waters which constituted "by virtue of their physical relationship a unitary whole"? If there was no physical relationship, how could such waters be part of a unitary whole? The question of confined waters deserved regulation, but it called for a different set of rules. Few if any of the articles, other than those embodying general principles, could be applied to confined groundwater. Even if the study which had been proposed by Mr. Bowett⁷ and approved by the Planning Group⁸ concluded that the regulation of such waters should be included in a separate part of the watercourse articles, he would still favour a separate instrument. At all events, pending a further study, he was opposed to the idea of including confined groundwater in the concept of a watercourse.

15. His third point concerned the words "appreciable" and "significant". The word "appreciable" was used in no less than eight articles to qualify either the extent to which a State must be affected, the adverse effects of a particular use or the harm caused. Since it was apparent that, in all cases, the adverse effects or the harm went beyond the mere possibility of "appreciation" or "measurement", it was clear that what was really meant was "significant" in the sense of something that was not negligible, but that did not rise to the level of substantial or important. In paragraphs (13) to (15) of its commentary to article 4,⁹ which had become article 3, the Commission had not been entirely successful in its attempt to clarify the position. Paragraph (5) of its commentary to article 8, which subsequently had become article 7,¹⁰ stated that the "term 'appreciable' embodies a factual standard" and that "The harm must be capable of being established by objective evidence", but went on to add that there "must be a real impairment of use, i.e. a detrimental impact of some consequence" and that "appreciable" harm was "that which is not insignificant or barely detectable, but is not necessarily 'serious'".

⁵ See *Yearbook*... 1990, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

⁶ See *Yearbook*... 1991, vol. II (Part Two), p. 70.

⁷ Document ILC/WG/LTPW/93/1/Add.1.

⁸ Document ILC/(XLV)/PG/R.1, para. 5.

⁹ See *Yearbook*... 1987, vol. II (Part Two), pp. 28-29.

¹⁰ See *Yearbook*... 1988, vol. II (Part Two), p. 36.

“Appreciable” therefore contained two elements: the possibility of objective appreciation, detection or measurement, and a certain degree of importance ranging somewhere between the negligible and the substantial. The problem was that “appreciable” could be understood as containing only the first of those elements. Anything that could be measured would be deemed to be “appreciable”. Indeed, that notion had been adopted by Mr. Barboza, Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law, who had said that appreciable risk meant the risk that might be identified through a simple examination of the activity and the things involved. In his own view, however, the two elements had to be present in any qualification of harm. He, therefore, agreed with the Special Rapporteur that, throughout the draft, the word “appreciable” should be replaced by the word “significant”.

16. Fourthly, there seemed no doubt that watercourse agreements which would be concluded in the future and which were expressly contemplated in the articles would take precedence over the articles. In that connection, he did not agree with the Special Rapporteur, who doubted whether such agreements should be considered valid if they were inconsistent with the articles. Given the residual character of the articles, States were free to include in watercourse agreements any provisions they regarded as an adjustment to the provisions of the articles, provided that third States were not affected. The question was perhaps more problematic when it came to watercourse agreements already in force. Would those agreements supersede the articles? As a solution to the problem, the Special Rapporteur suggested that, when States became parties to the articles, they should indicate their intent or understanding with regard to some or all of the existing agreements. While that seemed to be a logical solution, a problem would remain if the parties to an existing agreement did not all take the same position. The Special Rapporteur might wish to consider the problem further and propose a provision with a view to avoiding future difficulties. In the meantime, he agreed with Mr. Tomuschat that such a provision was unnecessary.

17. His fifth and last point concerned a far more substantial question, namely, the interplay between articles 5 and 7 and the concepts of equitable and reasonable utilization, on the one hand, and harm, on the other. The Special Rapporteur had rightly stated that articles 5 and 7 provided a key element of the entire draft and that the articles were not without ambiguity. That ambiguity, however, arose out of the compromise between those who believed that “equitable and reasonable” use, as provided for in article 5, should be the main consideration, implicit in which might be the right to cause some harm, and those—like himself—who gave predominance to harm on the ground that no use could be regarded as “equitable and reasonable” if it resulted in harm to another State. He was, of course, thinking of harm above a reasonable threshold. The Special Rapporteur now proposed that article 7 should be redrafted so as to impose on States only an obligation to “exercise due diligence”, not an obligation not to cause harm and, where the use was equitable and reasonable, some harm would be allowable, with the result that equitable and reasonable would become the overriding consideration. By way of

an exception to the general principle, only harm resulting from pollution would render a use inequitable and unreasonable, although, even then, the harm might be permitted if there was no imminent threat to human health and safety and if there was a clear showing of special circumstances and a compelling need for ad hoc adjustment. Needless to say, he was opposed to that redrafting, since it would completely upset the delicate balance achieved on first reading. The concept of *alienum non laedas* would become subordinated to the imprecise notion of “equitable and reasonable” use, which did not offer an objective standard and could not be accepted by itself as the basic principle for regulating problems arising out of the uses of watercourses that might cause transboundary harm. The fact that the concept of equitable and reasonable utilization was supported by many authorities and appeared in many international instruments did not make it a good substitute for the basic principle that the overriding consideration was the duty not to cause substantial harm to other States. He had agreed to article 5 on the understanding that article 7 as now drafted would be included in the draft. The second reading of the articles would be very difficult if there was any insistence on upsetting the existing balance between the two articles.

18. Mr. IDRIS expressed his congratulations to the Special Rapporteur on his preliminary report and paid a tribute to Mr. McCaffrey, the previous Special Rapporteur, for his contribution to the development of the text of the draft articles. The report provided a succinct treatment of the fundamental issues laying at the heart of the topic.

19. He agreed that the Commission’s proposals should take the form of a framework agreement or convention which would guide States in the drafting of specific agreements on common watercourses. However, the Special Rapporteur was right to say that the framework convention approach implied some expectation of widespread acceptance by States. In drafting specific agreements, States would of course retain full freedom to follow the Commission’s guidance or not. It was in any event too early to judge the outcome of the Commission’s work.

20. The Commission should certainly propose provisions on dispute settlement, for that would enhance the text’s credibility and encourage its acceptance by States. However, the Commission should complete its work on the draft articles themselves before turning to dispute settlement.

21. The present wording of article 1, paragraph 2, was ambiguous and could create confusion. It should therefore be given further study in the Drafting Committee.

22. Article 2, subparagraph (b), which defined the term “watercourse”, would be clearer if it referred to a system of waters including several elements: rivers, lakes, surface water and groundwater, canals and reservoirs. He also disagreed with the Special Rapporteur’s recommendation that the words “flowing into a common terminus” should be deleted because they expressed a fact and their deletion could lead to interpretations completely at odds with his own understanding of that fact.

23. With regard to article 3, he supported the Special Rapporteur’s recommendation that the word “appreci-

able” should be replaced by the word “significant”. Notwithstanding the analysis of the two words just given by Mr. Calero Rodrigues, the amendment would not affect the content of the article. In the light of the Commission’s study of the question in the past, it was clear that “significant” meant “important”. The framework convention would not necessarily affect existing international watercourse agreements unless the States parties to such agreements decided otherwise. As Mr. Calero Rodrigues had suggested, that point should be included, perhaps in article 3. The same amendment should, of course, be made in article 4.

24. The content of the principle of equitable and reasonable utilization dealt with in articles 5 and 6 would be determined by States, but article 5 should indicate model forms of utilization, concerning, for example, the division of a watercourse among States, for that would facilitate the settlement of disputes. There were already many useful agreements on the topic. Article 7 would then become redundant because it would constitute an exception to the principle of utilization of private property without harming others. Under article 7, the harm would be assessed subjectively rather than objectively and thus weaken the text.

25. The meaning of article 31¹¹ was unclear because the second sentence seemed to contradict the first. In any event, such vital information might be protected by national laws which would have to be observed. He agreed with the Special Rapporteur that no change was required in article 8, which had his full support.

26. He endorsed the comments made by Mr. Calero Rodrigues on the subject of confined groundwater, for groundwater appeared to have no direct connection with the topic of the draft articles. Its inclusion might cause fundamental difficulties because the issue really required a separate set of provisions.

27. Mr. CALERO RODRIGUES said that he had made a mistake in his reference to Mr. McCaffrey’s proposals on dispute settlement, for they included not only conciliation, but also an obligation of recourse to arbitration.

28. Mr. ROSENSTOCK (Special Rapporteur) said that Mr. Calero Rodrigues had been right the first time. The proposals pointed in the direction of arbitration, but did not impose an obligation.

29. Mr. GÜNEY expressed his congratulations to the Special Rapporteur on his first report, which took a pragmatic approach, but displayed a spirit of accommodation. He also paid a tribute to Mr. McCaffrey for his contribution to the draft articles. The Special Rapporteur was working in a field where there were many existing international agreements containing principles which were difficult to codify in view of the different situations covered.

30. The draft articles should take the form of a framework agreement containing general recommendations which States could follow in drafting agreements adapted to their own situations. Except in the case of the United Kingdom of Great Britain and Northern Ireland, all the Governments which had commented on the topic preferred a framework agreement rather than model

rules. The Commission should eventually make recommendations on the settlement of disputes, but it would be premature to do so before the draft articles themselves had been adopted.

31. He agreed with the Special Rapporteur that the definition of “pollution” should be moved from article 21¹² to article 2. The definition of “watercourse” contained in article 2, subparagraph (b), had been widely criticized because it extended the scope of the draft articles. The Commission would in fact be exceeding its mandate by dealing with groundwater as well as surface water. The definition in question would entail the comprehensive redrawing of maps, which at present did not indicate groundwater. That would be a burden for the developing countries and, in any event, there was insufficient data for the accurate representation of groundwater. It was also difficult to make distinctions between groundwater and surface water and disputes would arise as to whether water was confined or unconfined. Article 2, subparagraph (b), should therefore be redrafted to cover only surface water. There would then be no problem in deleting the words “flowing into a common terminus”.

32. He could accept the replacement of the word “appreciable” by the word “significant” in article 3 and the other draft articles, although he would have preferred the word “substantial”.

33. Article 5, paragraph 2, might be superfluous, since its main point—equitable and reasonable participation in the use, development and protection of an international watercourse—was already covered in paragraph 1. In his view, paragraph 2 should be deleted. He had serious doubts about the Special Rapporteur’s proposal for the rewording of article 7 because the result might be to upset a precarious balance which made equitable and reasonable use a decisive element of the draft articles.

The meeting rose at 11.20 a.m.

¹² See footnote 3 above.

2312th MEETING

Friday, 25 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

¹¹ See *Yearbook*... 1991, vol. II (Part Two), p. 69.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,¹ A/CN.4/451,² A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. MAHIOU, referring to the Special Rapporteur's proposals on parts I and II of the draft articles adopted on first reading,³ said that, with regard to the future form of the text, the Commission had been working since the beginning with a framework convention in mind and should, in his opinion, continue in that direction. The Commission was a codification body and not a "think tank" commissioned to produce reports on various subjects.

2. The draft text would benefit from the inclusion of provisions on dispute settlement. The previous Special Rapporteur had already drafted provisions along those lines: they could be taken up again and he was eager to hear the current Special Rapporteur's suggestions on that matter at the next session.

3. He had no comment on article 1 of part I of the draft; he did, however, have serious reservations about the Special Rapporteur's proposal to delete the phrase "flowing into a common terminus" in article 2. The Special Rapporteur stated without further explanation that the phrase could lead to confusion and risked "the creation of artificial barriers to the scope of the exercise". However, its deletion might also create an artificial unity between watercourses or watercourse systems which were very different. He recalled that, in paragraph (7) of the commentary to article 2 adopted on first reading,⁴ pains had been taken to explain that the simple fact that two different drainage basins were connected by a canal did not mean that they should be considered as a single watercourse or watercourse system. That was therefore a delicate issue. Nevertheless, he was not inflexible on the subject and was willing to endorse the Special Rapporteur's proposal if he could provide convincing arguments for it, but that was not the case for the moment.

4. Since the Commission had asked the Special Rapporteur to consider the problem of confined groundwater and to determine whether it should be the subject of a separate study or part of the draft articles, he would express his viewpoint after the Special Rapporteur had submitted his report on that matter.

5. In respect of article 3, he had no objection to the replacement of the word "appreciable" by the word "significant", in alternative A. However, he was not in favour of the proposed alternative B, which referred to "significant harm". In his view, that introduced a new element which limited the scope of the article. The difference between "affect to a significant extent" (altern-

ative A) and "cause significant harm" (alternative B) was not negligible. The Special Rapporteur was proposing that a reference to "existing agreements" should be added to article 3. He was not convinced that that was necessary; it might lead to complications and inflexibility. The normal rules deriving from the law of treaties and, in particular, the provisions of the Vienna Convention on the Law of Treaties would be adequate to deal with the question of successive agreements.

6. With regard to where articles 8 and 26 should appear in the text, he saw no reason why the Drafting Committee could not make that decision, since it was a question of form rather than one of substance.

7. In respect of part II of the draft articles, the Special Rapporteur was correct in referring to a delicate problem of balance between articles 5 and 7. There was perhaps also some ambiguity with regard to the nature and scope of the responsibility of States for the implementation of those articles. However, that did not justify amending article 7 as radically as the Special Rapporteur would like. The text he was proposing might actually destroy the balance to which he had wanted to draw the Commission's attention.

8. It was also unfortunate that the Special Rapporteur had felt obliged to refer specifically to pollution in article 7. The inclusion of that concept could only give rise to a new debate, the outcome of which was unclear. Assuming, moreover, that the Special Rapporteur's proposal was accepted, the wording he was suggesting was not free of difficulties. When he stated that a use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless "there is the absence of any imminent threat to human health and safety", the merits of such a limitation could be questioned. One had only to imagine, for example, the significance for certain riparian States of pollution which resulted in the death of all the fish in the watercourse system. That long and substantial amendment to article 7 did not seem necessary.

9. Thus, although he endorsed some of the drafting changes proposed by the Special Rapporteur, he could not for the time being agree to some far-reaching amendments, in particular to articles 5 and 7.

10. Mr. YAMADA said he would begin with some general remarks before commenting in detail on the draft articles re-examined by the Special Rapporteur, who had submitted a "model" report that was especially concise and practical.

11. Judging from the discussions in the Sixth Committee (A/CN.4/457, sect. E) and the comments and observations received from Governments (A/CN.4/447 and Add.1-3), the text that had emerged from the first reading seemed to have been received favourably by States, and that was clearly the result of the excellent work done by the previous Special Rapporteur. The Commission must not lose its momentum and should try to complete its second reading of the draft before the end of the next session.

12. One way to expedite the work was, as pointed out by the Special Rapporteur, to resolve immediately the issue of the form of the draft text. He personally favoured a framework convention. It was, however, important to have a clear idea of what was meant by that term. In

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² Ibid.

³ See *Yearbook*... 1991, vol. II (Part Two), pp. 66 *et seq.*

⁴ For the commentaries to articles 2, 10, 26 to 29 and 32, *ibid.*, pp. 70-78.

other words, what were the limits of freedom to which watercourse States were subject in concluding specific agreements? Article 3, paragraph 1, stated that watercourse agreements "apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof". If the Commission wished to continue to work towards a framework convention, it might be necessary to clarify the meaning and scope of the word "adjust".

13. The Special Rapporteur mentioned in his report that a number of Governments had urged the Commission to consider adding dispute settlement provisions to the text. He would also recommend the inclusion of provisions on the settlement of disputes relating to the interpretation and application of the future convention. Disputes that might arise with respect to the uses of international watercourses were of a special type and called for special settlement procedures. The articles contained in part II made it clear that disputes would probably relate to the "equitable and reasonable utilization" of a particular international watercourse: special attention should thus be paid to procedures for fact-finding, assessment and evaluation. It would thus be appropriate to provide for a system of amicable third-party settlement, with the possibility of recourse to arbitration.

14. He also drew the Commission's attention to the problem of ensuring the coherence and coordination of the work it was carrying out on various topics. The articles in part IV (Protection and preservation) and part V (Harmful conditions and emergency situations)⁵ were closely related to the questions of prevention being discussed in the framework of international liability for injurious consequences arising out of acts not prohibited by international law. Care should be taken to maintain consistency between the concepts and draft articles of those two topics in order to ensure the universality and uniformity of the international legal order.

15. Turning to the draft articles, he noted that the Special Rapporteur's first report dealt only with the articles of parts I and II, so he would refer only to those matters at present. However, that did not prevent him from commenting on the order of the articles in the draft text. In his view, the articles of part VI (Miscellaneous provisions)⁶ might be moved to other parts of the draft. For example, article 31 (Data and information vital to national defence or security) could be attached to article 9 (Regular exchange of data and information) and article 32 (Non-discrimination) could be transferred to part II (General principles).

16. Furthermore, he agreed with the Special Rapporteur's proposal that article 21, paragraph 1, in which the word "pollution" was defined, should be moved to article 2 (Use of terms). The same could be done with article 25, paragraph 1, which defined the word "emergency", and with article 26, paragraph 2, which defined "management". He also agreed with the Special Rapporteur's proposal that the word "appreciable" should be replaced by the word "significant" in article 3, paragraph 2. However, so far as terminology was concerned,

it was important, in his view, to be consistent with the wording used in the draft on international liability for injurious consequences arising out of acts not prohibited by international law. The scope of the word "significant" should therefore be explained in the commentary.

17. Although the Special Rapporteur seemed to prefer alternative B of article 3, paragraph 2, he felt somewhat uneasy about the expression "does not cause significant harm to the use ... of the waters". It would be more natural to say, as in alternative A, "does not adversely affect, to a significant extent, the use ... of the waters".

18. The Special Rapporteur also proposed that articles 8 and 26 should be placed before article 3. While he was not opposed to that change, careful thought should be given to where each of those articles would be transferred.

19. As to article 10, paragraph 2, which dealt with the question of a conflict between uses of an international watercourse, it would perhaps be advisable, with a view to the implementation of that provision, for the Commission to prepare some flexible system of consultation.

20. The Planning Group had recommended to the Commission that the Special Rapporteur should be requested to undertake a study in order to determine whether it would be feasible to incorporate into the topic the question of "confined underground waters" and the Special Rapporteur apparently considered that that could be done fairly easily. If that were so, he would see no difficulty in that. If, however, it were to cause difficulties and involve a considerable amount of additional work, it would be preferable to examine the question separately and to carry on with the work as scheduled.

21. Mr. BENNOUNA paid a tribute to the Special Rapporteur and also to his predecessor, whose excellent draft articles, which had already been adopted on first reading, required little change, in his view. He feared, however, that the present Special Rapporteur's proposals did not take sufficient account of the draft as a whole and might ultimately upset the balance of the text adopted on first reading.

22. Commenting on questions of a general nature, he reminded the Commission that it had already decided to work on a framework convention: it should stick to its original objective. The whole point of the work on watercourses was to harmonize certain minimal rules by laying down a basic framework which would have the support of all States. That was particularly true because part III of the draft was essentially procedural, and that was itself an indication that, in that as in other areas, procedure and substance were closely linked.

23. With regard to the settlement of disputes, the Commission, which could hardly expect to introduce innovations into the topic under consideration, could perhaps be spared the task of drafting provisions on the question, particularly since part III of the draft already provided for a system of negotiation and consultation. Reference could perhaps be made to Article 33 of the Charter of the United Nations. But it did not seem advisable, in what should be a flexible draft, to impose binding procedures on States.

24. In connection with article 3, he was not opposed to the word "appreciable" being replaced by the word

⁵ See footnote 3 above.

⁶ Ibid.

“significant” in alternative A, but he did not see what benefit was to be derived from proposing an alternative B, which in any event had no connection with the points of terminology raised by the Special Rapporteur. The Special Rapporteur’s analysis also seemed to be somewhat confused, as was apparent from his proposal to make mention of existing agreements in article 3, paragraph 3. Perhaps he had not weighed all the consequences. What purpose would be served by a framework agreement if it were weakened in that way? Moreover, it was clear from the draft as a whole that there was no need for such a proposal, since the question was settled by article 10, which stipulated that “In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses”. The best solution, in his view, would be to adhere to the general law of treaties.

25. What was most important was the relationship between articles 5 and 7, which lay at the very heart of the topic. The new wording proposed for article 7 was not clear, however, and also had the drawback of introducing the problem of pollution, which was already covered by article 21, without establishing any connection with that article. In reducing harm to cases of pollution, the Special Rapporteur was really going too far.

26. Having regard to all of those points, he believed that the draft adopted on first reading had been the best possible compromise. Perhaps it required a few drafting changes, but on the whole it should be retained.

27. Mr. YANKOV said that the report before the Commission was well suited to the requirements of a second reading in that it focused on the survey of the observations of Governments and took account of new developments which had a bearing on the draft articles.

28. Commenting on issues of a general nature and, above all, on the final form of the draft articles, he noted that the Commission, in paragraph (2) of its commentary to article 3,⁷ had already expressed a preference for a framework convention “which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and provide guidelines for the negotiation of future agreements”. It was true that, given the diversity of watercourses and the often conflicting interests of States, model rules embodied in a General Assembly resolution or declaration would make it possible to circumvent the problem of ratification. However that should not overshadow the legal advantages of a binding instrument which took the form of an umbrella convention, particularly since the existing draft had all the qualities and elements of a framework convention.

29. Another general issue dealt with in the report was dispute settlement. He agreed in principle with the Special Rapporteur’s proposal that the draft should contain general rules on the question, laying down standard dispute settlement procedures and providing in particular for recourse to special mechanisms in the case of specific agreements, with, where appropriate, the assistance of technical expert bodies. He agreed with Mr. Ben-

nouna, however, that it was important not to expect too much of a chapter on the settlement of disputes in a convention of that kind, which differed in that respect from, for example, the United Nations Convention on the Law of the Sea.

30. The establishment of river-basin committees or other similar bodies could, however, be envisaged under a general rule, which would be in accordance with a fairly widespread practice. The United Nations Conference on the Human Environment had recommended that the “Governments concerned consider the creation of river-basin commissions or other appropriate machinery for cooperation between interested States for water resources common to more than one jurisdiction”⁸ and the experience of those technical commissions was very encouraging. That was true of the Niger Basin Authority, the Gambia River Basin Development Organization and the International Commission for the Protection of the Rhine against Pollution. That kind of machinery was also envisaged for the protection of the environment in the Danube basin and for other rivers which contributed to the contamination of the Black Sea, such as the Dnieper and the Dniester, as well as for the Don and the Kuban, which flowed into the Sea of Azov, which was itself connected to the Black Sea. It would therefore be advisable, in his view, for the draft to contain a few general rules on systems of regional cooperation.

31. The draft should also reflect the relevant concepts and principles formulated at the United Nations Conference on Environment and Development, particularly in Agenda 21⁹ and in the Rio Declaration on Environment and Development.¹⁰ He had in mind, in particular, the concept of sustainable development and the so-called holistic approach to the protection of the environment, in which economic and social considerations were integrated with environmental issues. Principle 4 of the Rio Declaration stated, for example:

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

That idea was also embodied in chapter 18 of Agenda 21 relating to protection of the quality and supply of freshwater resources and the application of integrated approaches to the development, management and use of water resources, which stipulated in paragraph 18.5 that:

The following programme areas are proposed for the freshwater sector:

- (a) integrated water resources development and management;
- (b) water resources assessment;
- ...

and which also dealt with other fields of environmental protection and management that might be relevant to the non-navigational uses of international watercourses.

32. It would be unfortunate if the draft did not reflect those elements, among others, for they were extremely

⁷ Initially adopted as article 4. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), pp. 27-30.

⁸ 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), p. 17, Recommendation 51.

⁹ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

¹⁰ *Ibid.*, pp. 3-8.

relevant, such as, for instance, the principle laid down in paragraph 18.8 of Agenda 21 whereby:

Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization.

Furthermore, paragraph 18.9 stressed that:

Integrated water resources management, including the integration of land- and water-related aspects, should be carried out at the level of the catchment basin or sub-basin. . . .

that principle also deserved to have a place in the draft, which it would make more up-to-date.

33. Special attention should likewise be paid to the requirement of an environmental impact assessment, as laid down in principle 17 of the Rio Declaration, which read:

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

That general rule on environmental impact assessment had already been incorporated in a number of instruments, such as the Convention on Environmental Impact Assessment in a Transboundary Context or the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

34. Those concepts could perhaps have a place in part II of the draft, which dealt with general principles, and could then be elaborated in part III, particularly in relation to management issues, and in part IV, in relation to the holistic approach to the protection and preservation of the environment of watercourses.

35. As to the draft articles, the concept of integrated water resources management, as emphasized in paragraphs 18.8 and 18.9 of Agenda 21, should, in his view, be incorporated in article 1, paragraph 1. The Drafting Committee might therefore wish to add the word "management" before the word "conservation".

36. He did not agree with the Special Rapporteur's proposal that the phrase "flowing into a common terminus" should be deleted in article 2 for, as noted in paragraph (7) of the commentary to the article,¹¹ a common point of arrival was an important component in the definition of watercourse systems. As to the possible incorporation in the draft of "confined groundwater" he noted that, in the Special Rapporteur's view, it did not seem that such a change would require much change. He was not convinced that it would be such an easy matter nor that a simple drafting amendment would suffice to solve a problem which amounted to a topic in itself. In paragraph (5) of its commentary to article 2, the Commission had suggested that it might be appropriate to study confined groundwater separately. He agreed, however, with the suggestion that the definition of pollution in article 21¹² should be moved to article 2. He also trusted that the Drafting Committee would review the definition of pollution to bring it more into line with reality.

37. The main problem with regard to article 3 (Watercourse agreements) concerned the possible replacement

of the word "appreciable" by the word "significant". Although that might seem to be a wise suggestion and it had received a measure of support, he was not convinced that it was necessary. Admittedly, the word "significant" implied a threshold, which was an advantage, but that threshold was not defined by reference to objective parameters. The disadvantage of that word was therefore that its interpretation would depend on subjective criteria. As to the word "appreciable", it denoted something that could be established by objective evidence and also conveyed the notion of "significant" and "substantial". There were instances in the articles, however, where it was not the extent of the harm that was decisive for the interests of the watercourse States. That was why the word "appreciable" was often used in treaties, though the word "significant" occurred twice in the Rio Declaration, in principles 17 and 19, respectively. Consequently, the matter was not as clear-cut as it might appear to be. Furthermore, the adoption of the word "significant" could have certain repercussions on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In his view, therefore, the Commission should consider once again the relative merits of the two words before taking a final decision. It had in fact already had an opportunity to deal with the matter in its commentary to article 3,¹³ in particular in paragraphs (7) and (14).

38. In his view, article 26 should not be moved to part II (General principles), but the Drafting Committee might wish to consider the possibility of elaborating a general principle on the integrated approach, on the basis of principle 4 of the Rio Declaration, leaving the part on management in article 26 as drafted.

39. With regard to article 6, he pointed out that the list of factors in paragraph 1 was not exhaustive, but all six categories were very pertinent. The article should therefore be maintained in the proposed form.

40. Commenting on article 7, relating to the obligation not to cause appreciable (or significant) harm, he stressed that the revised text proposed by the Special Rapporteur was unnecessarily cumbersome for the statement of a general principle. The reference to "due diligence" was acceptable, but he feared that it might be insufficient because that concept did not cover all aspects of the principle of precaution embodied in the most recent instruments. The remainder of the proposed text, namely, the mention of the agreement of other States by way of exception, as well as the presumption relating to pollution and the modalities and limits of that presumption, would not contribute to the general improvement of that article. If the text submitted by the Special Rapporteur were to be accepted, however, he would propose that subparagraph (b) should contain an explicit reference to the environment, since he considered the reference to "human health and safety" was far too restrictive and did not tally with the exact definition of pollution, which also included, in particular, damage caused to living resources. For the article as a whole, he would, however, prefer a shorter wording keeping only the reference to "due diligence", but also aiming at the principle of precaution.

¹¹ See footnote 4 above.

¹² See footnote 3 above.

¹³ See footnote 4 above.

41. In conclusion, he urged the Commission to be cautious and not change the draft too much.

42. Mr. SHI said that, like the Special Rapporteur, he believed, in general, that the Commission should not wait until the work on a topic was completed before it decided on the question of the final form of draft articles. However, in the present case, it might be advisable for the Commission to postpone its final decision in the matter to a later date for two main reasons. First, the views of the few Governments which had commented on the draft articles were divided on the issue and some Governments were in favour of a framework convention, while others preferred model rules, recommendations or guidelines. Secondly, and above all, a great many States which had transboundary watercourses in their territories had not sent in their comments. One of them was China, which had 14 international watercourses in its territory, 2 of which were boundary waters, while in the case of the other 12, it was either the upstream or the downstream riparian. The Governments of States with watercourses in their territories might well have some difficulty in responding quickly to the request for comments on the draft articles and that suggested that there would be more Governments which would react to the draft articles at a later date. However, it would be better for the success of the draft articles, as well as for the Commission's prestige, if the recommendation it made to the General Assembly took account of the views of as many Governments as possible. That would not prevent the Commission from using a draft framework convention as a basis for its work.

43. With regard to the settlement of disputes, the Governments which had made comments, were, generally speaking, in favour of the provisions contained in the draft articles. He could agree that the Special Rapporteur should make proposals on the subject, although he usually preferred settlement provisions to be decided and formulated by the diplomatic conference in case the General Assembly decided that the draft articles should take the form of an international convention. The inclusion of articles on dispute settlement would, however, not harm the draft even if the Commission should finally decide that it would take the form of model rules, recommendations or guidelines.

44. Turning to the draft articles, he noted that, in general, Governments preferred the term "watercourses" to the term "drainage basin". He therefore believed that article 1 should stand as it was. As to the choice between "international watercourses" and "transboundary waters", he could go along with either term, though the term "transboundary" was less likely to create misunderstandings.

45. Governments appeared to be divided on the key issue of article 2, namely whether the words "flowing into a common terminus" should be deleted. The term "common terminus" had been added in order to exclude "confined groundwater" from the scope of the articles, thereby avoiding related problems. However, in view of the growing importance of confined groundwater intersected by State boundaries, some members had proposed that they should be dealt with as a separate topic whose inclusion in the Commission's long-term programme of work should be studied. As a matter of fact, the inclusion of the "common terminus" concept in the definition of

"watercourses" had been inspired by ILA's Helsinki Rules,¹⁴ and the ILA now seemed to agree with the Special Rapporteur about the deletion of the concept in the definition. If the Special Rapporteur could, within the period set by the Commission for the completion of work on the topic, actually prepare draft articles on "confined waters" without affecting the other draft articles, he could agree that the words "common terminus" should be placed in square brackets. If the Special Rapporteur failed to find a solution, however, the words "flowing into a common terminus" should remain intact in the definition. If the members of the Commission agreed that the definition of the term "pollution" should be placed elsewhere than in article 21, notwithstanding the Special Rapporteur's ideas on article 7, he would not object to its being transferred to article 2.

46. As to article 3, the proposal to replace the word "appreciable" by the word "significant", in support of which the Special Rapporteur had put forward two arguments, might do more than just eliminate an ambiguity of meaning. It might involve a standard of threshold beyond which harm could not be tolerated. According to the commentary to article 7,¹⁵ the term "appreciable" provided the most factual and objective standard and, in the framework of article 3, it should be understood to mean "significant". For one Government at least, however, the criterion of "significant" differed from that of "appreciable". It should be noted that the Commission had to deal with the same problem in its consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Since the Commission was now at the stage of the second reading of the draft articles, changes could still be made, but only after a full discussion of the issue and taking into account the views of the Special Rapporteur and the comments of Governments. If the change proposed for article 3 was accepted, changes would also have to be made in other articles.

47. With regard to the relationship between the draft articles and existing watercourse agreements, he held the same views as those expressed by the Special Rapporteur and accepted the amendment proposed by the Special Rapporteur to article 3, paragraph 3. Contrary to the views of the Special Rapporteur, however, he thought that the suggestion that articles 8 and 26 should be moved ahead of article 3 would affect the logic of the order of the draft articles. Those two articles, which dealt with cooperation and management, did not fit into part I (Introduction), which dealt essentially with the scope of the draft.

48. In chapter III of his report, the Special Rapporteur drew attention to the ambiguity of the present wording of articles 5 and 7, which had already given rise to comments by a number of Governments. He agreed with those Governments that had stressed that a proper balance should be struck between utilization and environ-

¹⁴ The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook... 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

¹⁵ Initially adopted as article 8. For the commentary, see *Yearbook... 1988*, vol. II (Part Two), pp. 35-41.

mental protection and utilization in the context of sustainable development. In order to clarify the issue, the Special Rapporteur proposed that article 7 should be revised to establish a regime in which equitable and reasonable use would be the determining criterion, except in cases of pollution in which article 5 would be subordinated to article 7. The general thrust of that amendment seemed to be acceptable, but it would have to be studied in detail.

49. Mr. FOMBA said that the general issues raised by the Special Rapporteur in his first report were the following: should there be a draft convention or model rules? Should that issue be settled at present? Should provisions on the settlement of disputes be included in the draft? The one basic principle in a topic such as the law of the non-navigational uses of international watercourses was that of specialization and the whole problem was thus to formulate a *jus generalis* on the basis of an accumulation of *jus specialis*. Bearing in mind the Commission's practice in respect of model rules and the example of the rules formulated by UNCITRAL, a framework convention seemed to be the logical solution. In addition, since it was essential to know in advance what the legal nature of the final product of the Commission's work would be in order to delimit its conceptual framework, that choice had to be made without delay and the Commission had wisely settled the issue, as a number of speakers had recalled. The Special Rapporteur had also been right to say that the draft articles must include provisions relating to fact-finding and dispute settlement, since those were essential aspects in view of the nature of the questions which arose in connection with watercourses.

50. Turning to part I (Introduction) of the draft, he agreed with the Special Rapporteur, who had said, with regard to article 1, that there was no substantive difference between the terms "watercourse", "drainage basin" and "transboundary waters", even though the term "basin" seemed to predominate in African treaty practice. He was opposed to the deletion of the words "and flowing into a common terminus" in article 2, subparagraph (b), because the definition of a "watercourse" had to be based on a "linear" approach. He was also opposed to the idea of extending the draft to cover confined groundwater, which was explicitly stated to be unrelated to the watercourse. He did, however, agree with the Special Rapporteur's two other proposals to take the present text of article 2 as a basis for considering the draft articles on second reading and to move the definition of the term "pollution" from article 21 to article 2.

51. As to the substance of article 3, he was of the opinion that the terms "appreciable" and "significant" were interchangeable and that there was no real difference between the words "does not adversely affect to a significant extent" and the words "does not cause significant harm". As to the form, he agreed that it seemed unnecessary to refer each time to the "waters" of the watercourse. The problem of the relationship between the draft articles and existing agreements gave rise to very interesting discussions, but there did not seem to be any real problem of intertemporal law. It was also unnecessary to add the idea of agreements to "characteristics" and "uses" in paragraph 3, since pre-existing agreements would apply as a matter of priority and corre-

sponded to the characteristics and uses of the watercourse in question. As to the idea of moving articles 8 and 26 to part I of the draft, the Drafting Committee should accept that idea if it meant that the articles would be in a more logical order. In connection with article 26, however, there might be some question about the exact scope of the terms "equitable and reasonable", "rational and optimal" and "sustainable development".

52. The questions that arose with regard to the general principles related mainly to articles 5 and 7 and to the connection between those two provisions. In his view, third-party determination was very important in the event that the States concerned were unable to arrive at a mutually acceptable solution and article 6, paragraph 2, could, as the Special Rapporteur had said, serve as a good basis for that purpose. The Special Rapporteur had also proposed a new text for article 7 that would change the title and make the text much longer, but that solution raised delicate problems of definitions and delimitations, so that it might be better to retain the present wording, which was more general, but expressive enough.

53. With regard to article 8, he agreed with the Commission's conclusion that it was better to adopt a general formulation for the objectives of cooperation and he could not understand the Special Rapporteur's prejudices with regard to the principles of good faith and good neighbourliness.

54. An analysis of some aspects of African treaty practice showed that many watercourse agreements used terms that were very close to the words "equitable and reasonable use", with some texts also specifying that the obligations of States in that regard had to be defined taking into account all hydrological, ecological, economic and social considerations; the expected impact of the development projects; the areas involved; direct or indirect access to the main watercourse; and other considerations. Those texts also used the terms "appreciable" as well as "significant", and even the term "substantial".

55. The question of groundwater was handled in various ways. Sometimes the agreement applied to groundwater only if its use might cause appreciable harm in one or several other States. In other cases, the agreement stipulated consultations in the event of a problem arising from the common use of such resources. And sometimes the agreement referred to groundwater without any further specification. Two agreements addressed the question of the relation between different uses: the Convention establishing the Organization for the Development of the Senegal River, article 20 of which gave the Permanent Water Commission the mandate to define the principles and modalities for the sharing of waters of the Senegal River between States and between sectors; and the Convention creating the Niger Basin Authority, of which article 4, paragraph 2 (v) mentioned the priorities among alternative uses, projects and sectors. Lastly, all the agreements provided almost identical dispute settlement procedures. Briefly, negotiation was stipulated in all the agreements, recourse to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity in 9 out of 10 cases and recourse to ICJ in half the cases.

Cooperation with other bodies (*continued*)*

[Agenda item 7]

**STATEMENT BY THE OBSERVER FOR THE EUROPEAN
COMMITTEE ON LEGAL COOPERATION**

56. The CHAIRMAN extended a warm welcome to Mr. de Sola, Observer for the European Committee on Legal Cooperation, and invited him to address the Commission.

57. Mr. de SOLA (Observer for the European Committee on Legal Cooperation) said that for international public law the competent body of the Council of Europe was the Committee of Legal Advisers on International Public Law, which counted among its members Mr. Eiriksson, who kept the Committee informed about the Commission's work. The Committee was a body in which the members of the Council exchanged views on current issues. The two main issues which it had taken up in recent times were State succession and the establishment of an international war crimes tribunal. The Committee had also set up a working group which had just concluded its work on a model documentation plan concerning State practice with respect to State succession and questions of recognition. The working group was to submit the plan to the Committee of Legal Advisers for adoption; it envisaged data collection and processing at the national level and in the Council of Europe for dissemination and probably publication.

58. As to human rights and the rights of minorities, the European Convention on Human Rights seemed at present to be a victim of its own success: very many requests were submitted every year and it was becoming increasingly difficult to deal with them within a reasonable time. The system had two bodies, the Commission and the Court, which corresponded roughly to two levels of jurisdiction, an arrangement which slowed the work down considerably. With a view to simplifying the system while retaining its effectiveness, a working group was working on a draft proposal which would be submitted to the summit meeting of Heads of State or Government of the countries members of the Council of Europe, to be held in Vienna in October 1993.

59. With regard more specifically to minorities—a question connected with the doctrine of democratic security which was being developed in the Council of Europe—the Council thought that their protection was a precondition of peace in Europe and that it was therefore essential to guarantee their rights. The Chairman of the Committee of Ministers of the Council of Europe had expressed the wish that the summit meeting of Heads of State or Government referred to earlier would call on the Council to devise legal instruments for the protection of minorities.

60. In civil law, the Council of Europe had adopted the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. That Convention, which was based on principle 13 of the Rio Declaration on Environment and Development,¹⁶ was not very original in all respects, for it borrowed a num-

ber of concepts from existing conventions, in particular the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, but it was the first convention of a general scope. It was based on the notion of strict liability and covered a vast range of activities which it classified as dangerous. The difficulty was to set forth sufficiently general concepts to cover all dangerous activities while ensuring a degree of legal certainty. The Convention therefore contained a general definition, but also a number of annexes listing hundreds of substances defined as dangerous. The list was not of course exhaustive and the Convention might possibly be applied to new substances or new mixes of substances. The Convention also applied to genetically modified organisms and to wastes.

61. Liability was assigned to the person controlling the dangerous activity. The issue had been discussed at length, especially with respect to wastes, but, in the end, for both theoretical and practical reasons, it had been concluded that the injured party must be able to easily identify the party responsible for the harm.

62. The kinds of harm covered were harm to persons, property and the environment itself, as well as any economic loss arising from the degradation of the environment. Special thought had been given to the tourism industry, agriculture and fisheries.

63. The question had arisen as to whether compulsory liability insurance should be envisaged; however, the Convention left it to States to determine the modalities of such protection and the activities which it should embrace.

64. The Convention was designed not only to provide theoretical definitions, but also to be a practical tool; that was why it had borrowed a number of existing notions from Community law or national legislations. First, it stipulated a right of access to information about the environment held by the public authorities: anyone, not only the injured party, could obtain such information. Secondly, an injured party might apply to a judge to compel an industrial concern to supply information which the injured party could use in an action against the concern. That was a provision of German environmental law which was being made universally applicable to the whole of Europe through the Convention. It had been thought necessary because, very often, the only person holding the information necessary for establishing liability was the perpetrator of the harm himself. Thirdly, environmental protection organizations could apply to a judge to compel an industrial concern to take measures to prevent damage to the environment or to make good any damage caused. Since the environment was common property, it had been thought that it was not the responsibility of the authorities alone to ensure its protection, but that the public ought also to be able to play an active role through environmental organizations.

65. The Convention had been opened for signature in Lugano and had already been signed by eight countries. Others had stated their intention of signing and the EC Environment Commissioner had recommended that the States members of the Community should do so.

66. In another area, a committee on family law was preparing a draft convention on children's exercise of

* Resumed from the 2304th meeting.

¹⁶ See footnote 10 above.

their rights. It did not seek to define any new rights not found in the Convention on the Rights of the Child, but to establish the modalities for the exercise of the rights set forth therein.

67. The European Committee on Legal Cooperation had also decided to begin work on a convention on questions of nationality. The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, adopted by the Council of Europe, was in fact out of date in some respects. The demographic situation in Europe had changed, especially as a result of immigration, and a considerable number of persons had dual nationality and the problems that went with it. The Committee considered that the future convention should be flexible and take into account the interests of both States and individuals and that it should not place obstacles in the way of, or require States to accept, multiple nationality. The work was to begin during the second half of 1993.

68. Following the political upheavals in Europe, the Council had established a threefold programme of cooperation with the countries of Central and Eastern Europe. In constitutional matters, the European Commission for Democracy through Law, the so-called Venice Commission, was collaborating with those countries in the drafting of fundamental rules compatible with democratic principles. Japan had requested to attend the Venice Commission as an observer and South Africa had also asked to participate in its work. Where legislation was concerned, an ambitious programme of cooperation, Demo-Droit, which had been operating for several years, was designed to help national authorities formulate new rules compatible with democratic principles. The third part of the programme, Themis, was concerned with training for the legal professions: it was not enough to devise rules; it must also be possible to apply them.

69. Mr. EIRIKSSON thanked Mr. de Sola and noted that he himself had had the honour of representing the Commission at the fifty-eighth session of the European Committee on Legal Cooperation in Strasbourg in December 1992. On that occasion, he had submitted a document on the work of the Commission at its forty-fourth session and had seen that the members of the European Committee followed the Commission's work with close interest. He had been most impressed by the range of legal topics discussed within the framework of the Council of Europe and he had been particularly interested in the results of the work on the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. He had been invited to participate in the final negotiating session on the Convention and had thus been able to supply first-hand information to the Commission's Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

70. Since the Commission's Planning Group had recommended the inclusion in the Commission's programme of work of the question of State succession and questions of nationality, it might be possible to establish cooperation in those fields with the European Committee on Legal Cooperation, for the Committee had decided to prepare a draft convention on questions of nationality.

71. As legal adviser to his Government, he participated regularly in the meetings of the Committee of Legal Advisers on Public International Law of the Council of Europe and, at the meetings held in late 1992, he had presented a document on the Commission's work, which was traditionally discussed at length during those meetings.

72. He was pleased that the discussion of legal questions under the auspices of the Council of Europe was indeed becoming pan-European with the attendance of lawyers from the countries of Central and Eastern Europe, whose contributions he had appreciated in recent years. Lastly, he thanked Mr. de Sola and, through him, his colleagues in the legal sections of the Council of Europe for their hospitality and the professional assistance which they had given him and the Commission's previous observers in Strasbourg.

73. The CHAIRMAN said that the members of the Commission did indeed follow with very great interest the work of the European Committee on Legal Cooperation and appreciated its quality and diversity. On more than one occasion, that work had been a source of inspiration for the Commission, as was the case today with the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which had much in common with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The adoption of the Convention by the Council of Europe augured well for a possible instrument creating a regime of liability applicable not to individual activities, but to the whole array of activities which constituted a danger.

74. He hoped that the cooperation and exchanges of information between the Commission and the European Committee on Legal Cooperation would continue.

The meeting rose at 1.05 p.m.

2313th MEETING

Tuesday, 29 June 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

later: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Shi, Mr. Szekeley, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,¹ A/CN.4/451,² A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. SZEKELY said he could not agree with the Special Rapporteur's personal verdict on the draft articles. Even though less than 10 per cent of the members of the international community had submitted written comments, the comments were on the whole unfavourable and a similar reaction was apparent in the specialized academic community. Nevertheless, while admitting to that situation, the Special Rapporteur had urged that all that was needed was some "fine tuning" of the draft articles. Actually, the external reaction to the draft seemed to advise a deep overhaul and reconsideration of the articles.

2. The first report of the Special Rapporteur (A/CN.4/451) pointed out that the draft articles had survived the United Nations Conference on Environment and Development, held at Rio de Janeiro in 1992, something that was not at all difficult to achieve in view of the low level of the legal output of the Conference, which had failed to produce the promised "Earth Charter" or the urgently needed convention on forests and had only yielded two weak treaties which minimized the legal obligations of States.

3. He could not agree with the Special Rapporteur's view that the draft articles need not be fundamentally reconsidered in order to take account of the very important developments since the completion of the first reading, such as the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on Environmental Impact Assessment in a Transboundary Context. The draft should be brought up to date precisely to reflect the progress made in those instruments.

4. The Special Rapporteur had confined himself to some minimal and cosmetic changes, with two notable exceptions. The first was the proposed deletion from the definition of a watercourse of the words "and flowing into a common terminus", something that would have a positive effect by correcting a lamentable error in the original draft. The second substantive proposal was, unfortunately, a lamentable step backwards, which was to replace the concept of "appreciable harm" by "significant harm", in article 3 and, what was worse, in article 7. The proposal went much further than the necessary distinction between inconsequential harm that could not even be measured or identified on the one hand, and consequential harm on the other. If adopted, it would raise the threshold in such a way as to have very adverse effects, since the subjectivity inherent in the term "significant" left the potentially victim State defenceless, contrary not only to its interests but to protection of the watercourse itself. The result would be to ignore the cu-

mulative effects of lesser harm, which could be substantial, especially in combination with other elements.

5. The draft was concerned with international rivers whose ecological balance had in most cases been badly affected for a long time, so that they had little remaining resistance to further interference. The standard proposed by the Special Rapporteur took no account of the particular conditions of each watercourse on the history of its use which could indicate different degrees of tolerance and vulnerability to harm. Accordingly, any qualification of harm ought to be preceded by still one more qualification, namely the set of particular conditions or factors of each watercourse and its resistance to harmful interference. In an environment with a relatively intact ecological balance, it would be justifiable to lower the threshold or level of protection. Few international rivers had such resistance and the least that could be said was that the already high standard of "appreciability" in the draft should be preserved, but explicitly subordinated to the particular conditions of each watercourse. In no event, however, should the standard be raised, as was being proposed.

6. Unfortunately, the comments received from Governments were not sufficiently representative and few came from lower riparian States, which had to resign themselves to harm suffered as a result of unduly high standards which rendered them defenceless. Under article 3, the interests of those States were already threatened when other riparian States were allowed to agree on uses of the watercourse which harmed them; and they did not even have the opportunity to participate in the negotiation of the agreements.

7. The Special Rapporteur did not consider it prudent or adequate to try to apply the principle of good faith or to add the concept of good neighbourliness to the instrument under discussion. Actually, those principles had their proper place in articles that sought to regulate relations between neighbouring States and included such subjective terms as "significant harm"—terms which at the very least should be subject to a good faith interpretation. Only in that way could the draft make an important contribution towards solving some of the water-related problems humankind will confront in the next few decades, as the Special Rapporteur had stated. In fact, the report helped to defeat that purpose with its proposal to alter the qualification of "harm" in a way that was bound to increase the possibilities of friction and controversy for watercourse States.

8. In order to encourage States to accept the draft, the Commission should embark on a determined effort to incorporate and define factors relevant to the qualification of harm and to include rules such as those regarding the abuse of rights. With the report's insistence on maintaining the poor side of the principles incorporated in the draft—when previous drafts were richer both in principles and in the factors relevant to the equitable and reasonable use of international watercourses—the effectiveness of the whole draft would be threatened.

Mr. Eiriksson took the Chair.

9. Mr. THIAM emphasized that for any change to be made in a text which the Commission had adopted on first reading it was essential that the relevant proposals should make for improvements and go in the direction of

¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

² Ibid.

progress. As he saw it, the changes proposed by the Special Rapporteur hardly went in that direction. Some examples sufficed. The first was from what the Special Rapporteur termed "issues of a general character". With reference to the issue of the choice between a framework convention and model rules, it was important to remember that the matter had virtually been decided by the Commission itself. In view of the major divergences and contradictions between States on the subject of international watercourses, the Commission had agreed that it was not advisable to try and impose any mandatory rules; indeed, any such attempt would mean condemning the draft to death. Accordingly, he could not agree with the Special Rapporteur's attempt to try and reopen the debate on that issue, an approach which would merely complicate the problem.

10. The second general issue was whether the draft articles should include a dispute settlement clause. As already pointed out during the discussion, in most cases the means set forth in Article 33 of the Charter of the United Nations would always be available to the parties concerned. Hence there appeared to be no need to introduce a specific clause on the subject in the draft itself.

11. Experience in Africa had shown that most of the disputes in question could best be settled by political means rather than by adjudication. Although he was a lawyer, he could not but admit that the difficulties involved could be settled to the general satisfaction much more smoothly by political bodies. One example was provided by the Organization for the Development of the Senegal River: the various difficulties and conflicts which had arisen had usually been settled by the Conference of Heads of State or by ministerial meetings. In the light of that experience, he was not at all convinced of the advisability of including a dispute settlement clause in the draft.

12. As to the Special Rapporteur's proposals concerning the articles themselves, there was no particular advantage in drafting changes such as replacing "appreciable harm" by "significant harm". It was worth recalling that the Commission had discussed the term "appreciable" at length and found it satisfactory in conveying the intended meaning of harm that was capable of being evaluated or measured. Consequently, it was advisable to keep to the word "appreciable", which the Commission as a whole had already accepted.

13. In the matter of changes of substance, he objected to the suggestion to delete the words "and flowing into a common terminus" from article 2, subparagraph (b). By completely altering the definition of "watercourse" in that way, the proposal would undermine the very basis of the whole draft. He did not find in the report any satisfactory explanation in support of such a sweeping proposal. One effect of the change in definition would be to bring confined groundwater within the scope of the draft articles. Such a result, however, would conflict with the decisions already taken by the Commission which indicated that confined groundwater should be treated as a separate subject. The question was one of great interest to the less developed countries, particularly those in Africa. Confined groundwater was very important in Africa, a continent with vast desert areas; it must necessarily be treated as a distinct concept and form the subject of a topic separate from that of international watercourses.

Such an approach was essential if the African countries were to make use of their confined groundwater in the future.

14. Again, he could not agree with the Special Rapporteur's suggestion that the concepts of good faith and good neighbourliness should not form part of the articles. In a draft dealing essentially with cooperation agreements on watercourses, those concepts were, on the contrary, absolutely indispensable. It was inconceivable that such cooperation agreements should be concluded in a climate of misunderstanding or in the absence of good faith.

15. The new text proposed for article 7 was unduly long and difficult to understand. In matters of codification, brevity was always the golden rule. Lastly, he urged the Commission not to accept the proposed changes, which would completely alter the substance of the draft, and to keep instead to the text adopted on first reading. The previous Special Rapporteur, Mr. McCaffrey, had produced a very clear text which had given satisfaction to the whole of the Commission.

16. Mr. AL-KHASAWNEH said he was opposed to the Special Rapporteur's suggestion that the issue of the ultimate form of the draft should be resolved or at least that a brief exchange on that point should take place before any further drafting was undertaken. Although the Commission had not taken any formal decision on the matter, it was fair to say that there had been a broad although not unanimous understanding that the draft would ultimately form a framework convention. A framework or umbrella convention ordinarily meant that it contained general residual rules that would apply in the absence of more specific agreements.

17. For his part, he had never been convinced that a framework convention was the best solution in the present case and he still held the view that a general convention specifying in detail the rights and duties of watercourse States would be a more significant contribution in an area of international relations that was increasingly topical and important. The perceived differences in the characteristics of individual watercourses did not constitute an effective bar to the real application of the law on watercourses. Moreover, the elaboration of a general convention was politically feasible. The signing at Helsinki in March 1992 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes demonstrated that it was politically and legally possible to regulate State activities relating to varied watercourses through uniform, specific and directly applicable rules. Nevertheless, the Commission had shown a distinct preference for a framework convention and he was prepared to accept that general trend, even though a framework convention fell short of the aims and purposes of codification and progressive development of the law. Accordingly, he could not accept the suggestion that the present endeavour should culminate in a set of model rules.

18. He agreed with the Special Rapporteur that in the light of the nature of the issues, it would be an important contribution for the Commission to recommend a tailored set of provisions on fact-finding and dispute settlement in the event that it decided to recommend a draft treaty and, arguably, if it opted for model rules as well.

He would go further and suggest that States which agreed to become parties to a treaty should accept that their performance under that treaty be open to third-party scrutiny. The nature of the substantive rules in the draft, and not merely “the nature of the issues” made it indispensable to provide for compulsory and binding third-party fact-finding and dispute settlement procedures. Such key elements of the draft as prevention of appreciable harm and reasonable and equitable utilization were characterized by vagueness and elasticity. It was difficult to imagine that a dispute arising out of the interpretation or application of such rules could be possible without objective third-party settlement and fact-finding.

19. The Special Rapporteur had not explained what type of rule he had in mind when referring to a “tailored set” of rules. The previous Special Rapporteur, Mr. McCaffrey, had produced a tailored set of rules, in his sixth report,³ characterized by compulsory fact-finding and conciliation. However the conciliation envisaged in those rules was described as compulsory, that is to say conciliation to which the parties to a dispute were required to resort yet whose outcome was not binding upon them. Nevertheless, regardless of its merits, that set of rules could not adequately cover the situations that might arise when the interpretation and application of the substantive rules became a matter of dispute. For such situations to be suitably covered, the dispute settlement procedure should provide for compulsory and binding arbitration and judicial settlement if negotiation and conciliation failed. There was also a role for international organizations in extending advice and in fact-finding.

20. As to article 2, Mr. Calero Rodrigues (2311th meeting) had correctly explained the drafting history of the term “common terminus”. Canals connecting two or more watercourses had been built and continued to be built. It was therefore necessary to deal adequately with that aspect and the closely related one of diversion of waters from watercourses. It was not properly dealt with in the draft, except to say as a matter of presumption that the twin rules on prevention of appreciable harm and on equitable utilization would be applicable. Further examination of that issue was necessary.

21. The question of confined groundwater—with which the Special Rapporteur was eminently qualified to deal—undoubtedly merited early codification and progressive development. It did not, however, fit well in the present draft. International watercourses had been regulated for thousands of years, but the use of confined groundwater was a relatively new phenomenon. The argument of diversity, which had led to the adoption of the framework agreement approach for watercourses, was less compelling in the case of confined groundwater. Moreover, the law relating to groundwater was more akin to that governing the exploitation of natural resources, especially oil and natural gas. The best course was to treat the topics of international watercourses and the law of confined groundwater separately, in the way in which the Commission had dealt with the law of treaties or State succession.

22. In regard to article 3, the use of the adjective “appreciable” or “significant” to describe the threshold of harm had a very long history in the Commission. The choice between the two terms was more one of legal taste than of established technique. For his part, he largely preferred the word “significant”, for the reasons given in the report and also explained by Mr. Calero Rodrigues (*ibid.*). Yet there was merit in paragraph 5 of the comments by the Government of the United Kingdom of Great Britain and Northern Ireland⁴ that the threshold of harm set in article 7 should accord with the work of the Commission on the other topics. The Drafting Committee should consider aiming at broad consistency if not actual uniformity with the qualification of the threshold of harm in the draft on international liability for injurious consequences arising out of acts not prohibited by international law.

23. His doubts about the appropriateness of draft article 4 were confirmed by the Special Rapporteur’s interpretation of the article. The entitlement of a watercourse State to become a party to agreements, whether those agreements applied to the whole or only part of the watercourse, was an exception to the fundamental principle whereby States enjoyed freedom to choose their treaty partners. That exception had to be narrowly construed. A watercourse agreement, even one which applied to the entire watercourse, might conceivably cause no harm, or virtually no harm, to the interests of another watercourse State. Indeed, as stated in paragraph (2) of the commentary to the article: “It is true that there may be basin-wide agreements that are of little interest to one or more watercourse States”.⁵ In such cases, there was no reason why the freedom to choose treaty partners should be unduly restricted by giving other unaffected or barely affected States *carte blanche* to overrule that fundamental principle. The uses by third States could and should be protected against adverse effects arising out of the conclusion by other watercourse States of watercourse agreements, but by some means that were less restrictive than was envisaged in article 4. For instance, States contemplating the conclusion of an agreement could be required to enter into consultations with third watercourse States to ensure that their uses would not be affected by the conclusion of the agreement in question. There was another reason why article 4 would benefit from revision. Under the general scheme of the draft, and particularly under the terms of article 7, a watercourse State might initiate works that could affect the whole or parts of the watercourse, provided always that there were no appreciable adverse effects on other watercourse States. Such a State would not be required, under the draft, to enter into treaty relations with other watercourse States. If, however, the same State were to initiate the same works jointly with another watercourse State, its freedom to choose treaty partners would be restricted in the sense that a third State would be entitled to become party to the agreement. If one of the main aims of the draft was to encourage the negotiation of watercourse agreements, he wondered whether that aim would not be defeated by article 4. What was more, the threshold of ap-

³ *Yearbook*... 1990, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

⁴ See *Yearbook*... 1993, vol. II (Part One), document A/CN.4/447 and Add.1-3.

⁵ Initially adopted as article 5. For the commentary, see *Yearbook*... 1987, vol. II (Part Two), p. 30.

preciable harm, which was so central to the draft, would be replaced by a much lower threshold.

24. Yet a further reason why article 4 should be looked at again was that article 30,⁶ which had been adopted after article 4, contemplated a situation in which the obligations of cooperation provided for in the draft could be fulfilled only through indirect channels. That latitude, which reflected an approach similar to the one adopted in part XII of the United Nations Convention on the Law of the Sea, was a realistic acknowledgement that the mere fact that a watercourse passed through the territories of two or more States, while arguably creating a community of interests of some sort, was not the sole factor of which the law should take cognizance. The unity of purpose of the draft would collapse if States were allowed the necessary latitude with regard to the choice of methods whereby their obligations might be fulfilled, but were required to enter into direct relations in a rigid manner.

25. Presumably article 4 would not apply to cases in which a watercourse State entered into an agreement with a non-watercourse State or with an international financial institution with a view to initiating new works on the watercourse; in such cases, the relationship would be governed by the general rules of the law of treaties relevant to the interests of third States. There was no reason why the rules governing agreements between watercourse States should differ from the general rules of the law of treaties, including the fundamental rule of *pacta sunt servanda*.

26. He fully agreed with the reasons cited by Mr. Calero Rodrigues (*ibid.*) for not tinkering with the delicate balance that existed between the duty to prevent appreciable harm, as provided for in article 7, and the rule of equitable utilization, as laid down in articles 5 and 6. There were, however, three further reasons for not doing so. First, the rule of equitable utilization was highly subjective, inasmuch as the factors relevant to equitable and reasonable utilization, as set forth in article 6, were not exhaustive and touched on virtually all aspects of life. Presumably, the Special Rapporteur hoped to mitigate the adverse effects of that rule by means of dispute settlement procedures. While it was not known whether such procedures would include binding judicial settlement, it was very important to ensure certainty in the substantive rules. The task of those called upon to decide what constituted appreciable or significant harm would be complicated still further if the rule of no harm was subordinated to the rule of equitable utilization. It was significant that, in their directives, international financial organizations, including the World Bank, tended to follow the rule on prevention of appreciable harm, which was more easily given to objective verification, rather than the equitable utilization rule.

27. Secondly, the Special Rapporteur proposed an exception in the case of uses that caused pollution and proposed a further exception to that exception in cases where there was a clear showing of special circumstances indicating a compelling need for ad hoc adjustment and the absence of any imminent threat to human health and safety. Apart from the uncertainty likely to

arise in the interpretation of that rule, pollution was so widely defined under article 21⁷ as to render virtually academic any distinction between activities that caused appreciable or significant harm and activities that caused pollution.

28. Thirdly, it was important to bear in mind that prevention of harm above the threshold of appreciable harm was the weakest formulation of the maxim *sic utere tuo ut alienum non laedas*. It would be virtually impossible to repair harm above that level. Any tinkering with the already narrowly defined rule would be totally unjustified.

29. Mr. Sreenivasa RAO said that he welcomed the Special Rapporteur's clear and concise report. The approach it adopted was a tribute to the efforts of previous Special Rapporteurs on the topic and particularly to Mr. McCaffrey, under whose guidance the Commission had completed its first reading of the draft articles.

30. As several more States were likely to submit comments on the topic, it would be advisable to wait at least until 1994 before the Commission began to finalize the draft articles on second reading. The comments received so far were, in general, appreciative of the Commission's work. Almost all of the States, however, approached the draft articles from their own national perspective, which meant that different preferences had been expressed about the way in which the articles should be finalized. Some States had rightly emphasized the need to integrate the law and the policy on international watercourses, where the concerns were similar, within the wider context of the global concern regarding preservation of the environment and sustainable development. While several of the comments endorsed the framework convention approach, some apparently favoured model rules or recommendations to allow States a degree of flexibility. There was also a favourable response to the idea of adopting a suitable dispute settlement provision within the overall scheme of the draft.

31. As to the draft articles adopted on first reading and the commentaries thereto, article 1, on the relationship between navigation and other uses of international watercourses, did not strike a proper balance. Any conflict involved should have been treated as a problem relating to the management of multiple uses. As article 1 was drafted, and as the matter was explained in the commentary,⁸ the articles could be stretched to cover navigational uses, which clearly fell outside the scope of the draft. An attempt should be made to correct that imbalance on second reading.

32. While the definitions in article 2 focused on certain physical factors, it was clear from the commentary⁹ and subsequent articles that the relationship between different watercourse States depended primarily on their common interests and on the need to avoid, and deal with, harm above an agreed threshold. In his view, to keep the scope of the articles clear, the words "and flowing into a

⁷ *Ibid.*, p. 68.

⁸ Initially adopted as article 2. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), pp. 25-26.

⁹ Subparagraph (c) was initially adopted as article 3. For the commentary, *ibid.*, p. 26. For the commentary to subparagraphs (a) and (b), see *Yearbook... 1991*, vol. II (Part Two), pp. 70-71.

⁶ See *Yearbook... 1991*, vol. II (Part Two), p. 69.

common terminus", in article 2, subparagraph (b), should be retained. Also, groundwater should not come within the scope of the articles. In that connection, while he welcomed the Special Rapporteur's offer to study the desirability of including "confined groundwater" within the scope of the draft articles, he agreed that the Commission would be well advised to complete its consideration of those articles as soon as possible and not to add a new topic that would take time to mature. Furthermore, he had no objection to the suggestion to move the definition of pollution from article 21 to article 2 since, as the Special Rapporteur had noted, that change in no way implied agreement to, or enhanced the utility of, any change in part II or part III of the current draft. The inclusion of that definition in article 2 would be without significance so far as the proposed change to article 7 was concerned.

33. He endorsed the framework agreement concept embodied in article 3. As stated in paragraph (2) of the commentary,¹⁰ such an agreement was intended to provide "guidelines for the negotiation of future agreements" and "optimal utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned". One important issue raised by article 3 concerned the definition of a threshold or standard of harm that would bring the draft articles into play. In that connection, he too believed that the word "appreciable", in paragraph 2 of article 3, should be replaced by "significant". Apart from the obvious advantages of setting a uniform and legally recognizable standard of harm, as opposed to a purely objective threshold, it was a standard that had been approved by the community of States in their endeavours to set an agenda for the protection and preservation of the environment at the United Nations Conference on Environment and Development and in the European context. Also, the establishment of an adequate threshold was crucial if worldwide acceptance was to be secured for the draft. So far as the alternative versions of article 3 proposed in paragraph 12 of the report were concerned, he was inclined to accept alternative B, for the reasons stated by the Special Rapporteur. A further issue was the impact of the article on existing agreements. In his view, no change to paragraph 3 of article 3 was needed, and the matter would best be left to the discretion of States. As the Special Rapporteur had pointed out in paragraph 14 of the report, States were in a position to avoid any unintended application of the convention in a variety of ways, including a clear statement of intent or understanding: a general statement to that effect at the time of signing or ratifying the convention would suffice. Alternatively, as already suggested, clear language should be used to specify that the articles in no way affected pre-existing treaties between States save for such changes as were deemed to be necessary by the parties to those treaties. The suggestion that articles 8 and 23 should be placed before article 3 was not, in his view, in keeping with the existing scheme of part I of the draft, which dealt only with general principles.

34. The Special Rapporteur was right to say that no changes to article 4 were needed: any ambiguity was dispelled by the Commission's excellent commentary to the article.¹¹

35. Article 5 laid down the fundamental principle whereby all riparian States were entitled to equitable and reasonable utilization of international watercourses. That entitlement was subject to the obligation of watercourse States to promote the optimal utilization and consequent benefits consistent with adequate protection of the watercourse. In that sense, the concept of optimal utilization embraced that of sustainable development. The commentary to the article¹² was generally acceptable, though it was a questionable suggestion in paragraph (3) that optimal utilization did not imply "maximum" use by any one watercourse State consistent with efficient or economical use but rather the attainment of maximum possible benefits for all watercourse States. Such an interpretation was not a proper reflection of the practice of most States which, in the absence of express agreement to the contrary, relied on their own capabilities and resources to maximize benefits, subject always to the requirements of the economy as well as to the need to protect the watercourse and to avoid causing significant harm to other co-riparian States—all of which was neatly encapsulated in the criterion of equitable and reasonable utilization of a watercourse. In addition, article 5 should concentrate on the basic principle of equitable and reasonable use as more clearly reflected in article IV of the Helsinki Rules,¹³ which set forth the concept of entitlement of watercourse States in more positive terms than did paragraph 1 of article 5. Paragraph 2 of article 5 should be deleted, since the right of equitable participation was no more than a right of cooperation, which was elaborated in greater detail in article 8, on cooperation.

36. Article 6 contained an illustrative list of factors, each of which would have to be reconciled with the others in order to achieve a balance. The concept of "existing uses" had gained some currency in the practice of States as an important factor in measuring significant or substantial harm. However, the need to reconcile that factor with the equally important consideration of the development needs of States should be given the same priority.

37. Article 7, which provided that a State should not use a watercourse in such a way as to cause significant or substantial harm to other watercourse States, laid down a standard which had already been incorporated in a number of articles to trigger various procedures, such as those relating to notification, consultation and negotiation. In their comments on the article some Governments¹⁴ justifiably took the view that, at best, the article did no more than repeat that standard and, at worst, that it would undermine the basic concept of equitable and reasonable use; in any event, it should be eliminated from the draft. He too would recommend that it should be deleted in its entirety and in that connection, he agreed with the Special Rapporteur's reasoning. Preven-

¹¹ See footnote 5 above.

¹² Initially adopted as article 6. For the commentary, see *Yearbook*... 1987, vol. II (Part Two), pp. 31-36.

¹³ See 2312th meeting, footnote 14.

¹⁴ See footnote 4 above.

¹⁰ Initially adopted as article 4. For the commentary, see *Yearbook*... 1987, vol. II (Part Two), pp. 27-30.

tion of pollution and management of water resources were goals everyone shared, and an explanation of the concepts of optimal use or reasonable use, or both, should be included in the commentary to article 5.

38. Achievement of the goals of watercourse utilization and management depended on the obligation to cooperate, set forth in article 8. Those goals had to be sought not only on the basis of sovereign equality, territorial integrity and mutual benefit, as provided for in the article, but also, as noted in the commentary,¹⁵ with due regard for good faith and good neighbourliness. Cooperation could not be imposed: it could only be cultivated on a reciprocal basis. The common interest inherent in the process of the utilization of water resources would promote the cooperation which was so necessary because the multiple and often conflicting uses called for an integrated approach. Article 9, on exchange of data and information, was essentially an extension of article 8, and gave rise to the same considerations of mutual benefit, reciprocity and sovereign equality. Much of the data exchanged would, of course, be the subject of agreements concluded between States.

39. Article 10, on the relationship between different uses, laid down the important principle that each use should be given its due weight in the attempt to reconcile different and multiple uses and different interests and factors. The problem of the management of multiple uses and conflicts was sufficiently important for States to require specific characteristics to be carefully balanced in separate agreements of their own.

40. The question of the peaceful settlement of disputes was particularly important in the context of the uses of international watercourses. As the needs of populations increased and water resources became ever scarcer, disputes were bound to arise if the issues were not tackled at the technical and professional level. Any attempt to politicize disputes was bound to be counterproductive. Accordingly, the appointment at an early stage in the dispute of joint technical commissions with a mandate to give priority to the optimal management of the watercourse should be encouraged. Wherever possible, settlement of disputes through negotiation and other means, including resort to third-party procedures, should be undertaken. While he agreed, therefore, that the draft should embody suitable provisions on the settlement of disputes, the Special Rapporteur should bear in mind that the choice of means should be freely available to States.

41. As the Swiss Government had stated in its observations,¹⁶ if the future framework Convention was to fulfil its aim, it must be balanced and it should not favour either upstream or downstream States.

42. Mr. VERESHCHETIN said that the topic was of the utmost importance for Russia, whose longest land frontier cut across a number of watercourses, rivers, lakes and even inland seas. Some watercourses which flowed through the territories of three or more States had acquired an international character when the Soviet Union had ceased to exist and their legal regime would in

all likelihood require international regulation in the near future.

43. He was grateful to the Special Rapporteur for his well-prepared first report which, though concise, gave a clear picture of the issues involved and of the positions taken by the Special Rapporteur. He trusted that, in the light of the report and of the favourable comments received from States, it would be possible for the Commission to complete its work on the draft in 1994. In that connection, the extension of the draft articles to cover confined groundwater would not be desirable, in his view. Like some other members, he saw no organic link between the two problems from the standpoint of legal regulation. He would not, however, object to the Special Rapporteur's carrying out a feasibility study, provided that such a study did not affect the deadline for the conclusion of work on the topic. While he supported the proposal that the draft articles should ultimately take the form of a framework convention, he agreed with the Special Rapporteur that there were sound arguments in favour of guidelines or model rules. As many members had pointed out, the more flexible the final document was, the more possibilities there would be for States to adapt the general rules to the regime applicable to specific watercourses and, hence, the wider the recognition that document would receive.

44. With regard to article 1, he agreed that it would be clearer hence and more in keeping with practice to use the term "transboundary waters" rather than "international watercourse". He did not, however, agree with the Special Rapporteur's proposal to delete the phrase "and flowing into a common terminus" from article 2, subparagraph (b), since that would extend the scope of the draft articles and would make it more difficult to implement them in practice. He had no objection to the Special Rapporteur's second proposal to move the definition of the word "pollution" from article 21 to article 2, something that would focus attention on one of the main aims of the draft, namely, to protect transboundary waters from pollution.

45. Although it was difficult in Russian to distinguish between "appreciable" and "significant", he could accept the Special Rapporteur's arguments in favour of "significant" and preferred alternative B for article 3. More thought would have to be given to the relationship between the draft articles and existing agreements, especially in the light of the Commission's decision in the future on the form and legal force of the future instrument. The proposal to place articles 8 and 26 ahead of article 3 was reasonable and would improve the structure of the text. The Drafting Committee might consider bringing all the definitions together in article 2, in accordance with the procedure followed in other international instruments.

46. He shared the general view that articles 5 and 7 provided a key element of the entire draft. The use of the words "equitable and reasonable" implied that watercourses should be used without causing significant harm to other States. It would seem logical to include the requirement contained in article 7 in article 5 and to delete article 7. However, since the two articles were viewed by many members as a compromise resulting from the Commission's earlier work, he would not object to a separate article 7. As to the rewording of article 7, he

¹⁵ Initially adopted as article 9. For the commentary, see *Yearbook*... 1988, vol. II (Part Two), pp. 41-43.

¹⁶ See footnote 4 above.

supported Mr. Tomuschat's proposal (2311th meeting) that only the first sentence of the new text should be used.

47. He doubted, as did other members of the Commission, the value of having a section on dispute settlement in the framework convention, especially if the future instrument took the form of model rules. Because of the specific characteristics and nature of the use of different watercourses, a specific dispute settlement machinery might be required in each case: one dispute might require arbitration and conciliation, while for another it might be better to have a bilateral or multilateral commission; in other cases it might be preferable to have recourse to ICJ or to some other bodies, including regional ones.

Mr. Barboza resumed the Chair.

48. Mr. KABATSI expressed thanks to the Special Rapporteur for his first report, which showed a full understanding of the topic and followed the path laid out by previous special rapporteurs. The draft articles had prompted a generally favourable response from Governments. He agreed with several other members of the Commission that the topic had been well covered before the submission of the report and that the draft articles, in the Special Rapporteur's words, merely required fine tuning.

49. As to the form of the future instrument, there was much to be said both for a framework convention and for model rules. The Special Rapporteur seemed to favour the model rules approach, but he was more inclined towards a framework convention.

50. The Commission could certainly make an important additional contribution by recommending dispute settlement procedures. While he agreed with Mr. Sreenivasa Rao that all possibilities should remain open, he was in favour of binding arbitration and judicial procedures. The use of international watercourses was increasing and disputes would proliferate. Some of them might be serious and even end in war. It was therefore important for compulsory settlement procedures to be built into the instrument. With regard to article 5, an independent third party would certainly be needed in the event of a dispute, in order to decide whether the utilization and participation were equitable and reasonable. He did not agree that existing provisions, for example Article 33 of the Charter of the United Nations, were sufficient.

51. He did not think it advisable for the question of groundwater to be included in the draft articles at the present stage: it was not clear that groundwater had a clear relationship with the topic and its physical characteristics had not been thoroughly studied and mapped.

52. For the reasons given by other members of the Commission he was in favour of retaining the words "and flowing into a common terminus" in article 2, subparagraph (b). He could accept the replacement of "appreciable" by "significant" in article 3 and elsewhere in the text and he agreed with the Special Rapporteur that it was logical to move the definition of "pollution" from article 21 to article 2. He also held the view that article 7 served no purpose, as its content was covered in article 5. Article 7 should therefore be deleted.

53. Mr. EIRIKSSON noted that the Special Rapporteur proposed transferring the definition of "pollution" to article 2 because it would facilitate his proposal for article 7. In principle, however, when a term occurred only once in the draft articles it should be defined in that place. Accordingly, there was no need for the move.

54. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the comment that the draft was a remarkable achievement. As the outcome of lengthy negotiation, it was a tribute to the skill and patience of all of the Special Rapporteurs, especially Mr. McCaffrey, and should not be jeopardized in any way. The current Special Rapporteur was therefore right to say that what was now necessary was fine tuning. However, some of his proposals went beyond fine tuning.

55. That comment applied in particular to one of the key elements of the draft articles, that is the relationship between equitable and reasonable utilization (art. 5) and the obligation not to cause appreciable harm (art. 7), for the obligation should be a limit on the equitable and reasonable utilization of an international watercourse. Furthermore, the Special Rapporteur's suggestion that the draft articles should take the form of model rules rather than a framework convention also went beyond mere fine tuning. The Special Rapporteur did concede that he would not insist on resolving the issue of form at the present stage, but the Commission had been proceeding on the understanding that the end product would be a framework convention, with most of its provisions codifying existing law in the matter. The compromises achieved on the draft articles reflected that understanding and took into account the compulsory nature of the provisions. In view of the form the draft articles might take, it was important to make it perfectly clear in the text that existing agreements would not be affected unless the parties thereto so decided. It should not be forgotten that there were very many multilateral conventions governing relations between the riparian States of the world's main watercourse systems.

56. He could not accept the Special Rapporteur's recommendation that the phrase "and flowing into a common terminus" should be deleted from article 2, subparagraph (b). In any event, the Special Rapporteur would have to produce more extensive arguments than the ones contained in paragraph 11 of his report in support of what he seemed to regard as a kind of evident truth. He had no objection a priori to the inclusion of "unrelated" confined groundwaters in the article, for the principles applicable to watercourse systems could be extended to groundwater systems shared between several States. However, the topic was entirely new in international law and, if it was to be included, the Special Rapporteur would have to carry out a feasibility study and deal with the topic at greater length than in his report. The Commission would need to be informed about the physical conditions governing confined groundwater, about the kind of relationship between the different parts of what might be a system of transboundary groundwaters, and about the role played by groundwater in the general water cycle. It would also have to be determined whether the notion of "watercourse" was applicable to groundwater.

57. The Special Rapporteur's proposal to replace "appreciable" with "significant" in article 3 and through-

out the text was based on the comments of certain Governments concerning the practice followed to date in more or less comparable instruments in which the concept of "appreciable" was ambiguous because it had two very different meanings: capable of being detected; and indicating a level in excess of the mere inconvenience which should be tolerated between States in keeping with the principle of good neighbourliness.

58. Different kinds of issues were involved, not to mention the complications of translation. There was in fact no ambiguity in the meaning of "appreciable" but rather two meanings, both of which could be applied to harm to watercourses. There was nothing wrong in requiring that the harm should be capable of being measured, but no one believed that in the many existing instruments the word "appreciable" simply signified capable of being measured without indicating a threshold of harm. The issue of a threshold of harm was, of course, more important. A former Special Rapporteur, Mr. Schwebel, had argued in favour of "appreciable" in his third report, maintaining that it meant more than "perceptible" but less than "serious" or "substantial".¹⁷ In any event, it did seem that "appreciable" implied a lower threshold than "significant". The Special Rapporteur was thus proposing to raise the threshold of harm established in the draft articles, something that was much more than tuning the piano: it meant changing the entire keyboard.

59. In the law relating to watercourses, the applicable threshold seemed in general to have been established at a level lower than that implied by the term "significant". In a number of early and contemporary treaties, such as the Convention of 15 April 1891 between Italy and Great Britain,¹⁸ the Convention of 26 October 1905 between Norway and Sweden,¹⁹ the General Convention concerning the hydraulic system of 14 December 1931 between Romania and Yugoslavia,²⁰ the Act of Santiago of 26 June 1971 concerning hydrologic basins, between Argentina and Chile,²¹ the Convention relating to the Status of the Senegal River, and the Statute of the Uruguay River, adopted by Uruguay and Argentina on 26 February 1975,²² the terms used were closer to the English "appreciable" (*ouvrage qui pourrait sensiblement modifier; entraves sensibles; changement sensible du régime des eaux; perjuicio sensible; and projet susceptible de modifier d'une manière sensible*). In that connection, he wished to draw attention to the comment by the Government of Greece²³ that the term "perceptible harm", implying a lower threshold than that of "appreciable harm", would have been preferable and, to the comments of the Governments of Hungary and Poland,²⁴

which shared the view that the threshold of harm should be reduced. Hungary had rightly pointed out that the maxim of *de minimis non curat praetor* tacitly formed part of every legal instrument; consequently, if the articles made express reference to a minimum level of harm it was because that level was greater than *de minimis*, meaning that a not inconsiderable threshold had already been reached, and should be reduced.

60. The translation issues involved were fairly complex. While many of the agreements cited used the Spanish word *sensible* to refer to the threshold of harm, the English word "significant" was currently being translated as *importante* in Spanish and as *sensible* in French. Whatever the Commission's final decision about replacing the word "appreciable" by "significant" in the English text of article 3, the word used in the Spanish text could not be *importante*. It had to be another word indicating a lower threshold; perhaps the Spanish word *sensible* could be used so that the Spanish and French versions would correspond.

61. Some members had maintained that the Commission should be consistent in its use of terminology in the various instruments it elaborated. In the articles on international liability for injurious consequences arising out of acts not prohibited by international law, the Drafting Committee had provisionally approved the use of the word "significant" to refer to the relevant harm. The Special Rapporteur had bowed to what appeared to be a majority opinion among the members of the Commission with respect to replacing the original word "appreciable" by the word "significant" because the articles in question covered, in general, all activities involving risk. The justification for such a change in terminology was that, in such a general instrument, the threshold had to be somewhat higher in order to restrict the instrument's scope and with it the number and type of activities that would be subject to the prevention obligation. It had been felt that, otherwise, Governments would have too heavy a burden imposed on them.

62. That did not mean that the threshold would have to be raised in those areas where the law had already been determined or where a different regulation had been deemed appropriate.

63. Mr. ROBINSON, commenting on the question of replacing the word "appreciable" by the word "significant" in article 3, said he did not agree that the Commission had to use the same terminology for every instrument. The choice of wording should be determined by the Commission's approach to a particular topic, namely, whether it was undertaking the codification or the progressive development of international law. If the Commission considered that that topic of international watercourses was particularly amenable to codification, then he would favour using the word "appreciable", which had clearly been preferred in practice.

64. The relationship between articles 5 and 7 was a difficult issue. Article 5 established the criterion of equitable and reasonable utilization and article 7 established the obligation not to cause appreciable harm. That raised the question of whether use which gave rise to appreciable harm was inequitable. In his opinion, article 7 should be deleted, unless the relationship between the

¹⁷ *Yearbook... 1982*, vol. II (Part One), pp. 98-100, document A/CN.4/348, paras. 130-141.

¹⁸ G. F. de Martens, ed., *Nouveau Recueil général de Traités*, 2nd series (Göttingen, 1893), vol. XVIII-1, p. 737.

¹⁹ *Ibid.* (Leipzig, 1907), vol. XXXIV, p. 710.

²⁰ League of Nations, *Treaty Series*, vol. CXXXV, p. 31.

²¹ OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.L/VI/CIJ-75 Rev.2) (Washington, D.C., 1971), pp. 495-496; *Yearbook... 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327.

²² *Actos Internacionales, Uruguay-Argentina, 1830-1980* (Montevideo, 1981), p. 593.

²³ See footnote 4 above.

²⁴ *Ibid.*

two articles could be satisfactorily dealt with in the commentary, which was not currently the case.

Cooperation with other bodies (*concluded*)

[Agenda item 7]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

65. The CHAIRMAN extended a warm welcome to Mr. Rubin, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

66. Mr. RUBIN (Observer for the Inter-American Juridical Committee) said that the Inter-American Juridical Committee tended to place its emphasis on matters of immediate relevance to the inter-American community. Matters of particular concern included unification of the American republics, trade issues, financial data flows, freedom of information and humanitarian issues, including human rights. At the same time, the Committee, which operated in a hemisphere that included Spanish, English and French-speaking countries and was influenced by their various philosophical heritages, always returned to universal issues.

67. The agenda for the Committee's August 1993 meeting included items relating to continuation of its important work on juridical aspects of the Enterprise for the Americas Initiative, environmental law, and the judicial process and its implications in the administration of justice. The Committee would also be considering such fundamental topics as concepts of legitimacy and of human rights, including social and economic as well as civil and political rights, and the relation of those rights to the Charter of OAS²⁵ and the doctrines of the right to self-determination and of non-intervention.

68. The first item on the agenda, a proposed convention on traffic in children, illustrated one important function of the Committee—the preparation of draft conventions for consideration by various organs of the inter-American system. Other important areas of concern to the Committee included intra-regional economic cooperation and identification of obstacles to regional integration; aspects of public and private international law as related to the development and evolution of the Americas; the juridical aspects of environmental standards; and consideration of the role of an inter-American court of criminal jurisdiction or of a chamber of the existing Inter-American Court of Human Rights, in the light of recent work on the relationship between the principle of "legitimacy" and the principles of non-intervention and self-determination.

69. The Committee was committed to the promotion and protection of human rights. In that connection, at its next meeting it would be considering the issue of delay in the administration of justice as an aspect of human rights. By virtue of its mandate, the Committee had for several years been organizing regional seminars and co-operating with educational and other institutions. It had

worked closely with associations of magistrates, judges and legal practitioners to seek ways of facilitating access to justice, particularly for the disadvantaged, and to explore alternatives to traditional litigation in both public and private disputes. Those activities had proved very successful. They had not only facilitated the elaboration of legal doctrine but had also helped incorporate the work of international jurists in community life, a development which should be encouraged. In that connection, both the Committee and the Commission could perhaps make greater efforts to bring international law to other discussion and decision-making forums. Seminars, teaching materials and lectures in public or semi-public settings would change the image of international law from a plaything of the erudite to an area of law that could make a meaningful contribution to community life. Symposia for practitioners and academics, sponsored jointly by the Commission and the Committee and perhaps other regional bodies, would be a step in that direction.

70. Recognizing that the concepts of domestic and international law were not easily separated in today's complicated and interdependent world, the Committee had embarked in recent years on a far-reaching set of related projects concerning, among other things, the peaceful settlement of disputes and issues pertaining to economic development and integration. The international community was reacting to an important new phenomenon: the diminishing economic relevance of national boundaries, which were increasingly viewed as mere obstacles to the efficient conduct of the world's business. Efforts to remove or at least to diminish trade barriers were multiplying, and it was becoming increasingly difficult to identify national origins in order to satisfy national tariff regulations. Recent legal problems in the area of financial instruments and services provided some of the most dramatic illustrations of the growing insignificance of national boundaries and the need for global standardization in areas such as liquidation of multinational corporations and corporate and securities laws.

71. The phenomenon of internationalization was also giving rise in the Western hemisphere to a re-evaluation of a considerable part of accepted doctrine. For example, for historical reasons the concept of non-intervention had acquired an almost religious significance in the Americas and was enshrined in the Charter of OAS, yet the inviolability of that principle was being called into question in the light of other concerns. The Charter of OAS also provided that the political organization of the American States required that those States be organized on the basis of the effective exercise of representative democracy. The issue of how States could reconcile their obligation to promote democracy with the principle of non-intervention still had to be resolved.

72. Mr. VILLAGRÁN KRAMER said that it was a special pleasure to welcome Mr. Rubin, who had a distinguished career in international law. Among his many activities, he was currently professor of international law at American University, in Washington, D.C., honorary editor of the *American Journal of International Law*, and participated actively in the work of the American Society of International Law. By virtue of his long service on the Committee and his extensive knowledge of and active participation in its work, Mr. Rubin could be consid-

²⁵ Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324).

ered as the dean of the Committee. His statement had reflected not only the breadth of his own and the Committee's concerns but also the new trends emerging in the Americas.

73. The Committee was composed of States operating under the common law and the civil law systems, something that gave jurists an opportunity to learn about each other's legal systems and to work together to find ways of communicating and to identify commonalities in their institutions. It was a complex task to try and bridge the gap between the dynamic common law system and the civil law system, and Mr. Rubin had played an important role in that connection.

74. The variety of concerns addressed by the Committee demonstrated an interesting trend: North America and Latin America had begun to focus on international economic law as a basis for seeking new ways to define legal relationships. As a result of the Committee's emphasis on international economics, a new approach to the Calvo clause was taking shape in the Americas; that long-standing clause was currently being reviewed in the light of new economic trends. Noteworthy, too, was the fact that the World Bank and related institutions were elaborating mechanisms for settling disputes between States in cases involving foreign investments that gave rise to conflict between public and private interests. Thus, in the field of international economic law, the Committee was making rapid strides.

75. As to the environment, the Committee's emphasis reflected the recent trend to limit consideration to environmental phenomena which were of particular relevance to the American continents; there was even talk of elaborating an American environmental law system. It was not clear whether such a system would actually be realized; in any case, current work was linked not to issues of responsibility, but rather to those relating to the environment *per se*.

76. In the field of human rights, the Committee and its lawyers were playing an expanded role in the allied field of political law. Law and politics had traditionally been associated on the street but not in legal settings. Yet, the jurists of the Committee were discussing the principle of the legitimacy of Governments based on democracy and respect for human rights, thereby recognizing that international criteria prevailed over State sovereignty. That shift of concerns and new emphasis in the Americas was noteworthy.

77. The Inter-American Juridical Committee had two very important functions. The first related to the division between public international law and private international law; in private international law, the emphasis was based not on conflict of laws but on the search for commonalities between the North American and Latin American economic systems. The second was the Committee's extraordinary efforts to disseminate knowledge about international law. Mr. Rubin had been and continued to be instrumental in promoting those efforts.

The meeting rose at 1.10 p.m.

2314th MEETING

Wednesday, 30 June 1993, at 10.05 a.m.

Chairman: Mr. Vaclav MIKULKA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,¹ A/CN.4/451,² A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. SZEKELY said that he wished to add to his comments made on the qualification of harm at the preceding meeting and mentioned that some members of the Commission had made comments on it. The Chairman, in particular, had spoken against replacing "appreciable" by "significant" because that would raise the threshold of liability. He himself had stated that the Commission would be making a regrettable mistake if it proceeded in that way. Mr. Robinson, on the other hand, had said that the Commission was not compelled to use the same terms in the draft articles on the law of the non-navigational uses of international watercourses as in the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. The Chairman, who was the Special Rapporteur for the latter set of draft articles, had nevertheless explained why "appreciable" had been replaced by "significant" in them: it was because the range of activities was much broader than in the case of watercourses.

2. In any event, opinions were still very divided about the qualification of harm in the case of watercourses. He had himself not yet heard any convincing argument for the replacement of the word "appreciable" by the word "significant". On the previous day in the Drafting Committee, the Chairman of the Commission had said that harm which was not significant was harm which did not have to be taken into consideration. If that was the case, there would appear to be no point in making the proposed change. Or was the intention actually to raise the threshold of liability?

3. Mr. CALERO RODRIGUES said that the issue warranted detailed consideration and he emphasized the im-

¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

² *Ibid.*

portance of the comments made by the Chairman at the preceding meeting. It seemed that some members, including Mr. Szekely, agreed that replacing “appreciable” by “significant” might have the effect of raising the threshold of liability. The Chairman had pointed out that the word “significant” had been translated into Spanish by *importante*, but that it would be better to translate it by *sensible*, a word which also existed in French. He himself thought that “appreciable” or “significant” did indeed mean *sensible*. As far as English was concerned, “appreciable” meant that which could be detected and was of some importance without being serious.

4. Mr. SZEKELY thanked Mr. Calero Rodrigues for his explanation and said that it was a pity that a similar explanation was not to be found in the draft articles. Without such an explanation, in fact, the replacement of “appreciable” by “significant” might give the impression that the threshold of liability had been raised and that would create a number of problems.

5. Mr. YANKOV said that it was not just a question of terminology or translation. The issue must be examined in detail and the commentary should reflect the precedents as far as possible, for example, the cases in which “appreciable” had been used to qualify harm. The word could also mean “measurable”, which “significant” could not.

6. Mr. ARANGIO-RUIZ said that the French word *sensible* was translated into English by “perceptible” and not by “significant” or “appreciable”.

State responsibility (continued)* (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,³ A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPOREUR (continued)*

7. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the richness of the discussion was a good omen for the progressive development of the law of dispute settlement and therefore for the rule of law in the inter-State system. Whatever difficulties might lie ahead, the debate had proved that the overwhelming majority of the members of the Commission took the view that the role of the judge in the inter-State system and, in particular, in the area of State responsibility should be strengthened, and by more than lip-service.

8. He welcomed the very high degree of support for the notion that the draft articles should include dispute settlement provisions of such a nature as to represent an adequate corrective to the very serious but inevitable problems of unilateral countermeasures. However severely they were regulated—as they were for example in draft articles 11 to 14 proposed in 1992⁴—countermeasures testified to the still rudimentary nature of the

inter-State system and inevitably of the law governing it. Since that element of the system did not seem about to disappear—in other words, since countermeasures could not be totally eliminated—it was not sufficient to make them subject to conditions and limitations prescribed for that purpose, since such rules were themselves subject to the exclusively unilateral interpretation of the States which were called upon to apply them. A regime authorizing unilateral measures subject to unilaterally interpreted conditions and limitations seemed unacceptable and some way must be found to eliminate or reduce that “double unilateralism”. That seemed to be the view of the overwhelming majority of the members of the Commission, with of course some differences and nuances. He concluded in any case that, for the majority of the Commission, a step should be taken to achieve substantial progress in the area of dispute settlement.

9. With regard to the quality of the settlement obligations, that majority seemed to share his own pessimism about the possibility of attaining what he had called in the first part of his report (A/CN.4/453 and Add.1-3) the “theoretically ideal” solution. That solution was drastically to alter the countermeasures regime in such a way that countermeasures would be permissible only in order to secure compliance by the wrongdoing State with a binding third-party settlement, for example, with an arbitral award or a judgment of ICJ. That was the system which would come into effect if the future convention on State responsibility prescribed a compulsory, automatic and unilaterally triggered arbitration or judicial settlement of any “responsibility dispute”, namely, any dispute about the interpretation or application of the convention and if the convention prohibited at the same time any resort to unilateral countermeasures except in the event of refusal by a wrongdoing State to comply with the award or decision. But that solution, as he had expected, had been firmly rejected by the majority of the Commission, despite the solution’s theoretical merit, and he had therefore also set it aside.

10. There seemed to be general agreement that lawful resort to a countermeasure should not be subject to prior resort to any settlement procedures other than those to which the allegedly injured State was bound to resort under any general or bilateral treaties or dispute settlement clauses between itself and the wrongdoer. In other words, the Commission seemed to favour what might be called a “soft” solution of the kind which he had proposed in 1992 in article 12,⁵ which stipulated as a condition of lawful resort to countermeasures the prior exhaustion of “available” procedures which existed or might exist between the injured State and the wrongdoer, regardless of the instrument on which the Commission was working.

11. However, the fact that the majority of the Commission had rejected the “theoretically ideal” solution was not a totally negative sign. It indicated that the great majority of members who had taken part in the debate were not pipedreamers, any more than he was, and that they had their feet on the ground when they chose to favour, in addition to the general notion of the necessity of a corrective to countermeasures, the adoption of an ad-

* Resumed from the 2310th meeting.

³ See footnote 1 above.

⁴ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook*... 1992, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

⁵ *Ibid.*

equate, although less ambitious, set of dispute settlement obligations. He was confident that they had given their opinion after mature deliberation and had not merely paid lip-service to the cause of justice and of the weak against the strong. He hoped that they would maintain their positive position when the draft articles of part 3 came up for discussion the following year in the Drafting Committee. They had thus shown the seriousness of their purpose and of their efforts to control their own aspirations by setting them against the realities of the inter-State system and of international law, without ruling out the need to provide a less ambitious, but adequate corrective to the unfettered regime of unilateral countermeasures. In that connection, he repeated his objection to the incredible statement made by one member that the adoption of the Special Rapporteur's proposals for part 3 would cause a *bouleversement* in international law.

12. With regard to the elements and features of the dispute settlement system which he proposed in his fifth report, they had received considerable support, as a good number of speakers had said that they were generally in favour. Other solutions had, of course, been proposed. Some members had advocated reducing the system to its two main steps, arbitration and/or judicial settlement. Others had suggested greater use of ICJ, in particular the chambers system and advisory opinions. Others had seemed worried by some of the functions which he proposed to assign to the conciliation commission. (He stressed in that regard that he had never questioned the non-binding character of the report and of the main recommendations of the conciliation commission.) Still others had made interesting suggestions concerning the provisions of the annex to part 3,⁶ on the procedures for appointment of the members of the conciliation commission or the arbitral tribunal. And still others had suggested setting up a "countermeasures commission" or, like Mr. Mahiou (2306th meeting), had envisaged the possibility of combining compulsory and optional procedures, but had not indicated the scope of the latter.

13. Those and other suggestions nevertheless seemed compatible for the most part with one essential feature of his proposed regime, that is the existence of a post-countermeasures dispute settlement system. That emerged clearly from the statements of all the speakers, but it had been put in a particularly effective way by Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Fomba, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Robinson and Mr. Yankov.

14. There seemed to be a very broad consensus on two essential features of the proposed system: the "triggering mechanism" and the area of controversy to be covered by the post-countermeasure procedures.

15. With regard to the triggering mechanism, his suggestion that the existence of a dispute should be made subject to the taking of a countermeasure by the injured State and to the reaction of the State committing the initial act to that countermeasure had apparently not given rise to any difficulties. The reaction of the State against which the countermeasure was directed would take the form of a protest or a request for cessation of the countermeasure or perhaps of a counter-countermeasure. He

was surprised in that connection that the use of the term "counter-reprisal" in his report should have prompted an objection from one member of the Commission: the term was in fact widely known among international lawyers.

16. Mr. Pambou-Tchivounda had been concerned that the conciliation commission would be entitled to deal with the question of whether or not a dispute existed. He had vested that function in the conciliation commission simply because it would be the first third party to consider the case. In the event that direct recourse was had to an arbitral tribunal, the tribunal would make that decision. He had chosen as a triggering mechanism the concept of a dispute rather than that of an "objection to a countermeasure", which had been used by the former Special Rapporteur, simply because the former was a rather objective criterion and was supported by theory and practice. A dispute arose when, first, the State against which the countermeasure had been taken asserted that such a measure was unlawful and unjustified and, secondly, when the opposing view was taken by the injured State that had taken the countermeasure. It was the conflict between those two opposing positions, constituting the dispute, that triggered the procedures provided for in part 3 of the draft articles.

17. With regard to disputes which would be subject to third-party settlement procedures, he recalled that he had expressly indicated in chapter I of his report that the fact that the settlement procedures envisaged in part 3, unlike those referred to in article 12, paragraph 1 (a), could be resorted to only after the adoption of a countermeasure did not mean that those procedures were applicable exclusively to questions relating to the interpretation or application of the few articles of the future convention dealing directly with the regime of countermeasures, namely, articles 11 to 14 of part 2.⁷

18. In order to establish whether a countermeasure was "justified" or "lawful", it might not be sufficient to determine whether it was proportional, if it was in conformity with the obligation of prior resort to settlement procedures by which the parties were bound or with the prohibition against the use of force or the obligation to respect fundamental human rights. There were also "upstream" conditions of "justification" or "lawfulness" such as the existence of an internationally wrongful act—a condition implied in article 11; the attribution of that act to the State against which the countermeasure was taken; the absence of circumstances precluding wrongfulness; or non-compliance by the wrongdoing State with its obligation to make reparations in accordance with the relevant articles.⁸ Even if the "triggering mechanism" was the dispute arising from the taking of a countermeasure, the procedures envisaged would have to cover—for the purpose of a non-binding recommendation or a binding decision, according to the case—all disputes between the parties that might come under any one of the articles of the future convention. That was the meaning of the specifications contained in chapter I of

⁷ See footnote 4 above.

⁸ For the texts of draft articles 1, para. 2, 6, 6 bis, 7, 8, 10 and 10 bis adopted by the Drafting Committee at the forty-fourth session of the Commission, see *Yearbook... 1992*, vol. 1, 2288th meeting, para. 5.

⁶ For the text, see 2305th meeting, para. 25.

the report. That “upstream” extension of the competence of the third parties envisaged in the proposed articles of part 3 had been agreed to in substance during the debate on article 4 (c) as proposed by the previous Special Rapporteur.⁹

19. In respect of the role of the conciliation commission, there was, in his opinion, no ambiguity with regard to the non-binding nature of its report and recommendations. He had simply provided it with some ancillary powers which, in his view, would not significantly alter that role.

20. According to Mr. Al-Baharna (2309th meeting), Mr. Pellet (2305th meeting), Mr. Rosenstock (2309th meeting) and Mr. Vereshchetin (2307th meeting), the scope of application of the dispute settlement provisions were too broad. Of course, requiring the intervention and decision of a third party after the unlawful act, but before countermeasures, would be tantamount to subjecting the whole of the law of responsibility and, indirectly, the evaluation of compliance with all the substantive rules, to an international arbitral or judicial body. Obviously, that would have the effect of making all questions relating to State responsibility justiciable by definition. However, in his view, that remark applied very well to what he called the “theoretically ideal solution”, which, as he had just stated, seemed to have been discarded by the Commission. That remark did not apply to the solution he was proposing for part 3 of the draft. Since he had set aside the “ideal solution”, the only dispute settlement procedures to which the injured State was bound to resort as a precondition for the lawfulness of its countermeasures were those referred to in article 12, paragraph 1 (a).¹⁰ However, as he had already explained, those procedures would not be dictated by the future convention on State responsibility: they were imposed by Article 33 of the Charter of the United Nations or arose from treaties, arbitration clauses or declarations of acceptance binding the parties regardless of the future convention.

21. Those considerations also applied to other questions, such as the necessity of providing different settlement procedures for different types of disputes, as mentioned by Mr. Tomuschat (2308th meeting) and Mr. Yamada (2309th meeting). That was perfectly logical and natural for any settlement procedures that existed or that might exist between the parties in the future, regardless of the future convention, and which, under article 12, had to be exhausted before resort to countermeasures. However, post-countermeasure disputes and the procedures he had proposed in part 3 were another matter. The idea of article 12 was to reduce arbitrariness in resort to countermeasures. That objection thus did not concern the proposal he had made, but, rather, the procedures which might already exist between the parties.

22. The same consideration applied to the suggestion that priority should be given to any dispute settlement machinery already existing between the parties. That was precisely what article 12, paragraph 1 (a), whatever its other defects, did for the pre-countermeasure phase.

To do the same for the post-countermeasure phase would defeat the corrective purpose of the procedures in part 3.

23. The same applied to the observations regarding the need for flexibility. In his view, such flexibility was broadly guaranteed by article 12, paragraph 1 (a), since that provision certainly did not affect the freedom of choice of the parties. With regard to the rule of freedom of choice, he believed that, whatever decision the Drafting Committee finally took on paragraph 1 (a), that rule would be deadly, as Mr. Fomba had clearly explained (2305th meeting). If part 3 referred only to Article 33 of the Charter of the United Nations and nothing more, that would simply negate the binding nature of the settlement procedures.

24. One of the comments made with regard to the three-step system was that it was too complicated, too long and too expensive. He begged to differ on those drawbacks, the reality of which had not, moreover, been demonstrated. Would that system be any longer and more complicated than interminable negotiations? He did not think so. As to the cost, while Mr. Fomba's suggestion seemed reasonable, he did not think that a conciliation or arbitration procedure would cost more than the economic losses resulting from the application of unwarranted or disproportionate coercive measures.

25. The opponents of the system—who were a minority, whether it was the system he had proposed for part 3 or any similar system, were suggesting that matters should be settled by a protocol, by an “opt-in, opt-out” system or simply by diplomatic conferences. Obviously, if the decision was not to try to provide an adequate remedy for unilateral countermeasures taken on the basis of exclusively unilateral interpretations, then that was the best method. But it would be very sad if those solutions prevailed.

26. Questions had also been raised as to the desirability of giving the parties the freedom to submit their disputes directly to arbitration or judicial settlement, since both methods entailed binding decisions. It was true that the judicial settlement envisaged in the report under consideration was only an *extrema ratio*, to be used for limited purposes, for example, in cases of *excès de pouvoir* or violation of fundamental rules.

27. Several speakers had also asked why the “triggering mechanism” for dispute settlement procedures must necessarily be a countermeasure. He thought that he had given sufficient explanations on that matter and would not go over it again.

28. There had also been some speakers who had, in a sense, gone beyond what he himself had thought to be a reasonable solution and had advocated or at least come close to what he called the “theoretically ideal solution”. Mr. Idris, for example, had asked (2310th meeting) why binding third-party settlement procedures should begin only after the taking of countermeasures. On that point, he had already explained the difference between pre-countermeasure settlement procedures, as provided for in article 12, paragraph 1 (a), and the procedures dealt with in part 3, which applied after countermeasures had been taken.

29. Suggestions had also been made with regard to fact-finding. He was completely in favour of that method and had, furthermore, referred to fact-finding as one of

⁹ For the texts of draft articles 1 to 5 and the annex of part 3 proposed by the previous Special Rapporteur, see *Yearbook...* 1986, vol. II (Part Two), pp. 35-36, footnote 86.

¹⁰ See footnote 4 above.

the procedures which could be used by the conciliation commission.

30. In connection with the question of crimes, it had been said that the dispute settlement regime applicable in the case of crimes should be different and more binding than that applicable in the case of delicts. It had been suggested that the Commission should consider the substantive and instrumental consequences of crimes in part 2, before turning to part 3. He did not deny that a special and, if possible, more binding dispute settlement system for crimes should be considered. Moreover, the fifth report contained one paragraph which dealt with the idea put forward by the former Special Rapporteur in article 4 of part 3,¹¹ which referred to judicial settlement by ICJ.

31. Another important point was negotiation, which had been referred to a number of times, in particular in the Drafting Committee during the consideration of article 12, paragraph 1 (a). He nevertheless thought that the problem was sufficiently covered by paragraph 1 (a), since it referred to Article 33 of the Charter, which mentioned negotiation as the primary means of dispute settlement. In addition, negotiation was covered by implication in part 3 in more than one way, first of all, in a very clear manner, in article 1,¹² since there must have been negotiations between the parties for them to go on to the conciliation commission stage. Article 2 also presupposed negotiations because the parties would have to negotiate on the basis of the report and recommendations of the conciliation commission in order to bring them to an "agreed settlement" of their dispute. It was only in the event of failure at that stage, that is to say the failure of those negotiations, that the parties should or could resort, if necessary unilaterally, to arbitration.

32. In conclusion, he recalled, as he had done in the fifth report, that, with regard to part 3 of the draft, the Commission was called on to make an important choice: whether, for the want of anything better represented by the "theoretically ideal solution", or not to introduce an adequate corrective element to the hard, rudimentary law of unilateral countermeasures and thereby take a significant step in the progressive development of the law of State responsibility. For that choice, the Commission could draw inspiration from Rousseau's argument that might does not make right and that we were obliged to obey only "legitimate Powers"; "legitimate Powers" being obviously those which operated under the rule of law or at least under legal rules which such "Powers" had accepted by custom or treaty.

33. He was confident that the Commission would not fail to try to persuade the "Powers" to agree at least that, after they had exercised what was now their inevitable prerogative of unilateral reaction, the lawfulness of that reaction could, if challenged or disputed, be impartially ascertained. Unless, of course, the Commission believed, as a member of the Drafting Committee had recently said, that law was solely the product of power: it was subject to power, not above it.

34. That was an idea which was hard for a lawyer to accept and, if the majority of the members of the Com-

mission did so, it would make life for special rapporteurs in general and for him in particular very difficult.

35. The CHAIRMAN said that the Commission would then have to decide whether the articles proposed by the Special Rapporteur should be referred to the Drafting Committee. The majority of the members appeared to be in favour of doing so.

36. Mr. ROSENSTOCK said that he was not part of that majority. He actually thought that the Commission was divided on the fundamental issue of part 3 of the draft and he was not at all convinced that it would be advisable to refer the articles to the Drafting Committee because that would ultimately mean requesting it to fill the many gaps which had become apparent in those texts. He would, however, not go so far as to request a vote in the Commission because he was sure that it would in any case follow its usual practice and decide to refer the question to the Drafting Committee.

37. He nevertheless pointed out that, if the Commission was to make any progress, it had to complete its work on parts 1 and 2 of the draft before trying to reconcile the differing views on part 3.

38. Mr. VERESHCHETIN said that, in his view and from a purely theoretical and methodological standpoint, only part 1 of the draft articles on the origin of international responsibility¹³ and the first section of part 2 (which had been called "reparation")¹⁴ really related to the topic of State responsibility. Chapter II on countermeasures and part 3, which dealt with dispute settlement procedures, related not to State responsibility as such, but to enforcement measures. Those two sets of questions were completely independent, so that, by dealing with the problem of countermeasures and dispute settlement, the Commission was entering into a radically different area. A sufficiently broad measure of agreement had already been reached on part 1 and the first section of part 2. It would therefore be useful for the Commission to complete its work on those parts of the draft before beginning to draft articles on a new chapter, which, in the final analysis, did not strictly relate to the topic.

39. In the meantime, work on parts 1 and 2 of the draft and, in particular, on the question of reparation had made hardly any progress. First, the Commission had not yet adopted the commentaries to those articles. Secondly, it had not yet considered the extent to which the article on reparation, on which the Drafting Committee had already worked, required any changes to cover the case of crimes.

40. An assessment of the situation thus showed that the Commission had not only not completed its work on parts 1 and 2, but had also not completed its work at the current session on the articles relating to countermeasures. That was why he did not believe that the Commission was following the right course in not completing the work it had undertaken on one set of questions and in requesting the Drafting Committee to deal with other prob-

¹³ For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*

¹⁴ For the texts of articles 1 to 5 of part 2 provisionally adopted on first reading at the thirty-eighth session, see *Yearbook... 1986*, vol. II (Part Two), pp. 38-39.

¹¹ See footnote 9 above.

¹² *Ibid.*

lems, which were, in his view, much more controversial and complex. He feared that that approach would hamper the progress of the Commission's work.

41. However, since the majority of the members of the Commission appeared to be in favour of referring the articles to the Drafting Committee, he would not oppose that decision.

42. It would thus be a good thing if the Drafting Committee could rapidly have the Special Rapporteur's proposals on crimes because, otherwise, it would have only a partial view of the question instead of the whole picture. It was doubtful whether it was worthwhile for the Drafting Committee to look at the articles from the viewpoint of delicts only to discover, after receiving the proposals relating to crimes, that it had to amend all or nearly all of the articles of parts 2 and 3. That would only complicate its task.

43. Mr. SHI said that the Commission was aware of his views on part 3 of the draft and he had already stressed that he did not agree to linking the settlement of disputes with countermeasures. The proposals made by the Special Rapporteur in part 3 would deprive States of all freedom of choice with regard to dispute settlement procedures.

44. If the majority of the members of the Commission wanted part 3 to be referred to the Drafting Committee, however, he would not object, despite all his reservations on that score.

45. Mr. VILLAGRÁN KRAMER said that he did not know whether he preferred the Special Rapporteur's summing-up or his report. The current meeting had brought out new ideas and new points of view which made the question quite a bit clearer.

46. The decision to refer the draft articles to the Drafting Committee was a wise one, because it would mean that the question of dispute settlement could be dealt with pragmatically. The Drafting Committee might run into a problem, however, because it needed a minimum of guidance. The question was whether the Committee should abide by *lex lata* or whether it was empowered to enter the realm of *lex ferenda* and engage in the progressive development of the law. That was a genuine substantive question, since the question of dispute settlement was connected with that of reprisals.

47. In fact, the Drafting Committee, which depended on the Special Rapporteur's guidance, had been waiting two years to find out his views on the question of dispute settlement. Now that it had the reference document it had been waiting for, it would be able to finish its work.

48. The problem the Commission and the Drafting Committee faced was somewhat similar to the one now facing the inter-American system. Reprisals were clearly prohibited by article 18 of the Charter of OAS.¹⁵ However, the Protocol concerning the final and binding settlement of disputes had not entered into force for lack of ratifications, so that there was now a substantive rule prohibiting reprisals, but there was no legal instrument which would lead specifically to the settlement of dis-

putes and ensure that the mechanism was triggered not by countermeasures, but by the wrongful act itself.

49. He believed that the Commission would be able to complete its work on the matters under consideration when it had received the report to be submitted by the Drafting Committee on parts 2 and 3 as a whole. The decision to refer the draft articles to the Drafting Committee therefore warranted the support of the Commission, which should consider the Special Rapporteur's proposals with an open mind.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would be glad if his draft articles were finally referred to the Drafting Committee, where a great deal of work could be done.

51. He welcomed the statement by Mr. Vereshchetin, which clearly showed that the rules on countermeasures and those contained in part 3 of the draft belonged to the realm of procedure. That was the basis on which he himself had worked. Moreover, that point had already been clearly made by Mr. Bennouna (2307th meeting) and Mr. Calero Rodrigues (2308th meeting).

52. Mr Shi's objection to linking countermeasures with dispute settlement was based on his view that countermeasures were not admissible. However, the discussions in the Drafting Committee on article 12 had clearly shown that there was a link between countermeasures, on the one hand, and the dispute settlement procedures of part 3 on the other.

53. With regard to the question of crimes, to which Mr. Vereshchetin had referred, and if the Commission was able to continue its work on that aspect of the topic, he was certain that it would have to provide for dispute settlement machinery that was at least as effective as that proposed by the previous Special Rapporteur, who had suggested in article 4, subparagraph (b), of part 3¹⁶ that disputes of that kind should be submitted to ICJ. In that connection, he referred the members of the Commission to chapter II of his fifth report in which that possibility of recourse to ICJ appeared to be inevitable. However, the Drafting Committee already had enough to do with the existing articles without having to deal with the question of crimes and he did not see how the fact of not having any proposals on that question would prevent it from continuing its work. He was, moreover, not at all certain that he would be able to make proposals on crimes in his next report and would be very grateful for any help the members could give him in that regard. To sum up, he proposed that the Commission should continue the work on parts 2 and 3 without dealing with crimes and recalled that its practice had always been to proceed step by step.

54. Mr. ROSENSTOCK said that he did not altogether understand why it was not possible to conclude consideration of article 12, as originally framed in very clear terms by the Special Rapporteur. In his view, the Commission should not take up part 3 before it had finished with that article.

55. The Drafting Committee could work on part 3 of the draft in a more rational manner if the Commission made a genuine effort to conclude its consideration of ar-

¹⁵ Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324).

¹⁶ See footnote 9 above.

ticle 12 and, at the same time, its work on part 2, leaving aside the question of crimes. If it failed in that task, the Commission would constantly come up against the problem of article 12 without any hope of general agreement on the article.

56. With regard to crimes, assuming that concept was wanted and the wish was to keep it, it was not certain that recourse to ICJ would be desirable, given the constitutional division of powers for which the Charter of the United Nations, and Article 39 in particular, provided. In that respect, the Commission was venturing into an area that was even more dangerous than the tactics in which some members of the Commission were engaging to hold back a portion of part 2 instead of concluding the consideration of that part of the draft before taking up part 3, which would appear to be the logical and reasonable course.

57. Mr. VERESHCHETIN said that he was disappointed by the Special Rapporteur's comments on the question of crimes. If the Special Rapporteur's position, when finally formulated, amounted to saying that it was not possible to submit an article on crimes, there would be no other solution for the Commission but to propose to the General Assembly an amendment to the topic on which it was working, which would then become "State responsibility in the matter of delicts". The question was not actually before the current session, but logic and honesty required that the Commission should recognize the need for such a change. That was the conclusion to be drawn from the Special Rapporteur's report and comments.

58. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished to refer the draft articles proposed by the Special Rapporteur in his fifth report,¹⁷ to the Drafting Committee for consideration in the light of the discussion in plenary.

It was so decided.

CONSIDERATION OF DRAFT ARTICLE 1, PARAGRAPH 2, AND OF DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* OF PART 2, AS ADOPTED BY THE DRAFTING COMMITTEE AT THE FORTY-FOURTH SESSION¹⁸

59. The CHAIRMAN invited the Commission to consider the draft articles of part 2 as adopted by the Drafting Committee at the forty-fourth session.

ARTICLE 1, PARAGRAPH 2

Article 1, paragraph 2, was adopted.

ARTICLE 6 (Cessation of wrongful conduct)

Article 6 was adopted.

ARTICLE 6 *bis* (Reparation)

60. Mr. VERESHCHETIN said that the word "national", which appeared in the English version of paragraph 2 (b), was generally translated into Russian by an equivalent of the word "citizen", which signified a

natural person. The question was therefore, whether the word "national" applied only to natural persons, in which case the Russian translation would be correct, or whether it applied to natural persons and to legal persons, which seemed to be more in keeping with the context of the draft articles. Perhaps the English version could be amended to refer expressly to natural and legal persons or an explanation could be included in the commentary.

61. Mr. ARANGIO-RUIZ (Special Rapporteur) said he did not think that the question should be settled by an explanation in the commentary, which would disappear. There were two possibilities: either the Commission could agree that the word "national" should be translated by several words in Russian or—but it was hard to imagine—the word "national" could be replaced by the words "physical or juridical person". The best thing would be to amend the Russian translation.

62. Mr. VILLAGRÁN KRAMER drew attention to a mistake in the Spanish version of article 6 *bis*, paragraph 2. When the Drafting Committee had concluded its work, the reference had been to "negligence or the wilful act or omission". In the new version, however, the word "negligence" had been replaced by the word *imprudencia*, which was different.

63. The CHAIRMAN said that the Spanish version would be brought into line with the English.

64. Mr. RAZAFINDRALAMBO said that he wondered whether a comma should be added after the word "brought", in paragraph 2 (b). As drafted, the text could imply that the words "which contributed to the damage" referred to "a national of that State on whose behalf the claim is brought"; it should, of course, refer back to "the wilful act or omission".

65. The CHAIRMAN said that point was well taken. The words in question should be separated, both in English and in French, from the text of paragraph 2 (b) to make it clear that they referred both to paragraph 2 (a) and to paragraph 2 (b).

66. Mr. VERESHCHETIN said that, as the Special Rapporteur felt that it would be difficult to deal in the commentary with the inconsistency to which he had drawn attention, he would prefer that the word "national" should be retained in the English version of paragraph 2 (b) and would ask the English-speaking members of the Commission if that word could denote both a natural person and a legal person. If so, the problem was simply a matter of translation into the various languages. If, however, the word "national" applied only to natural persons, some other word should be used or an explanation should be given in the commentary.

67. Mr. ROSENSTOCK said that, normally, the word "national" referred both to legal persons and to natural persons. However, there was no reason why it should not be made clear that both categories of person were covered, if that would make the provision easier to understand, but it would be in line with practice to keep the word "national".

68. Mr. KABATSI, agreeing with Mr. Rosenstock, said that, unlike the word "person", which applied equally to natural and to legal persons, very often the word "national" referred in particular to citizenship. It

¹⁷ For the text, see 2305th meeting, para. 25.

¹⁸ Document A/CN.4/L.472.

would therefore be advisable to make it clear that the word “national” referred to both legal and natural persons.

69. Mr. Sreenivasa RAO said that he too agreed with what Mr. Rosenstock had said.

70. Mr. ROBINSON said that, given the context, it was essential that the word “national” should refer expressly to both categories of person. In the case of the right of diplomatic intervention, for example, most interventions were made on behalf of a legal person. He therefore proposed that the provision should be amended by adding a comma after the word “national”, followed by the words “whether natural or juridical” or the words “whether physical or legal”. In any event, it would be preferable for the explanation to be incorporated in the article itself rather than in the commentary.

71. The CHAIRMAN, noting that the Commission intended to cover both categories of person, said that the precise manner in which that intent should be reflected in paragraph 2 still had to be decided.

72. Mr. KUSUMA-ATMADJA said he doubted whether it would be advisable to make the English version more cumbersome to solve a problem which, if the word “national” signified natural and legal persons, arose only in Russian and, apparently, Spanish. Moreover, any additional explanatory word would inevitably have to be repeated wherever it appeared throughout the draft.

73. Mr. ARANGIO-RUIZ (Special Rapporteur), agreeing with that view, said that, if further clarification had to be introduced, it would be better, in the interests of style, for it to come after the word “State”.

74. Mr. VERESHCHETIN said he noted that the English-speaking members of the Commission were not absolutely sure that the word “national” was free of ambiguity. In the IMF Articles of Agreement for example, that word referred solely to natural persons.

75. Mr. THIAM, referring to the French text, said it should perhaps be made clear, not in the article itself but in the commentary, that the word *ressortissant* referred both to natural persons and to legal persons.

76. Mr. ROBINSON said that, after careful reflection, he felt that it would perhaps be best to include an appropriate clarification in the commentary.

77. The CHAIRMAN said the solution the Commission apparently preferred was to leave the English and French versions as drafted and to deal with the problem raised by Mr. Vereshchetin in the commentary, at the point where the word “national” first appeared.

78. Mr. Sreenivasa RAO said that assurances and guarantees of non-repetition were more in the nature of “satisfaction” than a form of reparation as such. Also, insistence on full reparation could be fraught with consequences for developing countries. For the sake of justice and equity, that aspect of the matter must not be lost sight of when it came to the commentary.

79. Mr. MAHIOU, agreeing with Mr. Sreenivasa Rao, said that, when the Commission had considered the cases in which reparation could be adjusted downwards, the Drafting Committee had noted that there were circumstances other than negligence or wilful act or omis-

sion that could have an effect on reparation. He himself had dwelled at some length on the case in which several States were involved and on the complex problems that posed. Those various circumstances should be kept in mind and they must be reflected in the commentary.

80. Mr. ROSENSTOCK said the presumption should be that the fundamental principle of equality before the law and equality of obligations applied at all times and that the only criterion was the commission of a wrongful act and the obligation of reparation.

81. The CHAIRMAN said that the Special Rapporteur would take account of all the comments made by the members of the Commission in the final version of the commentary to be submitted on the articles.

82. Mr. VERESHCHETIN said that some of the provisions in article 7 (Restitution in kind) would have been more appropriately placed in article 6 *bis*. The Drafting Committee had grouped together in article 7 four exceptions to restitution in kind which in fact were very different in their effects and scope. Material impossibility, the subject of subparagraph (a), obviously applied to only one form of reparation, restitution in kind, and therefore naturally appeared in article 7. Subparagraph (b), on the other hand, should apply to every form of reparation in that, if a particular form of reparation involved “a breach of an obligation arising from a peremptory norm of general international law”, recourse should then be had to another form of reparation. Accordingly, subparagraph (b) would be more appropriately placed in article 6 *bis*, which dealt with reparation in general.

83. Article 7, subparagraphs (c) and (d), gave rise to an even more complex problem. According to the Special Rapporteur’s original interpretation, the problem of excessive burden arose in two kinds of case: where the burden imposed was out of all proportion to the damage caused by the wrongful act and where it gravely imperilled the political, economic and social system of the State that committed the internationally wrongful act. In other words, it was a matter of comparing the burden imposed and the benefit obtained with respect to one and the same form of reparation, not different forms of reparation. According to that interpretation, which was perfectly admissible and in fact quite widespread, the exceptions provided for in the two subparagraphs related both to reparation and to restitution, and even somewhat more to the former than to the latter. They too therefore had a place in article 6 *bis*. The Drafting Committee had, however, now adopted a different interpretation whereby the burden imposed and the benefit obtained were compared according to the form of reparation. But, there again, the exceptions should be formulated so as to relate both to restitution in kind and to compensation and their place would therefore be in article 6 *bis*. If the Commission accepted that analysis, he was prepared to submit an amendment to article 6 *bis* with a view to incorporating subparagraphs (b) to (d) of article 7 therein.

84. Mr. MAHIOU said that Mr. Vereshchetin’s comments elaborated on those made by Mr. Sreenivasa Rao on the question of full reparation. There were indeed exceptions that were not peculiar to restitution in kind. If the Commission agreed that an attempt should be made to clarify the wording of the articles, it would be advis-

able for it to examine the proposals made for that purpose.

85. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as he—and the Drafting Committee, too—had seen matters at the outset, the intent of the subparagraphs in question had merely been to compare restitution in kind and compensation. None of those provisions really affected the general problem of reparation or the particular problem of compensation. Article 6 *bis*, subparagraph 2 (*b*), for example, covered the case where a State would be satisfied to accept a form of reparation instead of demanding that the right of a part of its population to self-determination should be observed. The problem of full reparation raised by Mr. Mahiou was an entirely different matter, in which connection it should be noted that article 8 (Compensation), for example, spoke of compensation, not of full compensation. It was therefore difficult to see how compensation, within the meaning of paragraph 1 of that article, could pose a serious threat to the political independence and economic stability of a State. In his view, article 7 should therefore stand and its provisions should not be slanted towards either the general (art. 6 *bis*) or the particular (art. 8).

The meeting rose at 1 p.m.

2315th MEETING

Thursday, 1 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ARANGIO-RUIZ (Special Rapporteur) said that chapter II, section A, of the fifth report (A/CN.4/453 and Add.1-3) could be considered as a historical survey of the question of the consequences of international crimes of States, summarizing the discussions which had taken place in 1976 in the Commission² and in the Sixth

Committee of the General Assembly, as well as the relevant literature, which was not always readily available to the Commission members. Section A was also essential because the 1976 debates and that doctrine were the starting points for identifying the issues discussed in chapter II, sections B and C.

2. According to article 19 of part 1 of the draft,³ crimes consisted of serious breaches of *erga omnes* obligations designed to safeguard the fundamental interests of the international community as a whole. That did not imply, however, that all breaches of *erga omnes* obligations were to be considered as crimes. The basic problem was, therefore, to assess to what extent the fact that the breach seriously prejudiced an interest common to all States affected the complex responsibility relationship which arose even in the presence of “ordinary” *erga omnes* breaches.

3. The best approach was to distinguish between the objective and subjective aspects of the issue. From an objective viewpoint, the question was whether and in what way the severity of the breaches in question aggravated the content and reduced the limits of the consequences—substantive and instrumental—that characterized an “ordinary” *erga omnes* breach, namely a delict. From a subjective viewpoint, the question was whether or not the fundamental importance of the rule breached gave rise to any changes in the otherwise inorganic and not “institutionally” coordinated multilateral relations that normally arose in the presence of an ordinary breach of an *erga omnes* obligation under general law, either between the wrongdoing State and all other States or among the multiplicity of injured States themselves.

4. He would deal first with the substantive consequences of crimes, namely cessation and reparation. With regard to cessation, it did not seem that crimes presented any special character in comparison with “ordinary” wrongful acts, whether or not *erga omnes*. That was understandable, considering that, first, the obligation of cessation did not allow for a “qualitative” aggravation, attenuation or modification, and secondly, what was involved, even in the case of delicts, was an obligation incumbent on the State responsible even in the absence of any demand on the part of the injured State or States; chapter II, section B, of the fifth report presented some examples from the relevant State practice. An extended analysis of practice in that area would be appropriate at a later stage, after comments had been heard from the Commission and others.

5. The issue of reparation *lato sensu*, which encompassed *restitutio*, compensation, satisfaction and guarantees of non-repetition, was more complex than the issue of cessation. From an objective standpoint, some of the forms of reparation, especially *restitutio* and satisfaction, were subject in the case of delicts to certain limits. Thus it had to be determined whether, in consequence of a crime, such limits were subject to derogation and, if so, to what extent; in other words, whether, in the case of crimes, the “substantive” obligations were more bur-

¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

² See *Yearbook* . . . 1976, vol. II (Part Two), pp. 69-122.

³ For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

densome for the wrongdoing State than in the case of "ordinary" breaches.

6. Three possible derogations could be envisaged: the excessive onerousness limitation for *restitutio*; the prohibition of "punitive damages", humiliating demands or demands affecting matters generally considered to pertain to the freedom of States; and demands for satisfaction or guarantees against repetition which seriously impinged on the domestic jurisdiction of the wrongdoing State.

7. As to the subjective aspect, it should be borne in mind that, unlike the case of cessation, the forms of reparation were covered by obligations which the responsible State was required to perform only upon demand by the injured party. Since a crime always involved, additionally or solely, States less directly injured than a "principal victim", the question arose whether, in the current state of international law, each of those States was entitled to claim reparation *uti singulus* or whether, according to the *lex lata* in the matter, some mandatory form of coordination was required among all the injured States. Examples of cases in which demands had been made by individual States (other than the "principal victim") as well as by international or regional bodies could be found in practice and were also presented in chapter II, section B, of the fifth report.

8. Once the *lex lata* on those points had been clarified, it would be possible to assess whether and to what extent it was appropriate to provide *correctifs*, or radical innovations, by way of progressive development, particularly with respect to coordinating the demands of several injured States.

9. In regard to the "instrumental" aspects of the possible special consequences of crimes, as compared with delicts, the first hypothesis that naturally sprang to mind was the reaction to aggression. While the Commission had already dealt with self-defence in part 1 of the draft,⁴ it needed to provide clear definitions for some of the requirements traditionally considered to be conditions of self-defence, namely: immediacy, necessity and proportionality, the first two of which were often overlooked. It would also have to clarify under what circumstances and preconditions the right of "collective" self-defence included the use of armed force against an aggressor by States other than the main target of the aggression: was such recourse legitimate only at the express request of the victim State; was a presumption of that State's consent sufficient; or could the third State's reaction follow automatically in such situations?

10. The Commission should adopt a position on those issues even if it preferred not to lay down express provisions governing them but rather to refer simply to the "inherent right of individual or collective self-defence". Nevertheless, a simple commentary on the meaning of that "inherent right" would not suffice to prevent dangerous misunderstandings, especially with regard to the requirements of immediacy and necessity which are more frequently overlooked.

11. However, the problem of resort to force in response to an international crime was not solely a ques-

tion of self-defence against armed attack. The question arose whether armed measures were not admissible also in order to bring about the cessation of crimes other than aggression, a problem which presented above all an objective aspect. It had to be established whether resorting to force in order to obtain cessation was admissible in circumstances other than those justifying self-defence against armed attack, namely, against the crime of aggression. He had in mind crimes listed in article 19, paragraph 3, subparagraphs (b) to (d). Among the problems which had to be considered in that context were those of armed support to peoples oppressed by alien domination or more generally by regimes committing grave violations of the principle of self-determination; and armed intervention against a State responsible for large-scale violations of fundamental human rights or for perpetrating genocide or violent forms of "ethnic cleansing", for example.

12. If in such cases the use of armed force was to be deemed admissible *de lege lata* or desirable *de lege ferenda*, the question arose as to whether that would constitute the standard sanction for a crime, namely, a reaction against the wrongdoing State under the law of State responsibility, or whether it would correspond to a different rationale, such as that underlying the state of necessity or distress—circumstances which ruled out illegitimacy but, unlike self-defence, were not characterized by the fact of authorizing a direct reaction against the perpetrator of a particularly serious international breach.

13. Another problematic aspect of resort to force in response to a crime was whether armed countermeasures were admissible when they were intended not to bring about the cessation of a crime in progress but to obtain reparation *lato sensu* or adequate guarantees of non-repetition. An example was the *debellatio* of a State which had started a war of aggression, including military occupation of that State by the victors or other sanctions imposed by force of arms in order to "undo" all the consequences of the crime. The situation of post-war Germany was a case in point. More recently, the possibility, contemplated in paragraphs 33 and 34 of Security Council resolution 687 (1991) of 3 April 1991, of using force to guarantee the disarmament obligations imposed on Iraq by that resolution, raised the question of how far resort to force was legitimate in cases of such a kind.

14. The subjective aspect of the instrumental consequences of crimes involving armed force gave rise to a different problem: did the admissibility of armed measures vary depending on whether they were taken by one or more injured States *uti singuli* or by the community of States *uti universi*? Were such measures considered inadmissible if they were resorted to unilaterally by one State or a small group of injured States and legitimate if they were the expression of a "common will" of the organized international community?

15. That problem was central to the entire regime of crimes, not just to the regime of armed measures aimed at cessation. It arose in connection with a number of substantive consequences and affected all the instrumental consequences whenever the regime of international crimes of States involved the possibility of a competence of the international community as a whole or of the organized international community.

⁴ Ibid.

16. Practice offered more than one example of injured States dealing with the consequences of a very serious breach—particularly one in progress—by means of the intervention of an international body belonging to a system of which the wrongdoing State was also a member. The actions of United Nations organs, and the Security Council in particular, were of special relevance in that respect. A number of examples of such “organic” armed or non-armed reactions to very serious breaches were presented in chapter II, section B, of the fifth report.

17. Precedents of that type were invoked to support the notion that the competence to adopt sanctions against particularly serious international delinquencies did not, and should not, belong to States *uti singuli*. The question was thus raised whether that competence should not belong instead, more or less exclusively, *de lege lata* and/or *de lege ferenda*, to the so-called organized international community, as represented by the United Nations and, in particular, the Security Council as the organ endowed with the greatest powers of action.

18. A considered juridical answer to such a question for the purposes of codification or progressive development of the legal consequences of crimes, as distinguished from a mere *constat* of actual conduct, would require an analysis of issues situated at the very apex of the international legal system. Those issues ranged from the nature of the international community, the inter-State system and the organized international community to the nature of the United Nations and the functions and powers of its organs.

19. The central issue was whether and to what extent the various functions and powers of the United Nations organs in the areas of international law governed by article 19 of part I were or should be made legally suitable for the implementation of consequences of international crimes. Three specific questions then arose: first, *de lege lata*, whether the existing powers of United Nations organs, among them, the General Assembly, the Security Council, and ICJ, were such as to include the determination of the existence, attribution and consequences of the wrongful acts contemplated in article 19; secondly, *de lege ferenda*, whether and in what sense the existing powers of those organs should be legally adapted to such specific tasks as the determination of the existence, the attribution and the consequences of the internationally wrongful acts in question; and thirdly, to what extent the powers of United Nations organs affected or should affect the *facultés*, the rights or the obligations of States to react to the internationally wrongful acts in question, either in the sense of substituting for individual reactions, or in the sense of legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

20. Starting with the first, *de lege lata*, position, as presented in chapter II, section B, of the fifth report, it should be stressed that the issue was not whether a United Nations body had in fact taken some action, in the form of a decision, recommendation or a concrete measure, with regard to international crimes as defined in article 19, paragraph 3. The question was, *de lege lata*, whether any United Nations body had exercised, as a matter of law (written or unwritten), the specific function of determining that such conduct had occurred and

that it had constituted a crime of one or more given States, and of determining the resulting liability and applying sanctions or contributing to their application. Only on such a basis would it be possible to determine whether a legally organized reaction to international crimes of States was provided *de lege lata*.

21. It was difficult to answer that question by comparing the various kinds of international crimes contemplated in article 19, paragraphs 3 (a) to 3 (d), with the powers vested in the organs of the United Nations.

22. If one combined the various kinds of crimes contemplated in article 19, paragraphs 3 (a) to 3 (d), on the one hand, with the functions and powers of United Nations organs, on the other hand, one would find it difficult to answer the above question. For the present purpose, he would confine himself to picking a number of points from a list that would otherwise be longer.

23. *Ratione materiae*, the General Assembly, as the most representative body of the inter-State system, was surely, under the Charter of the United Nations, the competent organ for the promotion and protection of human rights and of self-determination of peoples. At the same time, the Charter did not endow the Assembly with such powers as would enable it to produce an adequate reaction to violations of human rights and self-determination or of other obligations of the kind contemplated in article 19, paragraphs 3 (b) to 3 (d). With regard to such acts, the Assembly could not go beyond non-binding declarations of unlawfulness and of attribution and non-binding recommendations of reaction by States or by the Security Council.

24. The Security Council, for its part, was competent *ratione materiae* for the maintenance of international peace and security. Its powers under the Charter of the United Nations enabled it to provide for an adequate reaction in the form of economic, political or military measures against the crime of aggression mentioned in article 19, paragraph 3 (a). The Council could also react through the same measures against any crime, among those envisaged in subparagraphs (b) to (d) of paragraph 3, provided, however, that they corresponded to situations of the kind contemplated in Article 39 of the Charter.

25. The Security Council, however, was empowered under Chapter VII of the Charter to assess discretionally any situation involving a threat to peace, a breach of the peace or an act of aggression, with a view to maintaining or restoring international peace and security. The Council had neither the constitutional function nor the technical means to determine the existence, the attribution or the consequences of any wrongful act. Its competence to decide on the existence of one of those situations was confined to the purposes set forth in Chapter VII of the Charter.

26. That consideration, however, did not dispose entirely of the issue of the Security Council's competence. Although that organ had not been entrusted by the drafters of the Charter of the United Nations with the task of determining, attributing and sanctioning the serious breaches in question, a different situation might exist at present. The question might indeed be raised, in particular, whether recent practice did not show that the scope of the Council's competence had undergone an evolution

with regard precisely to the "organized reaction" to certain types of particularly serious international delinquencies. He was referring to some recent less easily justifiable decisions, under Charter language, such as Council resolution 687 (1991) in so far as it imposed upon Iraq reparations for "war damage", Council resolution 748 (1992) of 31 March 1992 which allowed the taking of measures against the Libyan Arab Jamahiriya for the failure to extradite the alleged perpetrators of a terrorist act, and Council resolution 808 (1993) of 22 February 1993 on the establishment of an ad hoc international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

27. In order to regard that practice as concurring to consolidate the Security Council's competence in the area of State responsibility for crimes—a problematic proposition—one would have to produce convincing arguments to the effect that it constituted a "juridically decisive" practice, reflecting a customary rule or a tacit agreement accepted or adopted by United Nations Member States and liable as such to derogate from the written provisions of the Charter.

28. Actually, ICJ was the only existing permanent body which possessed the competence and the technical means to determine the existence, attribution and consequences of an internationally wrongful act, including possibly a crime of State. It was the function of the Court under Article 38, paragraph 1, of its Statute "to decide in accordance with international law" and under Article 59 its pronouncements possessed "binding force... between the parties" to the dispute. Those two features of the Court's function, as well as its composition, made it in principle more suitable than any other United Nations organ to rule on the existence and legal consequences of an internationally wrongful act. There were, however, two sets of serious difficulties.

29. First, the Court's system involved a major difficulty in that its jurisdiction was essentially voluntary. For the Court to be entitled to exercise its jurisdiction with regard to a crime, its competence would have to derive from a prior acceptance by the alleged wrongdoer of the Court's jurisdiction in such terms as to allow the injured State or States to summon unilaterally the alleged wrongdoer before the Court. That could result either from the acceptance by all States (wrongdoer included) of the so-called optional clause of Article 36, paragraph 2, of its Statute, or by virtue of multilateral, bilateral or unilateral instruments binding the participating States in such a way as to allow unilateral applications to the Court against the wrongdoer. The only other way would be a very improbable ad hoc acceptance of the Court's competence by the wrongdoer itself.

30. Secondly, a series of difficulties arose from the absence of organs juridically empowered to investigate the facts, to play the role of public prosecutor in bringing a case to ICJ and to determine the sanctions. The implementation of any State's liability pronounced by the Court would thus escape any control by the Court itself. Any "sanction" other than the mere finding of the breach and its attribution would thus have to be determined and applied either by the injured party or parties or be left to the discretionary action of other United Nations organs.

31. He then turned to the second question identified in chapter II of the report, namely, the question *de lege ferenda*, whether the existing functions and powers of United Nations organs should be legally adjusted to the determination of the existence, the attribution and consequences of international crimes of States. The question arose there whether the Security Council—with a restricted composition in which some members enjoyed a privileged status—should be vested with the competence to act for the "international community as a whole". As a political body, the Council was entrusted with the essentially political function of maintaining peace, so that it operated with a high degree of discretion; it acted neither necessarily nor regularly in all the situations that would seem to call for action; it operated, on the contrary, in a selective way. The Council was not bound to use uniform criteria in situations which might seem to be quite similar; crimes of the same kind and gravity could be treated differently, or not be treated at all. Indeed, serious crimes could be ignored. Lastly, the Council was under no duty to motivate its decisions or its action or inaction. That fact precluded contemporary or subsequent verification of the legitimacy of its choices.

32. Those difficulties could perhaps be accepted as unavoidable drawbacks of the prevention and repression of aggression and other serious breaches of the peace. In that respect, it could be accepted, for lack of a better solution, that a political body should operate without the guarantees of a judicial process, which was inevitably uncertain and always much too slow: *vim vi repellere*, as in the case of self-defence, calling for immediate reaction.

33. Whatever the position regarding aggression, the propriety of relying too much on political bodies for the implementation of State liability for crimes was highly questionable with regard to the other cases contemplated in article 19, paragraph 3. The crimes of the kind described in subparagraphs (b) to (d) of that paragraph should be met by judicial means. The history of the penal law in national societies showed that, in the repression of criminal offences, the following three features were essential: (a) subjection to the rule of law, procedural as well as substantive; (b) regular, continuous and systematic conduct of criminal prosecution and trial; and (c) impartiality—or non-selectivity—of such action as to investigation, prosecution and pronouncement. For those reasons, the Security Council did not seem to meet the requirements of criminal justice or indeed those of justice in general.

34. A further matter on which the Commission should provide him with guidance related to the kind of dispute settlement provisions to be included in the draft. That matter was dealt with in article 4 (b) of part 3 as proposed by the previous Special Rapporteur, Mr. Riphagen,⁵ but was not covered in part 3 as proposed in the fifth report presently under consideration. The Commission should consider the possibility of improving on the text proposed in 1985 and 1986 by Mr. Riphagen, with special reference to the Court.

⁵ For the texts of draft articles 1 to 5 and the annex of part 3 proposed by the previous Special Rapporteur, see *Yearbook... 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

35. The last issue identified in chapter II, section B, of the fifth report was the relationship between the reaction of the organized community through international bodies such as United Nations organs and the individual reaction of States. The possibility of the organized community adopting measures against a wrongdoing State posed the problem of harmonizing the exercise of that competence with the carrying out of those measures which the injured State or States might still be entitled to adopt unilaterally, and he gave a number of examples in that connection.

36. As to measures not involving force, resort to measures short of force in reaction to a crime—unlike the adoption of measures involving force—did not give rise to problems of admissibility; those questions were generally settled in the affirmative with respect to any *erga omnes* breach. The problem which did arise was that of the possible aggravation of the measures taken by way of reaction to crimes. Such aggravation might take the form of the removal or the attenuation of the conditions or limitations to which resort to countermeasures was subjected.

37. Regarding the procedural limits, the question arose whether, in the case of crimes resort to countermeasures should not be admissible even in the absence of prior notification and also prior to the implementation of available dispute settlement procedures.

38. With respect to the substantive limitations, it was possible to conceive the setting aside, in the case of crimes, of such limitations as those concerning: (a) extreme measures of an economic or political nature; (b) measures affecting the independence, sovereignty or the domestic jurisdiction of the wrongdoer; (c) measures affecting “third” States; and (d) “punitive” measures. Illustrations of those four possibilities were given in the fifth report.

39. As to the “subjective” element, it should be noted that the following “subjective-institutional” questions arose:

(a) Did the possible attenuations of the limitations of recourse to “peaceful” countermeasures apply only to the “principal victim” of a crime or should they benefit all States in any way injured? Or did the entire handling of any countermeasures belong to the organized international community?

(b) If such “collective” competence existed—or ought to be provided for—also in respect of measures not involving the use of arms, would it be an “exclusive” or only a “primary” competence?

(c) In the latter case, in what manner would the “collective” competence be coordinated with the residual faculty of unilateral action on the part of the injured State or States?

40. With regard to the problem of obligations to react on the part of injured States, the previous Special Rapporteur had singled out those obligations in his sixth report.⁶ Foremost among them was the obligation not to recognize as “legal and valid” the acts of the wrongdoing State pertaining to the commission of the breach or

the follow-up thereof. Examples of the practice in the matter—which would be analysed at the appropriate time—were to be found in his fifth report.

41. In addition to the duty of non-recognition there was the obligation not to help or support the wrongdoing State in maintaining the situation created by the unlawful act. International practice showed a trend in favour of recognizing, on the part of States, an obligation not to assist a wrongdoing State in enjoying or preserving any advantages resulting from acts of aggression and other major breaches. Examples taken from State practice were contained in the report.

42. Moreover, States were under an obligation not to interfere with the response to a crime on the part of the “international community as a whole” and to carry out such decisions as were adopted by that community in connection with the sanctioning of a crime.

43. Having thus identified the main issues arising (*de lege lata* or *de lege ferenda*) with regard to the consequences of international crimes of States, the Special Rapporteur tried to put forward some tentative considerations on the main difficulties involved. Surely, the most important questions with regard to the consequences of international crimes were those which related to the role of the organized international community and, in particular, to that of United Nations organs. Those questions were far too difficult for the Special Rapporteur to submit, at the present stage, more than merely tentative reflections. The general picture of the international society—and in particular the picture of the so-called organized international community—was actually so grim as to justify the most pessimistic forecasts about the possibility of finding appropriate solutions for an organized implementation of the possible special consequences of international crimes of States. In the face of the impervious difficulties involved, one might even be led to conclude that it would be better to fall in with those who, like at least two members of the Commission, were not in favour of giving effect in parts 2 and 3 to article 19 of part 1.

44. Those who had criticized the adoption of article 19 could, of course, find arguments in the difficulties to which he had referred and also in the work of the Commission itself. With regard to the Commission he was thinking both of the broad thrust of the articles on State responsibility and of the draft Code of Crimes against the Peace and Security of Mankind, and also of the questionable approach adopted by the majority of the Commission concerning fault, including *dolus*, punitive damages and other consequences that did not come strictly within the context of reparation. Those considerations provided the basis for chapter II, section C, of the fifth report. The main question raised in that section was whether international criminal responsibility should be incurred by States and/or individuals.

45. Were it not for article 19 of part 1, one might assume that the Commission’s work on international responsibility was based upon an implied dichotomy between an essentially “civil” responsibility of States, on the one hand, and a penal responsibility of individuals on the other. After an initial phase of indecision, the work on the draft Code of Crimes against the Peace and Security of Mankind was firmly based on the assumption that

⁶ See *Yearbook... 1985*, vol. II (Part One), p. 3, document A/CN.4/389.

the Code would cover only crimes of individuals, though the individuals in question would have close ties with the State. According to the said dichotomy, individuals would be amenable to criminal justice, but States would not. On the basis of the maxim *societas delinquere non potest* and of the negative attitudes in the Commission with regard to fault and the strictly compensatory nature of international liability, it could be argued that article 19 had no place in the draft on State responsibility and that such an illogical and contradictory element should be done away with. He, however, could neither subscribe unconditionally to the notion that criminal responsibility would be incompatible with the nature of the State under existing international law nor to the view that the international responsibility of the State was confined *de lege lata* within a strict analogy with civil responsibility under municipal law.

46. The first and main cause of the alleged incompatibility of criminal liability with the nature of the State was the maxim *societas delinquere non potest*. That maxim was surely justified for juridical persons of municipal law, but it was doubtful whether it was justified for States as international persons. Although States were collective entities, they were not quite the same, *vis-à-vis* international law, as the *personnes morales* of municipal law. On the contrary, they seemed to present the features—from the viewpoint of international law—of merely factual collective entities. That obvious truth, concealed from students by the rudimentary notion of juridical persons themselves as “factual collective entities”, found the most obvious recognition in the commonly held view that international law was the law of the inter-State system and not the law of a world federal State.

47. As to the second cause of alleged incompatibility, however strongly it was believed—as many members of the Commission seemed to—that the liability of States for internationally wrongful acts did not go beyond the strict area of reparation, the practice of States showed that the entities participating in international relations were quite capable of criminal behaviour of the most serious kind. Even in the words of Drost—a strong opponent of any “criminalization” of States: “Undoubtedly, the ‘criminal’ State is far more dangerous than the criminal person by reason of its collective power”.⁷ The study of international relations—whether from the viewpoint of politics, morality or law—also showed that just as they could act delinquently towards each other, States were not infrequently treated as delinquents by their peers, the treatment being expressly or implicitly punitive—and often very heavily punitive.

48. In the most ordinary cases of internationally wrongful conduct, the penalty was either implicit in the fact of ceasing the unlawful conduct and making reparation by restitution in kind or compensation, or visible in that typically inter-State remedy which was known by the term “satisfaction”. In the most serious cases, such as those calling for particularly severe economic or political reprisals, or outright military reaction, followed by more or less severe peace settlements, the punitive intent

pursued and achieved by the injured States was manifest. In that connection, Drost had singled out the various forms of “political” measures against States, and distinguished them from “legal penalties”, against individual rulers. Those political measures, Drost had said, took on “all sorts of forms, ways and means”; and he listed a variety of measures such as:

Territorial transfer; military occupation; dismantling of industries; migration of inhabitants; reparation payments in moneys, goods or services; sequestration and confiscation of assets; armaments control; demilitarization; governmental supervision, together with many other international measures . . . Besides the two general categories of economic and military sanctions.⁸

Drost apparently did not suspect that most of the measures he had listed consisted of far more severe sanctions than just “civil” remedies. In addition, they were all such as to affect—some of them dramatically—the very peoples he rightly wished to spare from sanction by confining the “legal penalties” to the rulers.

49. The fact that numerous scholars and diplomats of international law preferred to conceal such obvious truths under the fig-leaf represented either by the omission of any reference to a punitive connotation of liability for internationally wrongful acts or by the suggested express indication that the only function of countermeasures was to secure reparation, did not alter the hard realities of the inter-State system. It was indeed recognized by the most respected authorities that international liability presented both civil and penal elements, the prevalence of one or the other depending upon the objective and subjective features and circumstances of each particular case.

50. Obviously, a staunch critic of the idea underlying article 19 of part 1 could contend—not without some justification—that, if States were at present not *societates* or *personnes morales* in the proper sense of the term, they would inevitably have to become so within an organized legal community of mankind. States would then not differ, in essence, from the subdivisions of a more or less decentralized federation. In so far as it could be assumed that such a scenario was a valid prediction, the same staunch opponent of the idea embodied in article 19 could further contend that the right way for the Commission to proceed would be precisely to maintain the distinction he had just mentioned, in which connection he would refer members to the distinction between a draft code of crimes against the peace and security of mankind covering exclusively the penal liability of individuals and a draft on State responsibility contemplating merely the civil liability of States. According to the same staunch opponent, that “civil” liability of States should be codified and developed by a convention on State responsibility of which article 19 of part 1 of the draft would not be a part. That, always according to the same opponent, would be the way to harmonize the Commission’s two existing drafts with the presumable lines of progressive development of the international system towards the “ultimate” end—to use Lorimer’s adjective⁹—represented by the establishment of a more or less centralized (or decentralized) organized community of mankind or world federation.

⁷ P. N. Drost, *The Crime of State* (Leiden, A. W. Sijthoff, 1959), Book I, *Humanicide: International Governmental Crime against Individual Human Rights*, p. 294.

⁸ *Ibid.*, pp. 296-297.

⁹ J. Lorimer, *The Institutes of the Law of Nations* (W. Blackwood and Sons, Edinburgh and London, 1884), vol. II, pp. 183 *et seq.*

51. It seemed equally evident, however, that the establishment of such a legal community was very far from imminent. Even the 12 European Community countries were very far from having reached that stage. And the inevitable consequence was that mankind would for a long time to come remain, for good or ill, in that condition of lack of integration which was, at one and the same time, the main cause and the main effect of what sociologists and lawyers called, in a technical sense, the inter-State system. Within such a system, States seemed bound to remain, whether one liked it or not, under an international law which was inter-State law, not the law of the international community of mankind. States remained essentially factual and not juridical, collective entities. As such, they remained not only able to commit unlawful acts of any kind—notably the so-called crimes as well as the so-called delicts—but equally susceptible of reactions quite comparable, *mutatis mutandis*, to those which are met by individuals found guilty of crimes in national societies.

52. Much had rightly been written in order to condemn “collective” responsibility, and he was indeed firmly convinced that it was a decidedly primitive, rudimentary institution. It was, however, difficult to deny the following facts:

(a) The inter-State system, from the standpoint of legal development, presented rudimentary aspects that could not be ignored without danger;

(b) One such aspect was that States did commit, together with delinquencies that could be classified as “ordinary” or “civil”, delinquencies that definitely qualified, because of their gravity, as “criminal” in the common sense of the term;

(c) Another aspect was that, for such grave delinquencies as aggression, States adopted forms of reaction which even a strong opponent of the penal liability of States like Drost recognized as so severe and numerous as those listed in the report. Drost classified such forms of reaction, which he termed “political” measures, as opposed to “individual penalties”, as “territorial, demographic and strategic; industrial, commercial and financial; even cultural, social and educational; last [but] not least, technological and ideological”.¹⁰

53. It was really hard to believe that measures of such tremendous weight were not, *mutatis mutandis*, abundantly similar, in their effects, to the penalties of national criminal law. It would thus seem that, for some time to come, lawful reactions to the kinds of crimes contemplated in article 19 of part 1 should be available. The Commission should therefore provide, in parts 2 and 3 of the draft, follow-up provisions to article 19.

54. The problems to be solved, however, seemed to be *de lege lata* or *de lege ferenda*, even more difficult than those, not yet resolved satisfactorily, of collective security. That was especially true for those problems that were related to the existing structure of the so-called organized international community.

55. A number of issues involved, *de lege lata* or *de lege ferenda*, had been summarily and tentatively evoked, others had not. Subject to any further additions

and corrections from his colleagues, he wished to raise three more issues.

56. One of the most crucial problems was that of distinguishing the consequences of an international State crime for the State itself—and possibly the State’s rulers, on the one hand, and the consequences for the State’s people, on the other. Drost—a not very consistent opponent, as shown, of the “criminalization” of States—had rightly stressed the moral and political necessity of separating the political measures against the delinquent State from the individual penalties against its rulers, the former measures to be of such a nature as to spare the “innocent” population of the “criminal” State. One could not but agree wholeheartedly. Considering, however, the kinds of measures Drost himself seemed to admit so liberally—measures that seemed to go pretty much beyond those contemplated in Articles 41 and 42 of the Charter of the United Nations—it did not seem easy to make the distinction. That was especially true with regard to economic and peace settlement measures (for the case of aggression), some of which seemed to hit the people themselves directly. There was also a further question that neither the sociologist, the lawyer, nor the moralist should ignore—though Drost himself seemed to ignore it totally: could it be assumed in any circumstances that a people was totally exempt from guilt—and liability—for an act of aggression conducted by the obviously despotic regime of a dictator enthusiastically applauded before, during and sometimes even after the act? The second problem was that of State fault. Should the Commission, or should it not, reconsider that matter which it had set aside, in his view unconvincingly, with regard to “ordinary” delinquencies? Was it possible to deal, as “material legislators”, with the kind of breaches contemplated in article 19 without taking account of the importance of such a crucial element as wilful intent (*dolus*)?

57. The last problem to which he felt bound to call attention concerned article 19 itself. He would leave aside the seriously problematic features of that article’s formulation—a formulation which was perhaps less difficult in the original version proposed by the previous Special Rapporteur in 1976.¹¹ Those features, not the least of which was the unclear nature of the provision compared with the so-called secondary character of the other articles in the draft, could be reconsidered by the Commission on second reading. For the time being, he would confine himself to a certain number of substantive questions.

58. In the first place, if there existed substantial or, in any event, significant differences in the manner in which the various specific types of crime were dealt with, was it in fact appropriate to elaborate a single dichotomy between “crimes” and “delicts”? Would it not be preferable, for example, to distinguish aggression from other crimes? Or to make several subordinate distinctions, so as to avoid placing on the same footing specific acts that were obviously quite remote from one another and would or should entail equally different forms of responsibility?

¹⁰ Op. cit., p. 297.

¹¹ See footnote 2 above.

59. Secondly, the exemplary list of wrongful acts constituting crimes contained in article 19 dated back to 1976. Were those still the best examples for identifying the wrongful acts which even today the international community as a whole considered, or would do well to consider, as "crimes of States"? In other words, could not that list, if indeed it was desirable to maintain a list, be "updated"?

60. Thirdly, in examining practice, it was often difficult to distinguish cases of crime from cases of delict, especially where very serious delicts were involved. Might not the reason lie partly in the manner in which the general notion of crime contained in article 19 was formulated, with wording characterized by certain elements that perhaps rendered it difficult to classify a breach as belonging to the category of crimes or that of delicts and hence to ascertain which unlawful acts now came, or ought to be placed, under a regime of "aggravated" responsibility.

61. Fourthly, if it was true that there existed a certain gradation from ordinary violations to "international crimes", especially from the standpoint of the regime of responsibility they entailed, was it in fact proper to make a clear-cut nominative distinction between "crimes" and "delicts"?

62. Mr. THIAM, supported by Mr. YANKOV, said that, in view of the wealth of material contained in the fifth report on State responsibility, any substantive discussion of the topic should be deferred until the Commission's next session.

63. The CHAIRMAN said that any member who wished to speak on the topic at the present session could, of course, do so. However, since the number of speakers was likely to be limited, the debate would probably not be representative of existing trends. He therefore suggested that in the report of the Commission on the work of its forty-fifth session (1993) the topic of State responsibility should be confined to the introduction just given by the Special Rapporteur, on the understanding that any views expressed at the present session would be reflected in the summary of the debate in the report of the Commission on the work of its forty-sixth session (1994). The Special Rapporteur might receive from the Sixth Committee the guidance which he was requesting concerning the questions he had raised.

64. Mr. ROSENSTOCK said that he could agree to defer the discussion to the next session. However, he wished to make it clear that his silence on the Special Rapporteur's comments on current activities in the United Nations system should not be interpreted as indicating either agreement or disagreement. The distinction made in article 19 of part 1 remained a disturbing example of the "taxonomania" in the first part of the report. If the Commission followed that approach, its work on the topic would not be completed within anyone's lifetime. Instead of making such distinctions, the Commission needed to consider a continuum of wrongful acts and ways of dealing with them.

65. Mr. VERESHCHETIN said that the Special Rapporteur's introduction of his fifth report had been brilliant but also tendentious in that he had tried to demonstrate that the codification of norms concerning the consequences of crimes was an impossible task. He

could not agree. He supported Mr. Thiam's suggestion to defer the discussion: the report of the Commission on the work of its forty-fifth session should merely state that the fifth report on State responsibility had been introduced and that the substantive discussion of the topic would begin in 1994.

66. Mr. KUSUMA-ATMADJA said he agreed that the discussion of the topic should be deferred. The Special Rapporteur's introduction had been brilliant: intellectual courage was indeed needed for the progressive development of international law. When the Commission had been established, international law had consisted essentially of inter-State law. The law of the sea provided a good example of how things had moved on since then. International law was in a period of transition, and the problems went far beyond inter-State law. Deferral of the discussion would not solve what was a very long-term problem.

67. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was apparent that there would not be an exchange of substantive views at the present session, although comments from the Commission would have helped him in his future work on the topic. The question of crimes was a difficult one, and it was possible that even in 1994 he would not be able to produce anything more than another list of questions. However, he would do his best, and advice might be forthcoming from academic circles.

68. On the point made by Mr. Rosenstock, it was the duty of any international lawyer to look as objectively as possible at any problems raised by the practice of States or international bodies that was relevant to the topic and to evaluate how existing international instruments had worked in the past and would work in the future with respect to crimes. He was not sure what Mr. Vereshchetin meant by "tendentious". In the report he had stated his doubts about certain problems and some recent practices in the United Nations system. The problem was one of crimes, which States certainly did commit. He was torn between the position of those who wanted article 19 of part 1 to be dropped and that of Mr. Vereshchetin, who wanted something to be done on the question of crimes. He simply did not know what to do, for he was genuinely perplexed by the contrast between the legal means available and the need to curb the phenomenon of criminality.

69. Mr. AL-KHASAWNEH, speaking on a preliminary basis, recalled that the previous Special Rapporteur had envisaged a "three-tier" system in terms of the consequences of delicts, crimes, and the crime of aggression which carried additional consequences to those of other crimes.

70. He also recalled that in an earlier report on the topic of the draft Code of Crimes against the Peace and Security of Mankind, Mr. Thiam, when commenting on the fact that "criminal law was steeped in subjectivity",¹² had spoken of the fact that the reprobation created in the public conscience as a reaction to the commission of a certain act was never uniform. With that in mind he wished to ask the Special Rapporteur whether he wished to maintain the classification of his predecessor, Mr. Ri-

¹² *Yearbook*... 1985, vol. II (Part One), p. 69, document A/CN.4/387, para. 47.

phagen, as far as the additional consequences of the crime of aggression were concerned.

71. Mr. ROSENSTOCK said that he had not intended to suggest any impropriety in the Special Rapporteur's reference to decisions taken in the United Nations system. However, he doubted the correctness of what the Special Rapporteur had said and wanted to emphasize the point which he had made about the interpretation of his own silence.

72. If there was any substantive discussion of the topic at the present session it must be included in the 1993 report. It would in fact be better not to have such a discussion; that report could then refer merely to the exchange of a few preliminary remarks.

73. Mr. THIAM said he endorsed the last point made by Mr. Rosenstock.

74. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was glad that Mr. Rosenstock was not taking a stand for or against any position on the issue. He had not done so either: he had merely described the perplexing legal problems.

75. Mr. AL-KHASAWNEH said he was still puzzled as to why a "small aggression", for example, should carry more consequences than a large-scale genocide.

76. Mr. ARANGIO-RUIZ (Special Rapporteur) said, in response to Mr. Al-Khasawneh, that in his report and his introduction he had indeed referred to the need to distinguish acts of aggression from other crimes. Acts of aggression posed less of a problem because there was a specialized United Nations body to deal with them, at least for the purposes of the maintenance of peace and security. The Commission was in a more difficult position with respect to other crimes.

77. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to proceed along the lines just suggested by Mr. Rosenstock and supported by Mr. Thiam.

It was so agreed.

The meeting rose at 1.05 p.m.

2316th MEETING

Tuesday, 6 July 1993, at 10 a.m.

Chairman: Mr. Julio BARBOZA

later: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

CONSIDERATION OF DRAFT ARTICLE 1, PARAGRAPH 2, AND OF DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* OF PART 2, AS ADOPTED BY THE DRAFTING COMMITTEE AT THE FORTY-FOURTH SESSION² (*continued*)*

1. The CHAIRMAN, speaking as a member of the Commission, asked for his position on the text of article 1, paragraph 2, of part 2 of the draft on State responsibility to be reflected in the summary record of the discussions in the Commission. Actually, the text appeared to make for some confusion by subjecting the State which had committed the internationally wrongful act to obligations which fell into two different categories and did not have the same source. On the one hand, there was the primary obligation, for example, which had its source in a treaty between the States concerned, and on the other hand, secondary obligations, which were the legal consequences of the internationally wrongful act and which had their source in the convention that the Commission was in the process of drafting. Endorsing the proposed text would mean completely ignoring the distinction between primary obligations and secondary obligations, which the Commission had been using successfully for many years and which was not simply a trick of formal logic that could be applied when it suited the Commission to do so. On the contrary, in his opinion, it corresponded to inescapable reality.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he partly agreed with Mr. Barboza's views and explained that the paragraph in question had not originally been part of his proposed text. He had tried, without success to prevent it being added to the draft article.

3. Mr. YANKOV said that, as he had indicated at the previous session in his capacity as Chairman of the Drafting Committee, article 1, paragraph 2, had been designed as a safeguard clause in regard to the general rule set out in the article.³ It had been intended to show that new relations formed after the internationally wrongful act did not automatically relieve the State committing the act from its duty to perform the obligation it had breached. He failed to see how that safeguard clause would destroy the structure of the article and, in the absence of convincing arguments, he could not endorse any proposal to delete it.

4. The CHAIRMAN pointed out that the Commission had already adopted the text in question.

5. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, for personal reasons, he was compelled to be away from Geneva until the middle of the following week. During his absence, the Drafting Committee could, as it was perfectly entitled to do, move ahead in finding a solution to difficulties of both form and substance still posed by article 12 as he had proposed at the previous

* Resumed from the 2314th meeting.

¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

² Document A/CN.4/L.472.

³ See *Yearbook*... 1992, vol. I. 2288th meeting, para. 13.

session.⁴ The article raised more difficulties than the Drafting Committee had considered so far: interim measures, prior communication, and so on. He wished, through the Chairman, to call the attention of all members of the Commission, whether or not they were members of the Drafting Committee, to the crucial importance of article 12. Whatever its faults of form or substance, which could not in any case be decisive, paragraph 1 (a) was essentially intended to declare unambiguously that resort to countermeasures was not admissible prior to recourse to settlement procedures provided for in international rules binding on the parties in a responsibility relationship. In other words, according to his original proposal, the settlement procedures available—by virtue of existing commitments between the parties—should be implemented before the injured State took any countermeasure. Other drafts with essentially the same effect had been proposed to the Drafting Committee, including one by the Chairman himself, who was convinced that a provision of that type was needed.

6. The Drafting Committee had for a number of meetings been discussing a so-called compromise solution which was unquestionably a reversal of that rule, since it provided that resort to available settlement procedures could follow or be concomitant with the adoption of countermeasures, without the slightest distinction being drawn between definitive and interim countermeasures. Such a rule would mean legalizing any arbitrary resort to unilateral measures before the least kind of settlement procedure was implemented. Adopting that rule, even if the text was placed in square brackets, would be highly detrimental to the work of codifying and developing the law on State responsibility. The Drafting Committee would be legitimizing in advance practically unfettered resort to unilateral reactions, something which would not fail, as was often the case with drafts by the Commission, to attract the immediate attention of public and private commentators, regardless of the status of the text and regardless of any square brackets or footnotes. The effects of adopting such a text would be all the more negative in that the Drafting Committee would thus have set aside the basic rule of the pre-countermeasure phase, namely the rule of prior resort to available procedures, before taking even a glance at part 3 of the draft which was now before it and concerned the settlement of disputes.

7. He trusted that members of the Commission who shared his views about the importance of article 12 would not fail to attend meetings of the Drafting Committee, whether or not they were members of that Committee. In that regard, the double composition of the Drafting Committee was not helpful, since it led to situations in which participation in the Drafting Committee was so small that it was doubtful whether a quorum was reached. This had been the case particularly during the discussion of the most crucial elements of article 12. He had frequently missed the presence of members whom he had heard speak in plenary in favour of the requirement for prior recourse to dispute settlement procedures. The Drafting Committee ought not to operate in such

conditions. It was not fitting for a special rapporteur to have to insist more than was reasonable on his views, but important questions should be dealt with by a full, or virtually full, Drafting Committee, for which 10 participants were the strict minimum. If such was the case, he would be very happy to find on his return that the problem of article 12 had been settled.

Mr. Eiriksson took the Chair.

8. Mr. CALERO RODRIGUES said that the discussion in plenary was not concerned with article 12, but since a statement had just been made in regard to that subject, he wished to say publicly that he entirely disagreed with the Special Rapporteur's analysis.

9. Mr. MIKULKA (Chairman of the Drafting Committee) said that it would be wise for the Drafting Committee to meet at least once in the presence of the Special Rapporteur, with the participation of the largest possible number of members of the Committee.

10. Mr. BENNOUNA said that the solution proposed by the Chairman of the Drafting Committee would avoid a debate in plenary and the Chairman should follow it up.

11. Mr. VILLAGRÁN KRAMER said that the Bureau should definitely follow up the request of the Chairman of the Drafting Committee, so that the Committee could allocate one or two meetings, in the presence of the Special Rapporteur, to the question of article 12. It was a delicate and complex question that had a bearing not only on part 3 of the draft but also on the distinction between international crimes and delicts. The Committee had now been considering the matter for two months without reaching agreement on a suitable formula. If the Commission discussed it openly, in the presence of the Special Rapporteur and a majority of the members of the Drafting Committee, it would perhaps be possible to find a solution.

12. The CHAIRMAN, after consulting the other members of the Bureau, said that the Drafting Committee would hold a meeting on article 12 that very afternoon.

ARTICLE 6 *bis* (Reparation) (*concluded*)

13. Mr. VERESHCHETIN recalled that, at the last meeting at which the Commission had considered article 6 *bis* (2314th meeting), he had proposed that it should incorporate some of the provisions contained in article 7. The exceptions in subparagraphs (b) to (d) of article 7 did not relate solely to restitution in kind; they were also applicable to other forms of reparation. He had therefore circulated the text of a proposed amendment to be inserted after the first paragraph of article 6 *bis*, a new paragraph which, in its subparagraphs (a), (b) and (c), would reproduce subparagraphs (b), (c) and (d) of article 7.

14. Mr. ARANGIO-RUIZ (Special Rapporteur) said he wondered how the exception in subparagraph (a) of the text proposed by Mr. Vereshchetin could apply to compensation, and whether the situations would not in that case be those in subparagraphs (b) or (c). Quite obviously, the relationship between the three subparagraphs was not clear. In the initial formulation of article 7, the three exceptions in question were deemed to

⁴ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook*... 1992, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

apply only to restitution in kind, because it concerned a form of reparation that could place an excessively heavy burden on the wrongdoing State. He asked whether the same could be said of the other forms of reparation, and particularly compensation. Again, applying the exception in subparagraph (c) to compensation would mean expressly and unnecessarily introducing into that form of reparation the principle of equity, which should implicitly be taken into account in any decision by an arbitral tribunal or by ICJ, but which should not explicitly be made an additional source.

15. Mr. VERESHCHETIN said he was convinced that the exception in subparagraph (a) applied in any case to all forms of reparation, including compensation, if only in the situation the Special Rapporteur himself had mentioned in the Drafting Committee, namely a situation in which the Government of one State relinquished the restitution of territory illegally occupied by another State and opted in exchange for compensation. It would unquestionably be a breach of a peremptory norm of general international law. As to subparagraph (c), he could not see why the principle of proportionality should not apply to the other forms of reparation.

16. Mr. ROSENSTOCK said that it would be a mistake to subject the various forms of reparation to the conditions set out in subparagraphs (b) and (c) of Mr. Vereshchetin's proposal, for to do so would be to seriously affect the rights of the injured State. The question of the condition concerning peremptory norms of general international law, in subparagraph (a) of the proposal, was more complex. The difficulty lay partly in the fact that the condition was set out in article 7, where it was not necessary, since respect for peremptory norms of general international law was essential in all cases, and there was no need for an express reference to them. Furthermore, article 6 *bis* concerned the rights of the injured State and not the options available to the wrongdoing State. Accordingly, it did not seem desirable to set forth a rule expressly limiting the injured State's freedom of action. Lastly, it would be a mistake to include subparagraphs (b) and (c) of Mr. Vereshchetin's proposal in article 6 *bis*, and he was not persuaded that it was advisable to include subparagraph (a).

17. Mr. YANKOV said that as Chairman of the Drafting Committee in 1992 he was in a position to state that, after considering article 6 *bis* at length and recasting it a number of times, the Drafting Committee had considered that it was a kind of *chapeau* article setting out principles applicable to all the forms of reparation mentioned in paragraph 1 of the article. The conditions in subparagraphs (a) and (d) of article 7 had been included in that article precisely for the reasons given by the Special Rapporteur.

18. He had at first been in favour of Mr. Vereshchetin's proposal, but on further reflection he thought that caution was necessary. It was difficult to see in particular how subparagraphs (a), (b) and (c) could apply to satisfaction and, for example, how satisfaction could be contrary to a peremptory norm of general international law. The same was also true of guarantees of non-repetition. The General Assembly's attention should indeed be drawn to the important issues raised by Mr. Vereshchetin, but the question deserved to be studied in

greater depth, in view of the possible consequences of adopting Mr. Vereshchetin's proposal.

19. Mr. VERESHCHETIN pointed out that precisely because article 6 *bis* was a *chapeau* article, his proposal was to set out the conditions governing all forms of reparation in that article, rather than in article 7, which was concerned solely with restitution in kind.

20. Mr. BENNOUNA said that, like Mr. Yankov, he thought the Commission should be cautious. It was quite obvious that, while subparagraphs (a) to (c) of the text proposed by Mr. Vereshchetin applied to *restitutio*, a form of reparation that involved risks, the same was not true of other forms of reparation. The Commission should look into the matter further before taking a decision.

21. Mr. TOMUSCHAT said he endorsed the comments made by Mr. Bennouna and Mr. Yankov. Moreover, he questioned whether it was really necessary to mention peremptory norms of general international law, for they would apply in any case. Again, the conditions in subparagraphs (b) and (c) of Mr. Vereshchetin's text might weaken the provisions of article 8, concerning compensation, residual provisions which the injured State could always invoke "if and to the extent that the damage is not made good by restitution in kind". Actually, if conditions (b) and (c) were applicable to compensation, the wrongdoing State would not fail to invoke them. It would therefore be better for article 6 *bis* to remain as it stood.

22. Mr. VILLAGRÁN KRAMER pointed out that it was PCIJ which had ruled that when *restitutio* was impossible the injured State had to be compensated. The question, therefore, was what options were available to the injured State when compensation was impossible. In that regard, Mr. Vereshchetin's proposal raised a very interesting question for small countries, namely, the difference between justice and equity. The question was to what extent the Commission should move ahead in regard to equity and find solutions to problems that would be encountered by some countries in order to discharge their obligation to make reparation.

23. From a legal standpoint, Mr. Vereshchetin was unquestionably right about the peremptory norms of general international law, which by their very nature did apply, whether to *restitutio*, compensation or even satisfaction. As to the conditions set out in subparagraphs (b) and (c) of Mr. Vereshchetin's proposal, it was difficult to see how they could apply to satisfaction or to guarantees of non-repetition. He would therefore like explanations on that point and considered that the question none the less deserved to be examined in greater depth.

24. Mr. ARANGIO-RUIZ (Special Rapporteur), replying to a question by Mr. KOROMA on Mr. Vereshchetin's proposal, said that it was interesting but, like Mr. Yankov and other members, he thought it could be taken up later, possibly on second reading.

25. The CHAIRMAN, speaking as a member of the Commission, said that, in the Drafting Committee, he had expressed serious reservations about the need or utility of including the conditions which were set out in subparagraphs (b) and (d) of article 7 and were reproduced in Mr. Vereshchetin's proposal. He had agreed to them in the Drafting Committee in regard to article 7, in other

words, restitution, in a spirit of compromise. That did not mean he would favour them being included in an article which concerned the other forms of reparation.

26. Mr. KABATSI said Mr. Vereshchetin's proposal deserved careful consideration. In his opinion, the exceptions set out in subparagraphs (b) and (c) could apply to forms of reparation other than *restitutio*.

27. Mr. THIAM said the Commission should be grateful to Mr. Vereshchetin for having raised certain important issues. Personally, he favoured the proposal, but the Commission should be given more time to examine it. It did not seem possible to take an immediate decision at that stage on a proposal that had such implications.

28. Mr. VERESHCHETIN said that the discussion on his proposal proved the Commission would need to revert to the questions it raised. He did not press for an immediate decision, but he believed that those questions would have to be examined, probably on second reading. He was convinced that the conditions set out in subparagraphs (a) to (c) of his proposed text did not apply solely to restitution in kind, and it was for that reason that the present text was difficult to accept. Article 10, paragraph 2 (c), for example, showed that the conditions set out in subparagraph (b) of his proposal applied to satisfaction. Apparently the majority of members of the Commission did not wish to take a decision at the present stage, but he hoped that the Commission would examine those questions in due course as they deserved, in the light of observations by Governments.

29. The CHAIRMAN said that Mr. Vereshchetin's proposal could be reproduced in its entirety in the summary record, together with the discussion to which it had given rise.

30. Mr. VERESHCHETIN said that the discussion could perhaps be placed in the commentary to article 6 *bis*. He would also like his proposal, which he had submitted in writing, to be reproduced in the commentary.

31. Mr. THIAM said it was difficult to understand exactly what decision the Commission was taking in regard to Mr. Vereshchetin's proposal.

32. The CHAIRMAN proposed that article 6 *bis* should be adopted in its present form, since Mr. Vereshchetin had explained that he was not pressing for an immediate decision on his proposal.

33. Mr. YANKOV recalled that when, in connection with reparation, Mr. Mahiou had mentioned the situation in which a number of States were concerned and had emphasized the complex problems that would arise, it had ultimately been decided that the best course was to reflect the discussion in the commentary, stating that it would be for the tribunal to settle the matter in each case. Mr. Vereshchetin's proposal could also be reflected in the commentary. As to the rest, he endorsed the Drafting Committee's text and proposed that it should be adopted without any change.

34. The CHAIRMAN pointed out that the discussion on article 6 *bis* and on Mr. Vereshchetin's proposed amendment would in any case appear in the summary record.

35. Mr. KOROMA asked whether that meant that the discussion would also be reflected in the Commission's report to the Sixth Committee. Otherwise, the Sixth

Committee might get the impression that article 6 *bis* had been unconditionally approved by the members of the Commission, which was not the case.

36. Mr. TOMUSCHAT said he, too, thought the discussion could be reflected in the commentary that the Special Rapporteur would be preparing on the draft article, so as to draw the Sixth Committee's attention to Mr. Vereshchetin's proposed amendment.

37. The CHAIRMAN said he fully agreed with that suggestion. For example, it could be mentioned in the commentary to article 7 that the conditions in subparagraphs (a) to (d), also applied in other cases. Perhaps the Special Rapporteur might wish to take note of that.

38. Mr. YANKOV said that that was precisely what he had proposed: Mr. Vereshchetin's proposal and the resulting discussion could be reflected in the commentary to article 7.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it might be better for the discussion to be reflected in the commentary to article 6 *bis*, with perhaps a reference to article 7.

Article 6 bis was adopted.

Mr. Barboza resumed the Chair.

ARTICLE 7 (Restitution in kind)

Article 7 was adopted.

ARTICLE 8 (Compensation)

Article 8 was adopted.

ARTICLE 10 (Satisfaction)

40. Mr. RAZAFINDRALAMBO drew attention to article 10, paragraph 2 (d), which read:

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct, disciplinary action against, or punishment of, those responsible.

Without further explanations the "criminal conduct" in question might be regarded as that of private individuals. However, it was apparent from the work of the Drafting Committee⁵ that the provision applied both to State officials and to private individuals. To make article 10 clearer in that regard, subparagraph (d) should be amended to read: "in cases where the internationally wrongful act arose from the serious misconduct or criminal conduct of officials or private individuals ...". It would then be obvious that "criminal conduct" could also be imputed to State officials.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said he agreed to that proposal, which seemed reasonable. In English it would be better to say "... from the serious misconduct or criminal conduct of officials or private parties ...".

42. Mr. EIRIKSSON said he did not agree. A distinction had been drawn in that subparagraph between the serious misconduct of officials, on the one hand, and criminal conduct by anyone, including officials and private individuals on the other. That distinction should be maintained. The effect of Mr. Razafindralambo's pro-

⁵ See *Yearbook* ... 1992, vol. I, 2288th meeting, para. 58.

posal would be to apply the notion of serious misconduct to private individuals, which was not in keeping with the meaning of the article.

43. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the Commission had been very clear. He believed the Commission was aware that extensive application of that form of satisfaction might result in undue interference in the internal affairs of States. It had therefore limited the scope of application of the subparagraph to criminal conduct whether of officials or private individuals and to serious misconduct of officials. It was not certain that that was quite clear from the English text of the article. Perhaps it would be possible to add something to bring out clearly that "criminal conduct" could indeed be the conduct of officials and of private individuals.

44. Mr. RAZAFINDRALAMBO pointed out that that was precisely the purpose of his proposal, which should perhaps be explained at greater length in the commentary on article 10.

45. Mr. VERESHCHETIN said he would like in that regard to revert to the work of the Drafting Committee where in connection with article 10, paragraph 2 (d), it was said that:

The subparagraph was constructed so as to make it clear that criminal conduct was punishable whether it was to be ascribed to State officials or to private individuals, whereas disciplinary action would of course be limited to officials.⁶

46. Hence, the idea underlying article 10, paragraph 2 (d), was that criminal conduct could be the conduct of both officials and individuals, whereas disciplinary action related solely to officials. That was not perhaps very clear from the French text of the subparagraph, but the English version did seem to reflect the position adopted by the Drafting Committee.

47. Mr. TOMUSCHAT said that the text could certainly be kept in its present form. If the meaning was to be made clearer, it would be better to do so as suggested by the Special Rapporteur rather than to follow Mr. Razafindralambo's proposal, which would have the effect of applying the concept of "serious misconduct" to individuals, when it applied only to State officials. However, by making the text more explicit, it could well become more cumbersome.

48. The CHAIRMAN said that perhaps the best solution would be to reverse the order of terms and say "... arose from criminal conduct of officials or private individuals or serious misconduct of officials ...".

49. Mr. CALERO RODRIGUES said he did not think that was necessary. In its present form, the text was sufficiently clear, but in the French version it might be better to add the words *de ces agents ou de particuliers après agissements criminels*.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was not opposed to that suggestion, even though repetitions seemed more tolerable in English than in the other languages.

51. Mr. EIRIKSSON said that, if the subparagraph was to be changed, he would prefer the Chairman's suggestion to reverse the order of terms: "... arose from criminal

conduct of individuals or from serious misconduct of officials ...".

52. Mr. THIAM said that he did not understand Mr. Eiriksson's proposal. Was it to be inferred that State officials could not engage in criminal conduct?

53. Mr. ROSENSTOCK said that, in the English version at least, the subparagraph seemed perfectly clear and in keeping with what had been proposed by the Drafting Committee. Perhaps an even more explicit formulation could be found, but a plenary meeting of the Commission was certainly not the best place to discuss it. In his opinion, it would be enough to insert in the commentary a remark or footnote indicating that the wording of the article should be considered more closely on second reading, it being understood that the members of the Commission wished fully to respect the intentions expressed by the Drafting Committee, as reflected in the discussions on the work of the Drafting Committee.⁷ In that way it would be possible to avoid losing time and possibly spoiling what was in fact a very acceptable text.

54. The CHAIRMAN, summing up the discussion, said the Commission therefore had a choice: either to adopt the proposal by Mr. Razafindralambo or by Mr. Calero Rodrigues, or to leave the text as it was, with a note in the commentary, as proposed by Mr. Rosenstock.

55. Mr. EIRIKSSON said that he would prefer a formulation in the singular: "of an official" and "of that official". In response to a comment by Mr. Thiam, he pointed out that he was referring to private individuals not in contrast to State officials but in contrast to artificial persons.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that, in the English version, the words "of officials or private individuals" should be repeated after the word "conduct".

57. Mr. GÜNEY said that the proposal by the Special Rapporteur and the proposal by Mr. Calero Rodrigues would make for some ambiguity: if the text stated "criminal conduct of officials or private individuals", the disciplinary action referred to afterwards would seem to apply also to private individuals, which was not possible. Accordingly, the best course might be to adopt the solution proposed by Mr. Rosenstock and to review the formulation of the subparagraph on second reading.

58. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it was impossible for "serious misconduct" to be ascribed to private individuals, who could not therefore be the object of disciplinary action.

59. Mr. CALERO RODRIGUES pointed out that the problem raised by Mr. Güney did not lie in the proposed amendment. The ambiguity already existed in the text, but that was not really a problem since no one would conceive of disciplinary action against individuals. He did not wish to press for adoption of the formulation he had proposed, but if members wished to make the subparagraph more explicit, either his own proposal or that of the Special Rapporteur seemed equally acceptable. There was also a minor problem of translation in regard to article 10, paragraph 2 (c). The words "gross infringement" had been translated into French by *atteinte*

⁶ Ibid.

⁷ Ibid.

flagrante. Would it not be better to speak of *atteinte grave*?

60. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10 with the changes to paragraphs 2 (c) and 2 (d) proposed by Mr. Calero Rodrigues.

It was so agreed.

Article 10 was adopted.

ARTICLE 10 *bis* (Assurances and guarantees of non-repetition)

Article 10 bis was adopted.

The law of the non-navigational uses of international watercourses (continued)* (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,⁸ A/CN.4/451,⁹ A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

61. Mr. ROSENSTOCK (Special Rapporteur) said that, unfortunately, circumstances beyond his control had prevented him from following all of the discussion, but he believed he had none the less gained a sufficiently accurate idea from the summary records transmitted to him by the secretariat and from written observations sent to him by some of his colleagues.

62. It was reassuring to see the constructive approach adopted by all speakers, except one. Admittedly, not all had approved each and every one of his suggestions, but they had all unquestionably been motivated by a common purpose, one which he shared. He had no axe to grind and concrete results alone counted, results that the whole of the Commission could be proud of.

63. On the question of the nature of the instrument, he had heard the message loud and clear. While no final decision would yet be made, the preference was clearly for a framework convention. Some members had regarded the generally favourable comments of Governments as auguring well for wide ratification. For his own part, he still feared that States which did not have significant international watercourses would not bother to ratify the convention and that many of those with substantial international watercourses might prefer to deal with questions on an ad hoc basis. In that regard, the view expressed in the comments by the Government of the Netherlands, a classic lower riparian State, that the incorporation of the draft articles in a recommendation providing guidelines for the conclusion of binding agreements on individual watercourses should not be lightly dismissed.

64. While he invited members to keep an open mind on that question, he would not go against the current and would approach the issue in the Drafting Committee on the basis of the implicit bias in the text adopted on first

reading and the preference expressed at the present session for a framework convention.

65. Before taking up more specific matters, he wished to make a few comments on the notion of good faith, which was relevant to treaties in general and in particular to any treaty that emerged from the Commission's work on the topic. It would be dangerous and unwise to suggest that the principle of good faith applied more to some articles or clauses than others in view of the *a contrario* consequences that manifestly stemmed from such a principle.

66. As to the 10 articles, and first of all article 1, he particularly appreciated the judicious proposal by Mr. Yankov (2312th meeting) to add the word "management", before "conservation", in paragraph 1.

67. With regard to article 2, the question was whether to retain the phrase "flowing into a common terminus". Subject to the open question of unrelated confined groundwaters, to which he would return in subsequent reports, there too he had noted the desire to retain the notion of flowing into a common terminus, even though he had not heard any overwhelmingly convincing arguments. Perhaps the perceived problems were mitigated or resolved by the conditions set out in article 3, paragraph 2, of the draft namely "where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies", and the careful distinction drawn in article 4 between system-wide agreements and agreements which applied only to a part of the watercourse. The Code of Conduct on Accidental Pollution of Transboundary Inland Waters¹⁰ contained no requirement about flowing into a common terminus. Lastly, the experts on ILA's Water Resources Committee favoured deletion of the phrase, pointing out that such a notion had never been included in the recommendations of any previous special rapporteurs. He hoped that those members of the Commission who supported retention of the concept of a common terminus would reflect further on the matter. For his part, he would not press for deletion unless, on further study, he concluded that the Commission should deal with unrelated confined groundwaters and that elimination of the common terminus notion was the best way to do so. In that case, he would explore the possibility of mitigating any concern about express language to the effect that a system which was artificially connected to an international watercourse system was not deemed part of that system.

68. As to article 3, there was substantial support for the drafting change—which should indeed be regarded as no more than that—of replacing the ambiguous word "appreciable" by the term "significant". The justification for using the term "significant" in the topic of international liability for injurious consequences arising out of acts not prohibited by international law applied with equal force to the present topic. It should also be made clear in the commentary that the change was intended not to raise the threshold of harm but rather to avoid an artificial lowering of the threshold as the scientific meth-

* Resumed from the 2314th meeting.

⁸ Reproduced in *Yearbook*... 1993, vol. II (Part One).

⁹ Ibid.

¹⁰ E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

ods of measurement or assessment became ever more refined.

69. With regard to possible changes in article 3 to reflect the relationship between the draft framework convention and previous agreements, there seemed to be a preference for maintaining the status quo. Mr. Mahiou (*ibid.*) had correctly said that all those questions could be dealt with by the law of treaties. He had been trying to respond to some comments by Government, but would not press the matter further.

70. A variety of views had been expressed in the Commission on the relationship between articles 5 and 7. Some members would go further than what he was proposing and simply delete article 7, other members agreed with him, and still others partly agreed, especially about inserting the notion of "due diligence". Then again, some members were opposed to any of the changes to the scheme contained in the 1991 draft. Those matters would have to be thrashed out in the Drafting Committee.

71. The fact that there appeared to be a greater willingness to accept dispute settlement might well point the way to a means of avoiding artificial constraints on optimal utilization, while providing protection from significant harm.

72. He also urged members to reflect on the fact that, if articles 5 and 7 were kept in their present form, there was a considerable risk of undue importance being attached to prior uses—often by a more developed lower riparian State.

73. Interesting comments had been made on various aspects of articles 8, 9 and 10, but no fundamentally new issues had been raised during the discussion.

74. In conclusion, he recommended that the articles discussed in his first report should be referred to the Drafting Committee. If the Committee could begin work on the draft at the present session, there was reason to remain optimistic that the Commission would be in a position to complete consideration of the topic at the next session.

75. The CHAIRMAN invited the Commission to decide on the Special Rapporteur's recommendation to refer articles 1 to 10 of the draft to the Drafting Committee.

76. Mr. SZEKELY thanked the Special Rapporteur for an excellent summing-up of the discussion in plenary, but said he regretted that he had not reported more faithfully on the diverse opinions expressed about the desirability of altering the adjective to qualify harm and had rather hastily concluded that progress could be made by replacing "appreciable" by "significant".

77. It was a question which, in the course of the session, had been discussed in different contexts and about which there was still clearly a dilemma. Consequently, if the Commission decided to refer the draft articles to the Drafting Committee, the articles would not, in view of the nature of the discussion on the qualification of harm, be an amended version in which "appreciable" was replaced by "significant". The articles should be referred

to the Drafting Committee, but with two alternatives, in other words, "appreciable" and "significant", possibly placed in square brackets, so as to reflect the real situation and to show that the question was still pending and had not been settled once and for all.

78. The CHAIRMAN said that, in his understanding, the articles would be referred to the Drafting Committee as worded in the draft and it would be for the Committee to assess, in the light of the discussion, whether a change was to be made. It was therefore pointless to place "appreciable" or "significant" in square brackets.

79. Mr. SZEKELY said that, in that case, he had no objection to referring the articles to the Drafting Committee. It should none the less be noted that a differing opinion had been expressed about the way in which the question had been discussed in plenary.

80. The CHAIRMAN said the Drafting Committee would have to consider an important point, namely the translation into Spanish of the English word "significant". The Spanish word *importante* did not faithfully render the English word "significant" and a change should be made in the Spanish version of the text.

81. Mr. SZEKELY said that, in his opinion, "significant" should be translated by *significativo* and not *importante*. Without prejudging the Drafting Committee's final decision, he would point out that, as the Commission had noted in the course of the session, the question was not one of translation in the various languages but one of substance.

82. The CHAIRMAN said that he took note of the Special Rapporteur's statement that the change in the term was not intended to raise the threshold of harm; that was a very important clarification.

83. Mr. YANKOV said that, in the main, he endorsed the Special Rapporteur's statement, with three minor reservations. The first was the desirability of incorporating the notion of diligence, either in part I or in part II.

84. Secondly, with reference to the introduction of the first report, mention should be made of new developments since the adoption of the draft articles on first reading, including Agenda 21¹¹ and the Rio Declaration on Environment and Development,¹² and their implications. Room could be made for them, perhaps in parts I and II, but above all in part III, on management problems.

85. Lastly, he had already pointed out that he had not adopted a position on replacing the word "appreciable" by "significant". He would simply urge the Commission, before taking any final decision, to look further into the possible consequences of its choice.

86. Mr. GÜNEY said he did not object to the articles being referred to the Drafting Committee if there was general agreement to do so, provided the membership of the Drafting Committee was reviewed in the light of the

¹¹ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

¹² *Ibid.*, pp. 3-8.

decision of principle taken in that regard at the beginning of the session.

87. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 1 to 10, contained in the first report, to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

2317th MEETING

Wednesday, 7 July 1993, at 11.10 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Gudmundur EIRIKSSON

Present: Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/446, sect. E, A/CN.4/L.479)

[Agenda item 6]

1. The CHAIRMAN said that, at its meeting which had just ended, the Enlarged Bureau had taken note of the report of the Planning Group (A/CN.4/L.479) and had decided to transmit it to the Commission. The Commission had to determine whether the views and recommendations of the Planning Group were acceptable and should be submitted to the General Assembly as part of the Commission's report.

2. Mr. EIRIKSSON (Chairman of the Planning Group) said that the report contained three groups of recommendations. First, on the planning of the activities for the remainder of the quinquennium, the Planning Group recommended in paragraph 7 that the Commission should endeavour to complete by 1994 the draft statute of an international criminal court and the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and by 1996 the second reading of the articles of the draft Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It also recommended that the Commission should endeavour to make substantial progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Paragraph 10 referred to a tentative schedule of work for the 1994, 1995 and 1996 sessions that was annexed to the report.

3. The second group of recommendations concerned the long-term programme of work. In paragraph 13 of the report, the Planning Group noted that the Working Group on the long-term programme of work had recommended the incorporation in the agenda of two new topics: "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". In paragraph 26 of the report, the Planning Group recommended the inclusion of the two topics and, in paragraph 27, it referred to the question of whether the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses should undertake a study on the feasibility of incorporating the question of "confined underground water" in the topic. In paragraph 28 it recommended that such a request should be addressed to the Special Rapporteur.

4. The third group of recommendations concerned the Commission's contribution to the United Nations Decade of International Law,¹ and the Planning Group recommended that the Commission should approve the arrangements proposed by the Working Group as set out in paragraph 31.

5. If the Commission endorsed the three groups of recommendations, together with the other recommendations contained in the report under "Other matters", they would appear as the final chapter of the Commission's report.

6. Mr. SZEKELY said that the report was an excellent one and provided guidance for the Commission. However, the two new topics proposed in paragraph 13 were extremely technical and, while no doubt of interest to experts, were not perhaps the most urgent in terms of the Commission's contribution to international law. Their selection illustrated a trend in the Commission to give preference to more technical topics, a trend that would be offset to a considerable extent if the Commission decided to include the very topical question of confined underground water in the topic of the law of the non-navigational uses of international watercourses. If it did so decide, the title of the topic might have to be changed.

7. Mr. MAHIOU said that he endorsed Mr. Szekely's comments on the proposed new topics. The Commission ran the risk of giving the impression that certain important topics could not be codified and that it preferred to stick to the subjects of the greatest interest to itself. The Planning Group was correct in arguing that consideration of the two topics could provide useful guidelines, but the guidelines would not amount to the codification of international law as such. He was not sure how the General Assembly would react to the proposal; it might conclude that, if the Commission could not propose topics requiring codification, it had no more work to do.

8. Mr. KOROMA said that the Planning Group had apparently not taken into account a thought-provoking report on the Commission's work produced a few years ago by UNITAR,² which had recommended that the Commission should enter new territory. He was in general agreement with the comments made on the new topics by Mr. Szekely and Mr. Mahiou. The topic of State

¹ Proclaimed by the General Assembly in its resolution 44/23.

² United Nations publication, Sales No. 81.XV.PE/1.

succession was of course relevant in the present world situation and might appeal to the General Assembly, but the technical "reservations" topic was not urgent and should not be taken up by the Commission. It would be better to propose other topics, such as the effects of General Assembly resolutions or the question of international migration, or to give further consideration to the other alternatives submitted to the Planning Group, which might be more suitable for codification. As in the past, the Commission must strike a balance between technical topics and topics of great current concern to the international community.

9. Mr. KUSUMA-ATMADJA said that he agreed to some extent with what the previous speakers had said. The urgency of a topic depended on the view taken of the Commission's function. If that function was still the codification and progressive development of international law, then the Commission might run out of topics unless it took up the ones just suggested by Mr. Koroma, or perhaps the question of the environment. But such topics were not yet ripe for codification or progressive development. In any event, the Commission should not express a view about its own continuing relevance.

10. It must be remembered that even the uncompleted work on some topics had provided useful guidelines for parties in litigation. That benefit might also accrue from the consideration of the two new topics. Furthermore, no one could say that the question of State succession was not topical, and the common practice of entering reservations had resulted, for example, in some provisions of the Vienna Convention on the Law of Treaties being circumvented. The topic now needed clarification, although a formal instrument might not be required.

11. Mr. ROSENSTOCK said that he broadly agreed with Mr. Kusuma-Atmadja. The work on the proposed new topics would be useful and could be achieved within a finite period. Taking up such topics did not mean that the Commission was turning away from the drafting of formal instruments. Moreover, it should not take on tasks it could not complete within a reasonable time.

12. Mr. SZEKELY said that he now realized that he had been too timid in his earlier statement. There was certainly no clamour from the international community or the academic world for the Commission to take up the proposed new topics. The key consideration was that the new tasks should be useful and achievable. Perhaps the best course would be for the Commission to adopt one of the topics and take a fresh look at the other in 1994. However, he was not making a formal proposal to that effect.

13. Mr. CALERO RODRIGUES said that, as a member of the Planning Group, he endorsed the recommendation concerning the two new topics. However, he agreed with Mr. Mahiou that the Commission should not depart too much from its task of the codification and progressive development of international law. The recommendation to request the Special Rapporteur to consider the inclusion of "confined underground water" in the topic of the law of the non-navigational uses of international watercourses was a good one. If the Special Rapporteur came out against inclusion, the question would still have to be addressed, perhaps as a new topic

specifically on groundwater, which certainly required international regulation. The Special Rapporteur should perhaps comment on the general question of groundwater and its regulation.

14. Mr. VERESHCHETIN said that, as a member of the Planning Group, he naturally endorsed its recommendations. He agreed to a large extent with the comments of previous speakers and in particular with the view that the Commission ought in future to include in its agenda topics that were impressive both from the theoretical and practical points of view. At the same time, the two topics currently being recommended by the Planning Group for incorporation in the Commission's agenda had been selected as a result of a thorough, unbiased and lengthy process involving a methodical review of all the information pertaining to the list of possible topics.

15. He recognized that the two recommended topics were not as impressive as some others and that, in addition, they were being regarded as topics for study rather than for codification. However, he objected categorically to Mr. Szekely's assertion that the two topics were technical and academic and failed to meet the criterion of topicality. State succession and its impact on the nationality of natural and legal persons was clearly a subject that did not fit Mr. Szekely's categorization. It was, unfortunately, all too relevant, particularly with regard to the situation in the former Soviet Union, where in some of the newly independent States more than one-third of the population had been deprived of citizenship. Those were issues on which current international law failed to give clear guidance. The topic was relevant not only to the former Soviet Union but to some European countries as well and, in his opinion, the Commission should begin considering it immediately, regardless of the final form of its work. Even a study of the issue would be valuable, given the current state of international affairs.

16. The topic entitled "The law and practice relating to reservations to treaties" was indeed academic; however, it might turn out to be more topical in the future. Furthermore, it was relevant to current State practice. For example, the members of the Commonwealth of Independent States were making so many reservations and declarations of interpretation that the legal force of the treaties concerned was in question.

Mr. Eiriksson took the Chair.

17. The CHAIRMAN, speaking in his capacity as Chairman of the Planning Group, said the Planning Group was suggesting that the Commission should decide at its next session how the proposed topics would be dealt with. No specific recommendations were being made with regard to the selection of a special rapporteur or the establishment of a working group to consider those topics.

18. If the Commission decided that it was not feasible to incorporate the question of confined underground water in the topic of the law of the non-navigational uses of international watercourses, it would subsequently have to decide whether to include that question as a separate topic in its agenda.

19. The Planning Group had recommended that the outlines prepared by members of the Commission on se-

lected topics of international law,³ should be included in the *Yearbook* of the International Law Commission for 1993.

20. In the report on its forty-second session, the Commission had referred to certain criteria for the selection of topics for its agenda.⁴ Those criteria had subsequently received general endorsement from the General Assembly and had more recently formed part of the basis on which the Working Group had chosen the two topics currently being recommended for inclusion in the Commission's programme of work.

21. Mr. ROSENSTOCK said that it was for the Commission and not for the Special Rapporteur to decide how to treat the question of confined underground water. If the Special Rapporteur were to conclude—something he was not likely to do—that the question could not be incorporated in the topic of the law of the non-navigational uses of international watercourses, he would strongly recommend that it should be taken up separately by the Commission as a matter of priority.

Mr. Barboza resumed the Chair.

22. Mr. SZEKELY said that he welcomed Mr. Rosenstock's open-mindedness with regard to the issue of confined underground water.

23. He agreed with Mr. Vereshchetin that the two recommended topics were of interest and were relevant to international law; in particular the topic on State succession was of practical relevance and any work the Commission did in that area would certainly be valuable. Nevertheless, both topics still gave the impression of being rather technical and it had to be recognized that they were not of the highest priority in terms of current international concerns. He hoped, therefore, that the choice of those two "modest" topics was not final. It would be more appropriate for the Commission to communicate to the General Assembly that consideration of new topics for its agenda was still open and that the Assembly was also welcome to offer suggestions in that regard.

24. Mr. TOMUSCHAT said that he had participated in the task of identifying topics which might be recommended for inclusion in the Committee's programme of work. Many of the "flashier" topics which had initially attracted interest had, on closer consideration, turned out to be problematic: either they had not been amenable to the identification of juridical features or they had posed problems at the political level.

25. In his view, the two subjects recommended by the Planning Group were indeed topical. He agreed with Mr. Vereshchetin that State succession was an issue of great importance for the former Soviet Union and for certain European countries; it might even at some point become relevant to the African countries. Current international law simply did not provide enough guidance on the question of newly emerging States and the right of residents to citizenship. Disputes in that matter could even threaten the application of multilateral treaties. The topic was thus well-suited for consideration by the Commission.

26. Mr. KOROMA said that, in his earlier statement, he had had no intention of impeding adoption of the Planning Group's report. He had simply wished to stress that the Commission must be responsive to the wishes of the international community.

27. The topic of the law and practice relating to reservations to treaties could be tied in with a well-defined objective: reservations to a treaty must not be contrary to the object and purpose of that treaty. Furthermore, reservations and declarations of interpretation were beginning to represent a real threat to quite a number of treaties, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. At the same time, the subject was rather "modest" in comparison with other more topical issues, such as mass migration, which was currently receiving coverage in the press and on which considerable research had already been done.

28. The topic of State succession and its impact on the nationality of natural and legal persons was clearly relevant to the current political situation. Moreover, it encompassed such issues as human rights and the application of the principles of equity and justice.

29. In his opinion, the Commission should adopt the Planning Group's recommendations on a provisional basis, while remaining open to suggestions from the Sixth Committee and the General Assembly about other topics that might be more suitable for the Commission's programme of work.

30. Mr. EIRIKSSON (Chairman of the Planning Group) pointed out that paragraph 26 of the Planning Group's report made it clear that its recommendations were subject to the approval of the General Assembly. It followed that the Commission would certainly be open to suggestions by the Assembly regarding other topics.

31. Mr. RAZAFINDRALAMBO said that it might be appropriate to delete paragraph 25 of the report, since it specified that the final form of the Commission's work on the topic of State succession and its impact on the nationality of natural and legal persons should be a study or a draft declaration.

32. Mr. ROSENSTOCK said that the text of paragraph 25 had been carefully formulated by the Planning Group and did not actually preclude the possibility that work on the topic might take other forms. He was in favour of maintaining the text as it stood.

33. Mr. KOROMA suggested that the paragraph should be amended to read: "The form of the Commission's work on that topic would be decided by the Commission at a later time".

34. Mr. EIRIKSSON (Chairman of the Planning Group) said that the wording of paragraph 25 had been carefully thought out and should remain as it stood. However, it might be appropriate to add a sentence along the lines proposed by Mr. Koroma.

35. Mr. KOROMA indicated that he was in agreement with Mr. Eiriksson's suggestion.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission had concluded its consideration of the report of the Planning Group and agreed that the Commission's views would

³ Subsequently issued as document A/CN.4/454; reproduced in *Yearbook* . . . 1993, vol. II (Part One).

⁴ *Yearbook* . . . 1990, vol. II (Part Two), p. 107, footnote 366.

be duly reflected in the draft of the final chapter of its report to the General Assembly.

It was so agreed.

37. The CHAIRMAN recalled that members had been invited to indicate whether they would be willing to participate in preparing a publication as part of the Commission's contribution to the United Nations Decade of International Law.⁵ He reminded members that few replies had been received and that the deadline was 15 July.

The meeting rose at 12.20 p.m.

⁵ See footnote 1 above.

2318th MEETING

Tuesday, 13 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (concluded)* (A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.480 and Add.1).

2. Mr. MIKULKA (Chairman of the Drafting Committee), said that at the forty-fourth session of the Commission (1992), the Drafting Committee had adopted articles 6, 6 *bis*, 7, 8, 10² and 10 *bis*, on reparation, as well as a new paragraph 2 for article 1.³ Those articles, which had

not been acted on at the previous session in the absence of commentaries, had now been adopted at the present session.⁴

3. At the present session, the Drafting Committee had considered the articles of part 2, proposed by the Special Rapporteur in his fourth report⁵ and adopted articles 11 to 14, concerning countermeasures. The titles and texts of those provisions read as follows:

Article 11. Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, subject to the conditions and restrictions set forth in articles . . . , not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under articles 6 to 10 *bis*.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 12. Conditions relating to resort to countermeasures

1. An injured State may not take countermeasures unless:

(a) it has recourse to a [binding/third party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) in the absence of such a treaty, it offers a [binding/third party] dispute settlement procedure to the State which has committed the internationally wrongful act.

2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Article 13. Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14. Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

* Resumed from the 2316th meeting.

¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

² The substance of article 9 (Interest), as proposed by the Special Rapporteur in his second report in 1989, was incorporated in paragraph 2 of article 8. Hence the gap in the sequence of articles.

³ For the text, see *Yearbook* . . . 1992, vol. I, 2288th meeting, para. 5.

⁴ For the adoption of article 1, paragraph 2, and article 6, see 2314th meeting; for the adoption of articles 6 *bis*, 7, 8, 10 and 10 *bis*, see 2316th meeting.

⁵ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook* . . . 1992, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

(e) any other conduct in contravention of a peremptory norm of general international law.

ARTICLE 11 (Countermeasures by an injured State)

4. Article 11, as originally proposed by the Special Rapporteur, had placed three conditions on lawful resort to countermeasures: the actual existence of an internationally wrongful act, the prior submission by the injured State of a demand for a cessation and/or reparation, and the lack of an adequate response to the demand. The Drafting Committee's version focused not so much on the conditions to be met for resort to countermeasures to be lawful as on the scope and limits of the injured State's entitlement to resort to countermeasures.

5. In the Drafting Committee's formulation of paragraph 1—as indeed in the Special Rapporteur's text—the essence of the concept of countermeasures was conveyed by the words “not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act”. In plenary, some members had suggested the phrase “to suspend the performance of its obligations” as an alternative. The Drafting Committee, however, had thought that the phrase might restrict the scope of application of countermeasures to obligations of a continuing character and exclude therefrom obligations requiring the achievement of a specific result. It had therefore opted for the Special Rapporteur's formulation.

6. Aside from defining the basic component of the notion of countermeasures, article 11 circumscribed the scope of the injured State's entitlement in three ways: it first required that the wrongdoing State should have failed to comply with its obligations under articles 6 to 10 *bis*. In that regard, the Drafting Committee had substituted for the criterion of “adequate response”, initially proposed by the Special Rapporteur, the clearer and more objective criterion of failure to comply with specific obligations, and the sentence was so structured as to place in a prominent position, at the very beginning of the article, that basic requirement for lawful resort to countermeasures. Secondly, the text recommended by the Drafting Committee, like the Special Rapporteur's proposal, made the injured State's entitlement subject to the conditions and restrictions set forth in subsequent articles. Thirdly, and perhaps most importantly, it required that resort to countermeasures should be “necessary to induce [the wrongdoing State] to comply with its obligations under articles 6 to 10 *bis*”. The expression “as necessary” performed a dual function. First it made it clear that countermeasures might be applied only as a last resort, where other means available to an injured State such as negotiations, diplomatic protests or measures of retortion would be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicated that the decision of the injured State to resort to countermeasures was to be made reasonably and in good faith and at its own risk. That point would be elaborated on in the commentary.

7. Some members of the Drafting Committee had felt that the right under article 11 should be limited to directly injured States. They had referred to the distinction, which was, of course, relevant only to the violation of multilateral obligations, between the State which was di-

rectly injured by the violation in the material and legal sense and the State which was injured, not materially, but only legally. The majority of the members of the Drafting Committee had, however, been reluctant to make such a distinction, which was not made anywhere else in the draft and would in some way call into question the definition of an injured State in article 5.⁶ Some members had taken the view that the problem was dealt with in article 13, on proportionality, which limited the legally injured State in the choice of the measures it could resort to, as compared with the directly injured State. Furthermore, the issue would arise again in the context of crimes, with which the Commission intended to deal at a later stage. The proponents of the distinction between directly and indirectly injured States had therefore agreed not to insist on the matter, on the understanding that it would be more thoroughly discussed when the Commission addressed the question of crimes.

8. As to paragraph 2 of article 11, the Special Rapporteur had included in his article 14,⁷ on prohibited countermeasures, a paragraph 1 (b) (iv) ruling out resort by way of countermeasures to conduct which consisted of a breach of an obligation towards any State other than the State which had committed the internationally wrongful act. In plenary, it had been generally recognized that the rights of States not involved in the responsibility relationship between the injured State and the wrongdoing State should not be affected by countermeasures taken by the former against the latter. At the same time, the approach adopted by the Special Rapporteur, which denied the legitimacy of any countermeasures incidentally breaching the rights of third States, had been viewed as too sweeping in an interdependent world where States were increasingly bound by multilateral obligations. In view of those considerations, the Drafting Committee had opted for ensuring protection of the rights of third States by relying on one of the initial characteristics of countermeasures, namely the fact that the unlawful character of conduct resorted to by way of countermeasures was precluded only as between the injured State and the wrongdoing State. As stressed by the Commission in paragraph (18) of its commentary to article 30 of part 1 of the draft, “the legitimate application of a sanction against a given State can in no event constitute *per se* a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction is justified”.⁸ The Drafting Committee had taken the view that, since that rule related to the content and scope of the injured State's entitlement to resort to countermeasures, its proper place was in article 11. It had therefore inserted in article 11 a paragraph 2 which provided that, if a countermeasure involved a breach of an obligation towards a third State, the wrongfulness of such a breach was not precluded by reason of its permissibility in relation to the wrongdoing State. In other words, paragraph 2 was in the nature of a warning to the injured State that any measure which might result in a violation of the rights of the third State would be a wrongful act against that third State and it

⁶ For the texts of articles 1 to 5 of part 2 provisionally adopted on first reading at the thirty-eighth session, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 38-39.

⁷ See footnote 5 above.

⁸ See *Yearbook* . . . 1979, vol. II (Part Two), p. 120.

served as an invitation to the injured State to pause before resorting to such measures and to take such precautionary steps as consulting with the third States concerned, weighing the consequences of alternative courses of action and ascertaining that no other choice was available on account of an instant overwhelming necessity. That point would be elaborated on in the commentary. The title of article 11 was that proposed by the Special Rapporteur.

ARTICLE 12 (Conditions relating to resort to counter-measures)

9. The text of article 12 had been extensively discussed and was the result of painstaking compromises. In plenary, a number of members of the Commission had felt that requiring, as a precondition, the exhaustion of all amicable procedures available under general international law would put the wrongdoing State in an advantageous position, bearing in mind the wide range of settlement procedures available and the time needed for their implementation. The Drafting Committee had therefore replaced the concept of the exhaustion of all available procedures by that of the initiation of a procedure.

10. The Drafting Committee had also distinguished between two different situations covered by paragraph 1 (a) and paragraph 1 (b), namely, the situation where the injured and wrongdoing States were bound to use a specific procedure by virtue of a "relevant treaty" to which they were parties and, secondly, the situation where there was no pre-existing obligation between the two States concerned about the specific type of procedure to be resorted to.

11. With regard to paragraph 1 (a), the term "relevant" referred to a treaty applicable to the area to which the wrongful act and countermeasures related.

12. With regard to paragraph 1 (b), it was important to subordinate recourse to countermeasures to the condition that the injured State offered a dispute settlement procedure to the allegedly wrongdoing State. That element was not provided for in the text initially proposed by the Special Rapporteur.

13. While that dual approach to the question of resort to dispute settlement had met with a wide measure of general approval in the Drafting Committee, views had differed, as indicated by the square brackets in paragraphs 1 (a) and 1 (b), on the nature of the dispute settlement procedure to be applied. Some members thought that the language between square brackets should be eliminated, so that any procedure could be used, whether or not involving a third party, others insisted on a procedure with binding effects, such as arbitration or judicial settlement, and still others considered that the two points of view could be reconciled by providing for third-party procedures in general. The positions were even more diverse, in that some members might favour one solution for paragraph 1 (a) and another solution for paragraph 1 (b). The Drafting Committee had not been able to come to a generally acceptable formula on that point, which would therefore have to be settled by the Commission.

14. The point most widely discussed in the Drafting Committee was whether or not the use of a settlement procedure should necessarily precede resort to counter-measures. The first solution, which was unquestionably preferred by a large number of members, might none the less give rise to several problems. First, it would be unjustifiable in cases where the internationally wrongful act continued. Secondly, it would not take into account the fact that "interim measures of protection", such as freezing assets, might have to be taken by the injured State without prior recourse to a settlement procedure. The Special Rapporteur had, admittedly, addressed that issue by way of an exception, contained in paragraph 2 (b) of his text,⁹ to the general rule of prior resort to a dispute settlement procedure. However, the Drafting Committee had not deemed it appropriate to follow that approach in view of the vagueness of the concept of "interim measures of protection taken by the injured State". Lastly, some members had been of the view that there were situations, other than those mentioned, in which it would not always be justified to require that resort to dispute settlement should precede the taking of countermeasures. For that reason, the Drafting Committee had preferred not to spell out the temporal element in the text and had opted for a formulation which emphasized the conditions that had to be met from the start in order for resort to countermeasures to be lawful.

15. At the same time, the Drafting Committee had placed an important limitation on the right to take countermeasures, namely—and that was the object of paragraph 2—by suspending that right when and to the extent that an agreed dispute settlement procedure was being implemented in good faith by the allegedly wrongdoing State. The term "agreed" referred both to procedures under pre-existing obligations as envisaged in paragraph 1 (a) and to procedures accepted as a result of an offer under paragraph 1 (b).

16. The suspension of the right of the injured State was subject to a very important proviso, reflected in the last clause of the paragraph, namely, that the internationally wrongful act had ceased.

17. As in paragraph 1, the question of the nature of the procedures, the application of which resulted in the suspension of the right of the injured State, had not been settled by the Drafting Committee and the word "binding" had been placed in square brackets.

18. Paragraph 3, which limited the scope of the exception contained in paragraph 2, dealt with the case in which, in the framework of a binding dispute settlement procedure, the competent body addressed to the parties a request or an order with which the wrongdoing State refused to comply. The phrase "request or order" covered such measures as interim measures of protection ordered by ICJ or an arbitral tribunal, as well as the judgement or award or other final decision of such a body. It did not, however, cover recommendations made in the framework of a non-binding procedure such as conciliation. Some members had taken the view that the case of the final decision should not come under that paragraph, since failure to comply with such a final decision should be seen as a new internationally wrongful act which gave

⁹ See footnote 5 above.

rise to all the rights provided for under part 2. Nevertheless, the prevailing opinion had been that the injured State should not have to bear the burden of going through all the stages involved in claiming reparation and resorting to countermeasures and should, rather, recover the right suspended under paragraph 2.

19. The title of the article was a slightly amended version of the one proposed by the Special Rapporteur.

ARTICLE 13 (Proportionality)

20. Article 13 as recommended by the Drafting Committee was very close to the text proposed by the Special Rapporteur.¹⁰ It laid down the rule of proportionality and provided that a specific course of conduct should be proportional, first, to the degree of gravity of the wrongful act, and, secondly, to the effects of that wrongful act on the injured State. The Drafting Committee had taken note of the views expressed both by the Special Rapporteur in his fourth report¹¹ and by members of the Commission in plenary that the test of proportionality should not be limited to a simple comparison between the countermeasure and the wrongful act because the effects of a wrongful act on the injured State were not necessarily in proportion to the degree of gravity of the act. Therefore, the effects of the wrongful act should also be taken into account in determining the type and intensity of the countermeasure to be applied.

21. With reference to the last four words of article 13, “on the injured State”, he would point out that the Special Rapporteur had expressed concern in the Drafting Committee that those words would have the effect of narrowing the scope of the article and unduly restricting a State’s ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, such as violations of human rights. The Special Rapporteur’s view was that the requirement that a countermeasure should also be proportional to the effects of the wrongful act on the injured State lent itself to unduly restrictive interpretations, since it might be invoked to prevent a State from taking countermeasures against a State violating the human rights of its own people or of the people of a third State, on the ground that the State contemplating the countermeasures was not materially affected. That would have a negative effect on the development and enforcement of human rights law. Other members of the Drafting Committee had disagreed with that interpretation, holding the view that violations of human rights entailed at least legal injuries and any legally injured State would be entitled to take countermeasures. For his own part, he wished to emphasize that understanding by the Drafting Committee, since it was an important issue. In the opinion of the Drafting Committee, the last four words of the article in no sense undermined the right of a State to take countermeasures against another State which had violated human rights or other rights corresponding to *erga omnes* obligations. It had been further pointed out that the purpose of countermeasures, namely, to induce the wrongdoing State to

comply with its obligations under articles 6 to 10 *bis*, determined the type of measures to be resorted to and their degree of intensity. Since the latter issue was already covered by article 11, it was unnecessary to revert to the matter in article 13. Those points should be explained in the commentary to the article.

22. It had been clear in the Drafting Committee that the requirement of proportionality under article 13 did not mean that a countermeasure must amount to the full equivalent of the wrongful act or of the effects of the act on the injured State. Rather, it was intended to put a brake on the injured State’s reaction. It should also be couched in sufficiently flexible terms to make it relatively easy to apply.

23. It had also been understood that, in defining the test of proportionality, situations of inequality in terms of economic power, political power, and so on, should be borne in mind, for they might well become relevant in some circumstances in determining the type of countermeasures to be applied and their intensity. It had been agreed that the commentary to the article should elaborate on all those points.

24. The Drafting Committee had inserted the words “degree of” before the word “gravity” in order to make it clear that the text encompassed wrongful acts of varying degrees of gravity. The title remained the same as the title proposed by the Special Rapporteur.

ARTICLE 14 (Prohibited countermeasures)

25. As to article 14, at the forty-fourth session there had been no disagreement with the Special Rapporteur’s general approach to the question of prohibited countermeasures or with his identification of the broad areas where non-compliance with applicable norms by way of countermeasures should not be permissible. In the light of the discussion in plenary, the Drafting Committee had therefore been faced with a twofold task, namely, to define precisely the limits beyond which, in each of the areas identified by the Special Rapporteur, an injured State was precluded from taking countermeasures, and to structure the article in such a way as to avoid *undesirable a contrario* interpretations.

26. The introductory phrase proposed by the Special Rapporteur had not posed any problem and had been left unchanged. Subparagraph (a) prohibited resort, by way of countermeasure, to the threat or use of force. The reference to the threat or use of force had been followed in the Special Rapporteur’s formulation by the phrase “in contravention of Article 2, paragraph 4, of the Charter of the United Nations”. The Drafting Committee had replaced that phrase by the words “as prohibited by the Charter of the United Nations”, which it considered an improvement over the original formula in two respects. First, it took account of the fact that Article 2, paragraph 4, was not the only provision of the Charter to bear in mind in defining the scope of the prohibition of the use or threat of force, since the Charter allowed for the use of force as authorized by the United Nations and also in the exercise of the right of individual or collective self-defence under Article 51. Some members had pointed out that those exceptions would come into play only in relation to delinquencies qualified as crimes un-

¹⁰ Ibid.

¹¹ Yearbook . . . 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3.

der article 19 of part 1¹² of the draft and might therefore not be relevant in the present context. However, the Drafting Committee had been generally agreed that, by merely referring to Article 2, paragraph 4, of the Charter, subparagraph (a) would incorrectly reflect the content of the Charter's prohibition of the threat or use of force. The Drafting Committee had therefore opted for a general reference to the Charter. A second advantage was that the formula took account of the fact that the prohibition of the threat or use of force, while it was contained in the Charter, formed part of general international law and had been characterized by ICJ as a norm of customary international law. The Charter was thus mentioned as one source, but not the exclusive source, of the prohibition in question.

27. Subparagraph (b) of article 14 corresponded to paragraph 2 of the article proposed by the Special Rapporteur.¹³ In plenary, it had been widely agreed that extreme economic and political coercion could have consequences as serious as those arising from the use of armed force and that the concern underlying paragraph 2 of the Special Rapporteur's text had therefore deserved to be reflected in article 14. As formulated by the Special Rapporteur, however, paragraph 2 had sought to clarify the meaning of the term "force", as used in Article 2, paragraph 4, of the Charter of the United Nations, and many members had taken the view that the Commission would be ill-advised to try to interpret the Charter or to get into the controversial question of whether the term "force", as used in Article 2, paragraph 4, meant exclusively armed force or encompassed other forms of unlawful coercion. Against that background, the Drafting Committee had decided to base itself on subparagraph (b) of article 14, as originally proposed by the Special Rapporteur, which had read: "any other conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken".¹⁴ Nevertheless, the members of the Drafting Committee had on the whole considered that the text had been couched in excessively broad terms, amounting, in effect, to a quasi-prohibition of countermeasures. The Drafting Committee had therefore restricted the scope of the subparagraph in two ways. It had first replaced the all-embracing concept of "conduct" by the narrow concept of "extreme economic or political coercion" and had furthermore replaced the phrase "susceptible of", which brought within the ambit of the paragraph any conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State, by the term "designed" which denoted a hostile or punitive intent.

28. As to subparagraph (c) concerning the norms of diplomatic law, a fundamental concept which had been raised was that of the relationship between article 14 and article 2 of part 2, as adopted in 1983.¹⁵ Concern had been expressed that, by strengthening the specific rules of the 1961 Vienna Convention on Diplomatic Relations

and the 1963 Vienna Convention on Consular Relations against countermeasures, the Commission might in effect be tampering with treaty regimes and primary norms. The remark had also been made that it was illogical to take into consideration one treaty regime and leave out others, such as the regime governing the law of the sea, which contained principles no less important than those of diplomatic law. Nevertheless, the prevailing view in the Drafting Committee had been that certain rules of diplomatic law had enough of a political basis and purpose to place them beyond the scope of the regime of countermeasures. More specifically, it had been pointed out that, in situations which were, by definition, conflictual, it was essential to keep open the channels of diplomacy and to protect from countermeasures persons and premises which were highly vulnerable.

29. In plenary, the formulation of the corresponding provision in the Special Rapporteur's text, paragraph 1 (b) (ii),¹⁶ had been generally regarded as too sweeping and the concept of "normal operation of . . . diplomacy" as prohibiting, in effect, all countermeasures in the diplomatic field, since any such countermeasures necessarily entailed some disruption in the normal conduct of diplomatic relations. Yet, as everyone knew, measures such as declarations of *persona non grata*, the severance or suspension of diplomatic relations and the recall of ambassadors were widely and effectively used as retaliatory measures.

30. The Drafting Committee had therefore limited the scope of the text proposed by the Special Rapporteur by focusing not on the normal operation of diplomacy, but on the inviolability of persons, premises, archives and documents. The Drafting Committee had thought it appropriate to extend the scope of the provision to consular agents and premises because they, too, were prime targets in situations of inter-State tension. That, however, did not imply any equation between the diplomatic and consular regimes, which were different. Indeed, the understanding was that consular agents, premises, archives and documents were protected to the extent that they enjoyed inviolability under the relevant rules of international law.

31. On the other hand, the Drafting Committee had eliminated the reference to multilateral diplomacy, which was unnecessary because representatives to international organizations were covered by the reference to diplomatic agents and inappropriate because no retaliatory step taken by a host State to the detriment of officials of international organizations could ever qualify as a countermeasure, for it would involve non-compliance not with an obligation towards the wrongdoing State, but with an obligation to a third party, namely, the international organization concerned.

32. Subparagraph (d) dealt with countermeasures not in conformity with rules on the protection of human rights. In plenary, the basic approach suggested by the Special Rapporteur had commanded general agreement, subject, however, to defining with more precision the threshold beyond which each State was allowed to derogate from human rights by way of countermeasures. The Drafting Committee had considered that the phrase "is

¹² For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

¹³ See footnote 5 above.

¹⁴ See *Yearbook . . . 1992*, vol. I, 2277th meeting, p. 151, footnote 9.

¹⁵ For the text, see *Yearbook . . . 1983*, vol. II (Part Two), p. 42.

¹⁶ See footnote 5 above.

not in conformity” duplicated the idea of prohibition which was the essence of article 14 and had therefore replaced it by the more appropriate expression “derogate from”. The other change made by the Drafting Committee was the characterization of those human rights which were, so to speak, off limits for countermeasures. The Special Rapporteur had explained in plenary that, in using the expression “fundamental human rights”, he had not intended to reinterpret Article 1, paragraph 3, of the Charter of the United Nations, but had merely tried to restrict the scope of the text to the “core” of human rights to be protected against countermeasures. To convey the Special Rapporteur’s intention, the Drafting Committee, drawing on the judgment of ICJ in the *Barcelona Traction, Light and Power Company, Limited* case,¹⁷ had used the phrase “basic human rights”. The intention of that phrase was to prohibit any infringement of the right of every individual to life, liberty and security of person. Also prohibited were infringements of the rules of the humanitarian law on the protection of war victims and massive violations of human rights, particularly in the form of racial discrimination. An important factor to be taken into consideration in determining the lawfulness of a countermeasure derogating from basic human rights was the requirement that countermeasures should remain essentially a matter between States and have minimal effects on private individuals lest they might amount to collective punishment.

33. The last subparagraph of article 14, namely, subparagraph (e) corresponded to paragraph 1 (b) (iii) of the Special Rapporteur’s text¹⁸ and prohibited resort, by way of countermeasure, to conduct in contravention of a peremptory norm of international law. In plenary, some members had questioned the need for such a prohibition in view of the fact that the rules of *jus cogens* were, by definition, rules which might not be derogated from, by way of countermeasures or otherwise. The prevailing view had been that a reference to *jus cogens*, a concept which varied with the passage of time, would ensure automatic adjustment of the instrument being elaborated, in keeping with changes in international legal thinking. The Special Rapporteur’s text had one drawback. By singling out the prohibition of the threat or use of force—a rule of *jus cogens par excellence*—and then referring in general terms to the peremptory norms of international law, it had given the impression that that prohibition did not form part of *jus cogens*. Subparagraph (e) as proposed by the Drafting Committee remedied that problem. It did not attempt to decide which, among the types of conduct described in subparagraphs (a) to (d), would depart from peremptory norms of international law, but clearly indicated that at least some of those types of conduct, first and foremost the threat or use of force, were in contravention of *jus cogens*.

34. Paragraph 1 (b) (iv) of the Special Rapporteur’s text¹⁹ on countermeasures affecting the rights of third States had been unlimited and the issue was now dealt with in paragraph 2 of article 11. “Prohibited countermeasures” was the title of article 14 proposed by the Special Rapporteur.

35. Lastly, the Drafting Committee had not had time to consider article 5 *bis* referred to it at the forty-fourth session.²⁰

36. The CHAIRMAN suggested that the Commission should take note of the report of the Drafting Committee and wait until its following session to take a decision on the draft articles, once it had considered the commentaries to the draft articles which would be submitted by the Special Rapporteur.

37. Mr. YANKOV thanked the Chairman of the Drafting Committee for the excellent, complete, thorough and accurate report he had submitted on the Committee’s work at the current session, which provided relevant commentary on the substance and form of the articles and showed the various stages each one had gone through, from the text proposed by the Special Rapporteur to the text adopted by the Drafting Committee. That work might in fact provide the basis for the actual commentaries to the draft articles. In any case, that proved that the Commission had been right to allocate more time to the work of the Drafting Committee.

38. Up until its forty-fourth session, the Commission had been in the habit of coming to a decision on the draft articles and commentaries immediately after they were adopted by the Drafting Committee. Since then, a new procedure appeared to have developed, namely, that the commentaries were not submitted until the following session and, consequently, one year went by between the adoption of a text by the Drafting Committee and its adoption by the Commission. Since a new practice had come into being, some thought should be given to all its consequences. In particular, the Special Rapporteur should be required to take fuller account of the report submitted by the Drafting Committee at the preceding session, from the point of view of both substance and the interpretation and development of the various provisions. The commentaries submitted at the current session did not give the impression that that had been done. In particular, the commentaries seemed to attach too much importance to doctrine instead of explaining why a certain expression had been used or a certain provision adopted. Although the importance of doctrine should not be minimized in any way, it could not take precedence over the implementation of the law and the way the problem was understood at the present time.

39. Mr. KOROMA said he regretted that the Commission would not be able, in plenary, to consider the draft articles adopted by the Drafting Committee. In the first place, the question involved was the very important one of countermeasures. Secondly, experience had shown that anything the Commission produced, even provisionally, came into the public domain and ran the risk of being taken for a finished product. It would therefore be better to follow Mr. Yankov’s suggestion and go back to the previous practice of considering draft articles the same year that they were adopted by the Drafting Committee.

40. Mr. CALERO RODRIGUES said he agreed with the speakers who did not think that it was wise for the Commission to consider draft articles one year after they had been adopted by the Drafting Committee. The rea-

¹⁷ Judgment of 5 February 1970, *I.C.J. Reports* 1970, p. 3.

¹⁸ See footnote 5 above.

¹⁹ Ibid.

²⁰ Ibid.

son for the time-lag was the need to have the commentaries to the articles, but that need had not actually been proved. The Commission could perfectly well work on preliminary commentaries, since, in any case, the final commentaries could affect only the articles adopted by the Commission itself and not those produced by the Drafting Committee. The Commission might therefore consider the draft articles on the basis of the text of those articles and the report of the Chairman of the Drafting Committee. In addition, the new practice introduced at the preceding session might give rise to problems at the end of the Commission's term of office, since its membership would change between the adoption of the draft articles by the Drafting Committee and their adoption by the Commission itself.

41. Mr. BENNOUNA noted that the term "peremptory" in article 14, subparagraph (e), should be translated in French as *impérative*, not as *obligatoire*. With regard to the draft articles as a whole, he agreed with Mr. Calero Rodrigues that the Commission might adopt the texts without waiting for the commentaries. Not doing so would give the impression that the Commission had produced less, whereas it had allocated two weeks of intensive work to the Drafting Committee in order to produce more. It had also committed itself to completing its work on the topic during its current term of office. In any event, only article 12 gave rise to problems and contained passages in square brackets; the Commission might therefore postpone the consideration of only that draft article until the following year and come to an immediate decision on the others.

42. Mr. VERESHCHETIN said he agreed with Mr. Yankov that the commentaries to the draft articles should be broadly based on the Drafting Committee's report and reflect its discussions. The Commission was in fact planning to prepare guidelines on the preparation of commentaries at its next session and it would be highly desirable for it to include Mr. Yankov's proposal.

43. He was, however, not convinced that it was wise to refer draft articles to the Sixth Committee without commentaries. One solution might be to replace the commentaries by the report of the Drafting Committee, in which case the report should be attached in an annex.

44. The CHAIRMAN said that, if the Commission did the same as the previous year, the Chairman of the Commission would, when reporting to the Sixth Committee, inform delegations that the text of the draft articles adopted by the Drafting Committee and the report of the Committee were available to them for information purposes, but that they could, of course, not discuss them.

45. Mr. SHI noted that article 20 of the statute of the Commission provided that the "Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary . . .". Thus, no text, not even one adopted by the Commission, could be submitted to the Sixth Committee without its commentary. As to Mr. Bennouna's fears about the Commission's productivity, the Commission had to produce, at its current session, the report of the Working Group on a draft statute for an international criminal court, a subject that was of the greatest interest to the General Assembly. He was therefore in favour of

postponing the consideration of the draft articles in plenary until the following year.

46. Mr. PAMBOU-TCHIVOUNDA said that he understood both Mr. Bennouna's and Mr. Shi's arguments, but feared that letting the draft articles "lie fallow" for a year would affect the importance the Commission attached to the question of countermeasures. Without going so far as to adopt the draft articles and submit them to the Sixth Committee, the Commission might adopt the in-between approach of considering the text adopted by the Drafting Committee and including the debate in the summary record of the meeting.

47. Mr. VILLAGRÁN KRAMER noted that Mr. Bennouna had made a specific proposal that only the consideration of the article that involved problems, namely, article 12 should be postponed until the following session.

48. The CHAIRMAN read out article 20 of the statute of the Commission and said that it seemed perfectly clear: all draft articles submitted to the Sixth Committee must be accompanied by commentaries.

49. Mr. BENNOUNA said that he would not insist that the Commission should come to a decision on his proposal, although he did not feel that the interpretation of article 20 of the statute given by the Chairman and Mr. Shi was the only one possible. The Commission had before it several draft articles on a topic that was in the course of being considered and not the entire set of draft articles on that topic. In any event, at its next session, the Commission should think about going back to the only logical practice, namely, as soon as the Drafting Committee had adopted a text, the Commission should consider it and adopt it at that same session and submit it to the General Assembly together with a commentary.

50. Mr. TOMUSCHAT said he realized that the drafting of commentaries was a heavy burden for the special rapporteurs and very time-consuming, but the task did not appear to be absolutely impossible. The discussion was showing that the Commission did not wish to continue having a time-lag between the adoption of texts by the Drafting Committee and their adoption by the Commission, especially if delegations to the Sixth Committee would have the text of the draft articles available and might therefore consider them without necessarily realizing that they did not have the Commission's imprimatur.

51. The CHAIRMAN said that, at the previous session of the General Assembly, the Sixth Committee had not considered any draft articles that had not previously been adopted by the Commission.

52. Mr. ROSENSTOCK said that the Commission was not bound to adopt the draft articles at all costs, even without commentaries, especially since it had no reason to be ashamed of its record. Generally speaking, it was better for draft articles to be adopted the same year by both the Commission and the Drafting Committee, but that rule could stand an exception from time to time, provided that the exception did not become the rule. The problem should be seen in the broader context of the Commission's working methods, and it had to be determined how special rapporteurs might be given a reasonable length of time to prepare commentaries worthy of the name without the Commission having to wait for the following session.

53. Mr. YANKOV requested that the report of the Drafting Committee should be reproduced *in extenso* in the summary record of the meeting.

54. The CHAIRMAN said that, in his understanding, the debate that had just taken place indicated that the Commission wished to take note of the Drafting Committee's report (A/CN.4/L.480 and Add.1) and to postpone the adoption of the draft articles contained therein until the next session.

It was so decided.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/446, sect. D, A/CN.4/450)²¹ (A/CN.4/L.487)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

55. The CHAIRMAN, speaking as Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that, although both the draft articles on State responsibility and the draft articles proposed by the Drafting Committee in the report under consideration (A/CN.4/L.487) were not accompanied by commentaries, the reasons for the lack of commentary were different in each case. He had not drafted commentaries, not because of lack of time or willingness, but because of the particular features of the chapter on prevention and in order to take account of the views of the members of the Commission who had stated that they preferred to have a general view of the articles on prevention before adopting them. He would submit commentaries at the next session if the Drafting Committee had completed its consideration of the articles on prevention.

56. Mr. MIKULKA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, noted that the Commission had decided at its forty-fourth session to approach the topic step by step and to consider, first, articles dealing with preventive measures for activities with a risk of transboundary harm.²² When the Commission had referred articles 10 to 20 *bis* to the Drafting Committee at the current session, it had indicated that the Drafting Committee, with the help of the Special Rapporteur, could play a role that went beyond a simple drafting exercise. It could consider the scheme of the new articles and then begin actual drafting.

57. With that understanding, the Drafting Committee had first considered the general scheme of the draft. For that purpose, it had considered all the articles before it, namely, articles 1 to 5 (General provisions) and 6 to 10 (Principles),²³ as well as articles 11 to 20 *bis* (Preven-

tion) proposed by the Special Rapporteur in his ninth report (A/CN.4/450). It had concluded that, in order for the articles on prevention to be independent and coherent, there should be, above all, an article on the scope, defining the activities to which preventive measures applied. Then, the three terms that were essential to the formulation of a working hypothesis should be defined; those terms were "risk of causing significant transboundary harm", "transboundary harm" and "State of origin". The Drafting Committee had therefore worked on article 1 (Scope of the present articles) and article 2 (Use of terms) and had then moved on to the consideration of the articles on preventive measures.

58. The titles and texts of articles 1, 2, 11, 12 and 14 as adopted by the Drafting Committee read as follows:

Article 1. Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which create a risk of causing significant transboundary harm through their physical consequences.

Article 2. Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

...

...

Article 11. Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required when a major change in the activity is planned.

Article 12. Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.

...

Article 14. Measures to minimize the risk

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

* Resumed from the 2306th meeting.

²¹ Reproduced in *Yearbook*... 1993, vol. II (Part One).

²² See *Yearbook*... 1992, vol. II (Part Two), p. 51, paras. 345-346.

²³ For the texts of draft articles 1 to 10, see *Yearbook*... 1990, vol. II (Part One), pp. 105-106, document A/CN.4/428 and Add.1, annex.

ARTICLE 1 (Scope of the present articles)

59. According to the Drafting Committee, article 1, which defined the scope of the articles only for the purposes of the preventive measures, did not define the scope of all of the articles, but only those that dealt with prevention of transboundary harm. The Committee had benefited from the work done by the Drafting Committee on article 1 at the previous session. That text had not been adopted by the Drafting Committee, at the time, but had already incorporated a number of points that had been raised and discussed and had therefore provided the Drafting Committee with a good working document for its work at the current session.

60. Article 1 limited the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which created a risk of causing significant transboundary harm through their physical consequences. That definition of scope, which was limited to preventive measures, introduced four criteria.

61. The first criterion referred to the title of the topic: the articles applied to "activities not prohibited by international law". It had been the view of the Drafting Committee that that critical element of the topic, although already indicated in the title of the topic, should be incorporated in the article on the scope. That criterion was also crucial in making the distinction between the articles of the topic under review and those of the topic of State responsibility for wrongful acts. Some members of the Drafting Committee had been of the opinion that it would be more prudent not to mention that criterion in article 1, arguing that the distinction between a wrongful act and an activity not prohibited by international law was not always so clear-cut and, in some cases, was a matter of a threshold of harm. In their view, preventive measures should be couched in general terms applicable to any activity. That view had not been accepted by the majority of the members of the Drafting Committee, who had believed that an article on the scope of such a general nature would blur the distinction between the two topics and contribute to theoretical confusion. In their view, it was clear that those articles were without prejudice to transboundary harm which might be caused by wrongful acts.

62. The second criterion was that the activities to which preventive measures were applicable were "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts were used in that criterion, "territory", "jurisdiction" and "control". The Drafting Committee had been aware that the expression "jurisdiction or control of a State" was a more commonly used formula in some instruments (for example, in principle 21 of the Stockholm Declaration,²⁴ the 1982 United Nations Convention on the Law of the Sea, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and principle 2 of the Rio Declaration on Environment and Development²⁵), but it had preferred to mention the con-

cept of "territory" as well in order to emphasize the territorial link between activities under the articles and a State. The most typical scenario covered by the articles was an activity undertaken within the territory of a State with some extraterritorial injurious impact on States. The territorial link was therefore a dominant factor.

63. Another reason for mentioning the term "territory" stemmed from concerns expressed in the Drafting Committee at both the current and the preceding sessions over some uncertainty in contemporary international law about the extent to which a State might exercise extraterritorial jurisdiction in respect of certain activities. Moreover, because multinational corporations operated under several jurisdictions for different purposes, the practical question had been how to draft that article so as to minimize ambiguity. The Drafting Committee had felt that territorial jurisdiction should be the dominant criterion. Consequently, when an activity occurred within the territory of a State, that State must comply with its obligations to take preventive measures. Territory was therefore decisive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered in the articles, the territorially-based jurisdiction prevailed. He drew attention to the fact that the words "or otherwise" after the word "territory" were intended to signify the special relation of the concept "territory" to the concept "jurisdiction or control". In cases where jurisdiction was not territorially based, jurisdiction was determined in accordance with the relevant principles of international law.

64. The three concepts called for a few brief observations. The expression "territory" referred to areas over which a State exercised its sovereign authority.

65. The expression "jurisdiction" was intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which a State was authorized under international law to exercise its competence and authority. For example, under international law, a State might in certain circumstances exercise jurisdiction over activities in what might be called the "global commons", such as the high seas or outer space, or activities in another State, for example, as a caretaker in a Trust or Non-Self-Governing Territory.

66. The concept of "control" was intended to cover situations in which a State was exercising *de facto* jurisdiction even though it lacked jurisdiction *de jure* under international law, as in cases of intervention, occupation and annexation which had not been recognized under international law. In such cases, international law did not recognize the jurisdiction of another State over the occupied or annexed territory, but attached certain legal consequences to the effective control of the occupying Power.

67. The third criterion was that activities covered in the articles must create a "risk of causing significant transboundary harm". The element of risk was intended to limit the scope of the articles, at the current stage of the work, to activities with risk and, consequently, excluded from their scope activities which in fact caused transboundary harm in their normal operation, such as creeping pollution. The words "significant transboundary harm" were intended to exclude activities which caused harm only in the territory of the State within

²⁴ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

²⁵ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), p. 3.

which the activity was undertaken or those activities which harmed the “global commons”, but did not harm any other State. The phrase “risk of causing significant transboundary harm” should be taken as a single term, as it was defined in article 2.

68. The fourth criterion was that the significant transboundary harm must have been caused by the “physical consequences” of such activities. The Commission had agreed long ago that, in order to bring the topic within a manageable scope, it should exclude transboundary harm which might be caused by State policies in economic, monetary, socio-economic or similar fields. The Drafting Committee had felt that the most effective way of limiting the scope of the articles, as had been indicated many times during the debate in the Commission, was to require that those activities should have transboundary physical consequences which in turn resulted in significant harm.

69. To conclude his discussion of article 1, he repeated that its title was to be understood as applying only to those articles dealing with obligations to take preventive measures.

ARTICLE 2 (Use of terms)

70. As to article 2, he said that two versions had been referred to the Drafting Committee in 1988 and 1989.²⁶ However, the Drafting Committee had considered that only those terms essential for dealing with the articles on prevention should be defined for the time being. Those terms were: “risk of causing significant transboundary harm”, “transboundary harm” and “State of origin”.

71. Subparagraph (a) defined the concept of “risk of causing significant transboundary harm” as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. The Committee had felt that, instead of defining separately the concepts of “risk” and “harm”, it was more appropriate to define the term “risk of causing significant transboundary harm” because of the interrelationship between risk and harm and the particular meaning of the adjective “significant” for both of them.

72. For the purposes of the articles under review, “risk” referred to the combined effect of the probability of the occurrence of an accident and the magnitude of its injurious impact. It was therefore the combined effect of those two elements that set the threshold: the combined effect should reach a level that was deemed significant. The Drafting Committee had been of the view that the obligations of prevention imposed on States should be not only reasonable, but also carry some limits, given the fact that the activities under discussion were not prohibited by international law and that the task was to strike a balance between the interests of the States concerned.

73. The Drafting Committee had drawn inspiration from the definition of risk contained in the Code of Conduct on Accidental Pollution of Transboundary Inland Waters.²⁷ Under section I (f), of the Code of Conduct, “risk means the combined effect of the probability of

occurrence of an undesirable event and its magnitude”. However, since the draft articles under review applied to a much wider range of activities than those covered by the Code of Conduct, the definition adopted by the Drafting Committee allowed for a spectrum of possibilities ranging from a low probability of causing disastrous harm, which was characteristic of ultra-hazardous activities, to a high probability of causing other significant harm. Obviously, in all cases, the combined effects must be “significant”. The word “encompasses” in article 2, subparagraph (a), was intended to highlight the fact that the spectrum of activities covered was limited and did not, for example, include activities where there was a low probability of causing significant transboundary harm.

74. With regard to the meaning of the word “significant”, the Drafting Committee had been aware that it was not without ambiguity and that “significance” had to be determined in each specific case. The commentary to the article might explain how that adjective should be understood, bearing in mind the definitions in the draft articles on the law of the non-navigational uses of international watercourses, if the Commission decided to use the same adjective in that context. In any case, it was the view of the Drafting Committee that “significant” was something more than “measurable”, but less than “serious” or “substantial”.

75. Subparagraph (b) defined “transboundary harm” as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned shared a common border. The definition was self-explanatory and made it clear that the articles did not apply to circumstances where the injurious impact of an activity affected the “global commons”. They did, however, cover activities conducted under the jurisdiction or control of a State, for example on the high seas, with effects in the territory of another State or in places under its jurisdiction or control or, conversely, activities conducted in the territory of a State with injurious consequences on, for example, the ships of another State on the high seas. The various possibilities would be explained more thoroughly in the commentary to the article.

76. At the request of some members of the Drafting Committee, he drew attention to the concerns they had expressed that the scope of the articles was unnecessarily narrow and consequently did not encompass the protection of the “global commons”.

77. Subparagraph (c) defined “State of origin” as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 were carried out. The definition was self-explanatory.

78. It went without saying that article 2 was not complete. As the Drafting Committee progressed, there would probably be more terms to be defined.

79. Turning to the articles on prevention, he recalled that one view that had been particularly emphasized by the Special Rapporteur in his ninth report and generally supported by the members was that the obligations imposed on States in the articles on preventive measures were primarily obligations of due diligence. The articles dealing with preventive measures identified, to the ex-

²⁶ See 2300th meeting, footnote 18.

²⁷ E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

tent possible, the content of the obligation of due diligence, so as to guide States in meeting such obligations, provide a common ground for them to negotiate with each other and possibly guide decision-makers called upon to settle disputes.

ARTICLE 11 (Prior authorization)

80. The content of article 11, which imposed an obligation on States to ensure that activities having a risk of causing significant transboundary harm were not undertaken in their territory or otherwise under their jurisdiction or control without their prior authorization, was the same as that originally proposed by the Special Rapporteur.²⁸ However, some drafting changes had been made in order to state the purpose of the article more clearly. The Drafting Committee had felt that the phrase "shall ensure" was stronger than the phrase "shall require", which had been used in the draft article proposed by the Special Rapporteur. The word "authorization" meant granting permission, the form of which was left to States. A State would therefore necessarily be aware that an activity referred to in article 1 was taking place under its authority and that it should take the other measures indicated in the articles.

81. The formula "in their territory or otherwise under their jurisdiction or control" was taken from article 1 for consistency. The words "activities referred to in article 1" was shorthand for activities with a risk of causing significant transboundary harm.

82. The second sentence of article 11 contemplated situations where a major change was proposed in the conduct of any activity that was otherwise innocuous, but was transformed as a result of that change into an activity that created a risk of causing significant transboundary harm. Such a change would also require prior authorization by States. The title of the article was "Prior authorization", as proposed by the Special Rapporteur.

ARTICLE 12 (Risk assessment)

83. The content of article 12 was similar to that proposed by the Special Rapporteur in his ninth report. Before granting authorization to operators to undertake activities referred to in article 1, a State should ensure that an assessment was undertaken of the risk of the activity causing significant transboundary harm. That assessment enabled the State to determine what risk was involved in the activity and what preventive measures it should take. It had been the Drafting Committee's view that, since the articles were designed to have global application, they should not be too detailed, but should contain the minimum necessary for clarity.

84. The question of who should conduct the assessment was left to the State. Such an assessment was normally conducted by the operators themselves observing certain guidelines set by the State. The evaluation of such assessments was normally done by Government departments or agencies. Those were matters within the purview of internal legislation. The article did require,

however, that the assessment should include an evaluation of the possible impact of the activity concerned on persons or property, as well as on the environment of other States. That requirement had been considered necessary to clarify the first sentence. That was because the State of origin would have to transmit the risk assessment to the States that were in jeopardy of suffering harm by it and those States would need to know what possible harmful effects that activity might have on them and the probabilities of the occurrence of the harm.

85. However, it was clear that the article did not oblige States to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. As to which activities should have risk assessments, the prevailing view in the Drafting Committee had been that activities falling within the scope of the draft articles had some general characteristics that were easily identifiable and could provide some indication to States. For example, the source of energy used in an activity, the material produced, the substances used in production, the location of the activity and its proximity to the border area, and so on, might provide some useful assessment criteria. There was also the possibility that, during the course of an activity, a State might recognize that the activity fell within the purview of the articles: it should then follow the procedures envisaged in them. The Special Rapporteur had explained that a provision might be inserted, for example, in article 2 (Use of terms), listing and describing in more detail the characteristics of activities falling within the scope of the articles.

86. The Drafting Committee had decided to put article 13 (Pre-existing activities) aside and come back to it later. It dealt with the problem of activities which had existed before the articles had come into force. Those cases raised complex questions and the Drafting Committee had felt that it would be more efficient to attempt first to discuss the articles dealing specifically with the preventive measures which had to be implemented in respect of new activities.

ARTICLE 14 (Measures to minimize the risk)

87. As to article 14 (Measures to minimize the risk), he said that the Special Rapporteur, in his ninth report, had defined prevention, in broad terms, as including measures taken prior to the occurrence of an accident (or prevention *ex ante*) and measures taken after the occurrence of an accident (or prevention *ex post*) to minimize the extent and the magnitude of the harm. Article 14, as proposed by the Special Rapporteur, reflected that broad concept of prevention, but included two additional elements. The first was the obligation of States to make sure that the operators used "the best available technology". The second was the obligation of States to encourage operators to obtain "insurance or other financial guarantees" enabling them to pay compensation in case they caused harm.

88. During the discussion in the Commission, many members had expressed a preference for the narrower concept of prevention, namely, prevention *ex ante*. They had taken the view that the measures taken after the occurrence of an accident to minimize the harm belonged to the part of the articles that dealt with compensation.

²⁸ See *Yearbook* . . . 1992, vol. II (Part Two), p. 45, footnote 100.

The Drafting Committee had adopted their point of view. It had also considered that it might not be appropriate to require a State to make certain that the operators used the best available technology. There were problems with that requirement: for example, who would determine what the best available technology was and how would that be done? The most advanced technology was not necessarily a guarantee of safety and in addition was not always within the means of the developing countries. The use of proper technology was only one of the many factors that States had to take into account in order to minimize the risk of causing significant transboundary harm. It was the view of the Drafting Committee that those questions could be elaborated on in the commentary, but need not be covered in the text.

89. The Drafting Committee had felt that the requirement of insurance should be dealt with in the section dealing with liability and compensation. The Drafting Committee consequently had revised the text of article 14 as proposed by the Special Rapporteur.

90. Like the earlier articles, article 14 should be seen in the context of an obligation of due diligence of States. The articles were an attempt to specify, to the extent possible, the content of that obligation, which was particularly clear in the present case, since States alone were directly concerned. In accordance with that article, States were under an obligation to take unilateral measures to minimize the risk of transboundary harm of activities referred to in article 1. Those unilateral measures included enacting legislation and taking administrative and other actions to ensure that all necessary measures were adopted to minimize the risk of transboundary harm.

91. "Administrative and other actions" meant enforcement actions. The words "to ensure that all necessary measures are adopted" had two functions. The first was to underline the requirement that the State was obliged to enforce its domestic laws and regulations designed to minimize transboundary harm by seeing to it that operators complied with those regulations. The second was to stress that the obligation of the State was no more or less than the obligation to exercise all due diligence. States were obliged only to do their best to see to it that operators complied with the rules. The word "minimize" should be understood in that context to mean reducing the possibility of harm to the lowest degree possible. Lastly, the title of the article had been changed to "Measures to minimize the risk", which was closer to the content of the article.

92. The CHAIRMAN drew the attention of the members of the Commission to a translation problem in the Spanish and French versions of the draft articles. The word "significant" had been translated by the words *importante* and *important*, respectively. Supported by Mr. PAMBOU-TCHIVOUNDA, he suggested that, in the French version, the word *important* should be replaced by the word *sensible* in all the articles in which it appeared. The corresponding correction should be made in the Spanish version.

It was so decided.

93. The CHAIRMAN thanked the Chairman of the Drafting Committee for his excellent introduction to the Committee's second report. If he heard no objection, he would take it that the Commission wished to take note of

the report and postpone the adoption of the draft articles until its next session.

It was so decided.

The meeting rose at 1.15 p.m.

2319th MEETING

Wednesday, 14 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

later: Mr. Vaclav MIKULKA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-fifth session

1. The CHAIRMAN invited the Commission to consider its draft report on the work of its forty-fifth session, starting with chapter IV, and in particular first to consider the commentaries to articles 1, 6, 6 *bis*, 10 and 10 *bis* of the draft on State responsibility.

CHAPTER IV. *State responsibility* (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. Draft articles of part 2 of the draft on State responsibility

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (A/CN.4/L.484/Add.2-7)

Commentary to paragraph 2 of article 1 (A/CN.4/L.484/Add.2)

Paragraph (5)

2. Mr. RAZAFINDRALAMBO, referring to the French text, proposed that the words *d'un désistement par l'État lésé de son droit*, in the last sentence, should be replaced by the words *d'une renonciation par l'État lésé à son droit*.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to paragraph 2 of article 1, as amended, was approved.

3. Mr. ROSENSTOCK observed that, at its next session, the Commission should consider the advisability of making the commentaries, some of which were long and

complex, available sufficiently in advance to enable members of the Commission to examine them properly.

Commentary to article 6 (Cessation of wrongful conduct) (A/CN.4/L.484/Add.2)

Paragraph (1)

*Paragraph (1) was approved.*¹

Paragraph (2)

4. Mr. PAMBOU-TCHIVOUNDA, referring to the French text, suggested that the words *sous un certain nombre de formes* in the second sentence, should be replaced by *sous certaines formes*.

5. Mr. MAHIOU said that Mr. Pambou-Tchivounda had raised a valid point which applied to all language versions, not just the French.

6. The CHAIRMAN suggested that it should be left to the secretariat to make the necessary changes in all language versions.

Paragraph (2) was approved on that understanding.

Paragraph (3)

7. Mr. PAMBOU-TCHIVOUNDA, referring to the French text, proposed that the word *formule*, in the fourth sentence, should be replaced by the word *présente*.

It was so agreed.

8. Mr. TOMUSCHAT said that the third sentence of the paragraph should be deleted: it simply was not true that, whenever resort was had to a third-party settlement procedure, such procedure opened at a time when the commission of the wrongful act had "completed its cycle"—whatever that might mean. For instance, where proceedings were brought before the Court of Justice of the European Communities under article 169 of the Treaty establishing the European Economic Community,² the act which was inconsistent with that Treaty might not even have been repealed.

9. Mr. MAHIOU said that, while he sympathized with Mr. Tomuschat's view, he would not go so far as to delete the whole sentence. It was always possible, of course, that whenever resort was had to a third-party settlement procedure, the commission of the wrongful act continued. The point could perhaps be covered, however, in less absolute terms.

10. The CHAIRMAN suggested that the word "often" should be added after the words "such procedure".

11. Mr. TOMUSCHAT said that, in that case, the word "necessarily", at the end of that sentence, should be replaced by the word "mostly".

12. Mr. BENNOUNA said that Mr. Tomuschat was right. In particular, the reference to completion of the cycle of the wrongful act made no sense and should be de-

leted. Perhaps the intention, however, was that a third-party settlement procedure was opened when the positions of the two parties had been clearly established, possibly in the course of prior negotiations. However, that did not necessarily mean the wrongful act had ceased for it could, and frequently did, continue.

13. Mr. TOMUSCHAT suggested that the best course would be to insert the word "often" before "opens at a time" and to delete the words "in fact necessarily". In that way, the sentence would be more in harmony with the sentence that followed.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

14. Mr. BENNOUNA proposed that the word "inorganic" in the second sentence should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

Paragraph (8)

15. Mr. RAZAFINDRALAMBO proposed that the words "the cessation of the wrongful conduct", in the fifth sentence, should be replaced by "the normal application of the primary obligation violated".

16. Mr. MAHIOU said that, while he agreed with that proposal, he would suggest that the words "normal application" should be replaced by "respect for the obligation violated".

17. Mr. TOMUSCHAT said that he would prefer the original wording to stand. The point the Special Rapporteur had been trying to make was that reparation and cessation were very similar. Deletion of the word "cessation" would divest the paragraph of its meaning.

18. The CHAIRMAN, noting that Mr. Razafindralambo did not insist on his proposal, said that, if he heard no objections, he would take it that the Commission wished the paragraph to stand as drafted.

Paragraph (8) was approved.

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

19. Mr. TOMUSCHAT said that the *De Becker* case³ was very old. Many other cases had been brought on cessation by virtue of the procedure provided for under arti-

¹ After the consideration of the commentary to article 6 *bis*, the Commission amended paragraph (1) of the commentary to article 6 (see paras. 39-42 below).

² See *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987), p. 207.

³ European Court of Human Rights, *Series A: Judgments and Decisions*, 1962, *Judgment of 27 March 1962* (Registry of the Court, Council of Europe, Strasbourg, 1962).

cles 169 and 170 of the Treaty establishing the European Economic Community.⁴ In his view, therefore, a brief reference to that instrument should be incorporated in the commentary to demonstrate that the Commission was aware that cessation of conduct by States which was contrary to Community obligations had been obtained under the terms of the Treaty.

20. The CHAIRMAN suggested that Mr. Tomuschat should be asked to draft an appropriate form of wording to cover that point for incorporation in the paragraph.

It was so agreed.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were approved.

Paragraph (13)

21. Mr. BENNOUNA said that the subtleties introduced in the commentaries made for a highly complex text. He felt for those who would have to read them later, and trusted that, in the future, they would be made simpler. A prime example was the third sentence of the paragraph, where, at the very least, the word “internationally” should be inserted before the words “wrongful act of a State”, to draw a distinction with wrongful acts under national law.

22. Mr. MAHIOU said that, as the words “international law” already appeared at the end of the third sentence, the words proposed by Mr. Bennouna were perhaps redundant. However, the words *aux yeux du droit international*, at the end of that sentence, should be replaced, in the French text, by *au regard du droit international*.

23. Mr. BENNOUNA said that he did not believe his proposal was redundant. In his opinion, the phrase “unlike wrongful acts of national law”, the words “the wrongful act of a State” seemed to imply that a State could not commit a wrongful act under internal law. The point to be made clear was that a State could indeed commit a wrongful act both under internal law and under international law.

24. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to Mr. Bennouna’s proposal, as well as the amendment proposed by Mr. Mahiou to the French text.

Paragraph (13), as amended, was approved.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were approved.

The commentary to article 6, as amended, was approved.

Commentary to article 6 bis (Reparation) (A/CN.4/L.484/Add.3)

Paragraph (1)

25. Mr. VERESHCHETIN suggested that the words “in cases of delicts” should be added after “international obligation” in order to make it clear that the com-

mentary did not apply to all breaches of an international obligation.

26. Mr. CALERO RODRIGUES said that, since the articles would appear as a separate section on delicts, there was no need to insert the words suggested by Mr. Vereshchetin: the whole section applied only to delicts. If the addition were made in paragraph (1), it would have to be made elsewhere, thus overburdening the text.

27. Mr. KOROMA said he endorsed the point made by Mr. Calero Rodrigues and pointed out that the Commission had not yet decided whether to treat crimes separately from delicts. He suggested that the words “giving reparation” should be replaced by “making reparation”.

28. Mr. MAHIOU said he endorsed the points made by Mr. Calero Rodrigues and Mr. Koroma.

29. Mr. VERESHCHETIN said that he could not really understand the objections to his suggestion. The point made by Mr. Calero Rodrigues was correct, but there was no harm in making the matter clear. To judge by the Special Rapporteur’s fifth report (A/CN.4/453 and Add.1-3), there might never be a separate section on crimes. The present text gave the impression that the commentary was referring to responsibility as a whole, but responsibility could have consequences other than those arising from delicts. He agreed that “giving reparation” should be replaced by “making reparation”.

30. Mr. de SARAM suggested that the phrase “by making good” should be replaced by “by wiping out all the consequences”, a phrase that had been used in the *Chorzów Factory* case (Merits).⁵ The Commission should be consistent in terminology in talking about the same point.

31. Mr. ROSENSTOCK said he endorsed the comments by Mr. Calero Rodrigues and Mr. Koroma: problems could certainly be created by adding the reference to delicts. If the Commission decided to have a separate section on crimes, then the issue would be perfectly clear. If not, there would be no need for the reference. The point could only be decided once the Special Rapporteur’s study had been completed.

32. Mr. VERESHCHETIN said that he would not insist on his suggestion if the other members of the Commission did not agree with it, but he was not convinced by the arguments put forward. The articles would, of course, have to be reviewed in the light of the completed study and the decision as to whether to include a separate section on crimes. In the meantime, the Commission should make it quite clear that the articles referred only to delicts. In paragraph (1) of the commentary to article 6 (see A/CN.4/L.484/Add.2) the Commission had already referred to “an international delict”.

33. Mr. CALERO RODRIGUES said that he understood Mr. Vereshchetin’s concern. The Commission should perhaps explain the situation, either at the beginning of the commentary to article 6 *bis* or in its report, making it clear that draft articles 6 to 10 *bis* referred only to delicts and that the legal consequences of crimes aris-

⁴ See footnote 2 above.

⁵ P.C.I.J., Series A, No. 17, Judgment No. 13 of 13 September 1928, p. 47.

ing from violation of article 19 of part 1⁶ would be considered at a later stage.

34. Mr. MAHIOU pointed out that the word "delict" had been omitted from the French version of paragraph (1) of the commentary to article 6. Mr. Vereshchetin's concern was legitimate, but the suggestion just made by Mr. Calero Rodrigues seemed to meet it.

35. Mr. VILLAGRÁN KRAMER said that it might be better to give the explanation at the beginning of the commentary to article 6, paragraph (1) of which already made it quite clear that the draft articles referred only to delicts.

36. Mr. KOROMA said that the commentary to article 6 already met Mr. Vereshchetin's concern, so that there was no need for an additional reference to delicts.

37. Mr. BENNOUNA said that the issue was one of substance, for some members of the Commission did not agree with making a distinction between crimes and delicts. The whole philosophy underlying international responsibility was centred on the internationally wrongful act. The Commission was drafting a general rule. A crime would be an exception to the general rule since it was an internationally wrongful act of exceptional gravity, but the regimes governing delicts and crimes could not be entirely separated.

38. Mr. VERESHCHETIN said that he supported the suggestion made by Mr. Calero Rodrigues. Mr. Bennouna's arguments had convinced him only that the Commission must make it very clear, preferably in the commentary, that it had not considered the consequences arising from violations of article 19 of part 1. It could do that regardless of the differing positions on the distinction between crimes and delicts.

39. Mr. CALERO RODRIGUES proposed that two sentences should be inserted after the first sentence of paragraph (1) of the commentary to article 6 (ibid.): "The Commission decided to consider separately the relations which may arise from international crimes as provided for in article 19 of part 1. Therefore, articles 6 to 10 *bis* do not apply to international crimes."

40. Mr. VERESHCHETIN said that he could accept the first sentence, but the second sentence was not accurate and might give rise to disagreement.

41. Mr. MIKULKA suggested that the second sentence should read: "Articles 6 to 10 *bis* are without prejudice to the consequences of crimes".

42. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to the amendment proposed by Mr. Calero Rodrigues, as further amended by Mr. Mikulka, to paragraph (1) of the commentary to article 6 as well as the amendment proposed by Mr. Koroma to paragraph (1) of the commentary to article 6 *bis*.

Paragraph (1), of the commentary to article 6 bis, as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

43. Mr. TOMUSCHAT said that, according to the Special Rapporteur, the right to reparation arose from the injured State's express claim in that regard. In his view, that was not accurate: while satisfaction and assurances and guarantees of non-repetition might not be automatic, reparation as such was a direct consequence of an internationally wrongful act. The last phrase in paragraph (4), reading "taking into account the fact that it is by a decision of the injured State that a secondary set of legal relations is set in motion", should therefore be replaced by "taking into account that some forms of reparation may presuppose a formal request from the injured State".

44. Mr. CALERO RODRIGUES said he was not certain that such an amendment was in keeping with the meaning of article 6 *bis*, which referred to the entitlement of the injured State rather than to the express obligation of the wrongdoing State.

45. Mr. TOMUSCHAT said that entitlement and obligation were two sides of the same coin: the right of the injured State was, at the same time, the obligation of the wrongdoing State. The wording in article 6 *bis*, paragraph 1, did not make it clear whether the right was granted automatically or whether the injured State had to act in order to avail itself of that right, which would not be in accordance with the customary rules of international law.

46. Mr. KOROMA said that he shared Mr. Tomuschat's view. The entitlement existed whether or not the injured State decided to avail itself of that right.

47. Mr. MAHIOU said that he did not fully agree with Mr. Tomuschat and Mr. Koroma. He pointed out that paragraph (4) of the commentary to article 6 *bis* made reference to paragraph (14) of the commentary to article 6, which explained why article 6 was couched in terms of an obligation. In regard to cessation, there was clearly an obligation: the wrongdoing State was bound to cease its wrongful act regardless of whether the injured State so demanded. The case was different for reparation: the injured State had to assert its claim to reparation; if it failed to do so, the process would not be set in motion.

48. Mr. YANKOV said that the amendment proposed by Mr. Tomuschat would bring the commentary more into line with customary law and practice. However, the wording should be more precise.

49. Mr. KUSUMA-ATMADJA said that paragraph (4) was perfectly clear and did not need to be amended. The paragraph did not assert that the right to reparation actually arose from the injured State's claim in that regard; it simply said that, in order to avail itself of its right, the injured State could set in motion a secondary set of legal relations. The right itself was a consequence of a wrongful act having been committed.

50. Mr. de SARAM proposed that the text following "of the commentary thereto," should be replaced by: "the present article provides for the entitlement of the

⁶ For the texts of articles 1 to 35 of part I provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*

injured State to compensation and for one or more of the forms in which such compensation can be provided”.

51. Mr. TOMUSCHAT, revising his earlier proposal, suggested that the phrase “a secondary set of legal relations is set in motion”, at the end of the paragraph, should be replaced by “the process of implementing this right in its different forms is set in motion”. The rest of the paragraph would remain as it stood.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

52. Mr. VILLAGRÁN KRAMER said that the legal precedents cited in the commentary should be brought up to date. Accordingly, the express reference to the 1897 *Costa Rica Packet* case should be deleted from the second footnote to the paragraph, as it hardly reflected the development of international law on that subject.

It was so agreed.

Mr. Mikulka took the Chair.

53. Mr. YANKOV said that, according to the Commission’s traditional practice, each paragraph or subparagraph of a particular article should be treated separately in the commentary to the article. Paragraph (6) should be altered to conform to that structure. The phrase “Among the various factors which may combine with the wrongful act to produce the injury,” in the fourth sentence, should be deleted, since it stated the obvious; the rest of the sentence should be retained and, in keeping with practice, would begin a new paragraph.

54. Mr. MAHIOU said that he agreed with Mr. Yankov’s suggestion to make paragraph (6) into two paragraphs.

55. Mr. BENNOUNA said that, the phrase “whereas, in the absence of negligence on the part of the injured State, the principle of *restitutio in integrum* would have required return of the object in its initial condition”, at the end of the ninth sentence, should be deleted because it was a statement of the obvious.

56. Mr. PAMBOU-TCHIVOUNDA said that he had reservations about Mr. Bennouna’s proposal. It was possible for a ship to sustain damage between the time it was seized and the time it was returned and, in his view, that important element was taken into consideration in the very part of the sentence Mr. Bennouna wished to delete.

57. Mr. BENNOUNA said that that element was in fact taken into consideration in the part of the sentence before his proposed deletion. The rest of the sentence added nothing more and simply served to make an already heavy paragraph even more cumbersome.

58. Mr. TOMUSCHAT said the Commission might wish to voice a reservation with regard to the words “causal link theory” in the third sentence, as it had not fully accepted all of the developments connected with that theory.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (6 bis)

59. Mr. ROSENSTOCK proposed that paragraph (6 bis) should be deleted, for it seemed to have no foundation. He did not recall any discussion on which it might be based and it appeared as a confusing—and unnecessary—addition to the commentary.

60. Mr. MAHIOU said that the idea expressed in paragraph (6 bis) had its source in a comment made by Mr. Sreenivasa Rao during the discussion which had attracted support from several members, including himself. The purpose of the paragraph was to take account in connection with the principle of full reparation of the position of developing countries with limited financial resources.

61. Mr. TOMUSCHAT said he supported the proposal to delete paragraph (6 bis). The idea underlying the paragraph did not relate to reparation—the subject-matter of article 6 bis—and was more akin to the question of financial compensation. Furthermore, no explanation was put forward, nor any reference given, in support of the statement contained in the paragraph. Again, there was nothing in the article itself that could justify that statement.

62. Mr. AL-BAHARNA proposed that the paragraph should be retained but that wording on the lines of “In the view of some members . . .” should be inserted at the beginning. In that way, it would be clear that not all the members of the Commission were in agreement on the matter.

63. Mr. ROSENSTOCK said that he had no objection to that proposal, but it would no longer be suitable for the commentary. Rather, it should appear in the Commission’s report, apart of course from being mentioned in the summary records.

64. Mr. de SARAM agreed with Mr. Mahiou on the origin of the idea contained in the paragraph as well as with the suggestion by Mr. Al-Baharna. The idea should be retained, but careful thought should be given to where it was placed, for example in the Commission’s report.

65. Mr. VERESHCHETIN stressed that the idea embodied in the paragraph fell squarely within the subject-matter of article 6 bis, on reparation. Paragraph (6 bis) stated that there could be “other equitable considerations that militate against full reparation”. The issue was therefore clearly one of reparation.

66. Mr. RAZAFINDRALAMBO said that the paragraph did indeed deal with the subject-matter of article 6 bis, namely reparation. The problem of full reparation in the case of States with limited financial means had been raised during the discussion. The paragraph should therefore be kept, specifying that it reflected the views of only some members.

67. Mr. BENNOUNA said he agreed with Mr. Rosenstock. The commentary to article 6 bis should reflect the view of the Commission as a whole. The suitable place for a view held only by some members was in the Commission’s report.

68. Mr. MAHIOU said that article 20 of the Commission's statute required it to take note of divergences of views among writers, or in State practice. As far as the Commission's commentaries were concerned, an effort had always been made to avoid reflecting any disagreements.

69. Mr. KOROMA proposed that the passage should be toned down by amending the unduly short wording "There may be other equitable considerations that militate against full reparation" to read "There may be other equitable considerations that ought to be taken into account in providing for full reparation".

70. Mr. GÜNEY said he supported that proposal but was opposed to the suggestion to introduce any reference to "some members".

71. Mr. BENNOUNA said any reference to "some members" should be avoided, since the commentary was an expression of the view of the Commission as a whole. Nevertheless, he could accept the solution suggested by Mr. Koroma.

72. Mr. AL-BAHARNA said he endorsed the wording proposed by Mr. Koroma, which represented a more neutral formulation. However, it should be noted that the words, "There may be", clearly indicated that the view expressed in the paragraph was held by only some members.

73. Mr. ROSENSTOCK said he could accept Mr. Koroma's wording, provided the word "ought" was replaced by "might". The use of the verb "ought" could weaken the impact of the firm language employed in article 6 *bis*.

74. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (6 *bis*) with Mr. Koroma's amendment, as sub-amended by Mr. Rosenstock.

Paragraph (6 bis), as amended, was approved.

Paragraph (6 *ter*)

75. Mr. ROSENSTOCK, supported by Mr. MAHIOU and Mr. GÜNEY, said that the contents of paragraph (6 *ter*) constituted a footnote to the articles as a whole rather than an interpretative comment. The paragraph should therefore be deleted and the contents transferred to a footnote.

It was so agreed.

Paragraph (7)

76. Mr. YANKOV, supported by Mr. ROSENSTOCK, proposed that the word "theoretically" should be deleted from the last sentence. It was unnecessary and confusing.

77. Mr. CALERO RODRIGUES pointed out that the word "theoretically" was used to contrast with the words "in practice" in the first part of the sentence. Accordingly, if it was decided to delete the word "theoretically", the words "in practice" should be omitted as well.

78. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (7) with those two changes.

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

79. Mr. VILLAGRÁN KRAMER proposed that the reference to "the prevailing doctrinal view" should be removed from the first sentence. The Commission should not give the impression that it relied exclusively on doctrinal views for the codification of international law. Its work was based essentially on State practice and treaties.

80. Mr. MAHIOU asked whether the suggestion was to omit the extensive references to the legal literature contained in the first and second footnotes to paragraph (9).

81. Mr. KOROMA said that the reference to doctrinal views could be deleted, for paragraph (9) itself contained abundant references to treaties and to State practice.

It was so agreed.

Paragraph (9) was approved.

The meeting rose at 1.05 p.m.

2320th MEETING

Thursday, 15 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-fifth session (*continued*)

CHAPTER IV. *State responsibility* (*continued*) (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. *Draft articles of part 2 of the draft on State responsibility* (*continued*)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (*continued*) (A/CN.4/L.484/Add.2-7)

1. The CHAIRMAN said that one point was still pending with regard to the commentary to article 6, namely

the inclusion in paragraph (10) of two sentences on the recent jurisprudence of the European Commission of Human Rights. An agreed text was to be submitted by Mr. Tomuschat after consultation with the Special Rapporteur. He therefore invited the Commission to continue its consideration of the commentary to article 6 *bis*.

Commentary to article 6 bis (Reparation) (continued) (A/CN.4/L.484/Add.3)

New paragraph (9 *bis*)

2. Mr. YANKOV proposed that a new paragraph, (9 *bis*), should be inserted to read:

“9 *bis*) In substance paragraph 3 states the general principle that the State which has committed an internationally wrongful act cannot invoke its internal law as justification for failure to provide reparation. The concept of reparation should be understood in the light of paragraph 1 relating to the right of the injured State to obtain full reparation. The wording of paragraph 3 is modelled on article 27 of the Vienna Convention on the Law of Treaties”.

3. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (9 *bis*), as proposed by Mr. Yankov.

Paragraph (9 bis) was approved.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

4. Mr. TOMUSCHAT proposed that the penultimate sentence, which referred to the *Aminoil* case, should be deleted. In his opinion, the case was quite different from those discussed at the beginning of the paragraph and it was not really a relevant example.

5. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the reference in no way changed the meaning of the commentary and it was not out of place.

6. Following a brief exchange of views involving Mr. MAHIOU and Mr. de SARAM, who were in favour of retaining the reference to arbitration, Mr. TOMUSCHAT withdrew his proposal.

Paragraph (11) was approved.

Paragraph (12)

Paragraph (12) was approved.

Paragraph (13)

7. Mr. YANKOV proposed that the words “at a later stage” should be deleted.

It was so agreed.

Paragraph (13), as amended, was approved.

8. Mr. FOMBA, expressing his general position on the commentaries, said article 20 of the Commission's statute provided that the Commission's commentaries submitted to the General Assembly should contain:

...

(b) Conclusions relevant to:

- (i) The extent of agreement on each point in the practice of States and in doctrine;
- (ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

9. In his opinion, that meant two things: first, members of the Commission should not necessarily be better informed but at least as well informed as the Special Rapporteur on the “legal corpus”, in other words, the treaties, jurisprudence and doctrine pertaining to the topic under consideration, something that was not self-evident. Quite often, it was the Special Rapporteur who provided the information. Nevertheless, members could also add to and go into greater detail on that legal corpus. He had mentioned a number of conventions regarding African practice on the matter of causal liability. Even though the subject was slightly different, the Special Rapporteur had not drawn attention to that point. When members of the Commission gained the impression that a particular element in jurisprudence was not topical or did not sufficiently support the argument being advanced, the reason was often quite simply that the Special Rapporteur had not had access to the relevant information.

10. Secondly, it also meant that members should be in a position to comment, with supporting arguments, on the Special Rapporteur's analysis of the extent of the agreement on each point in State practice and in doctrine. That was not self-evident either, and confidence should be placed in the Special Rapporteur. Admittedly, such confidence did not rule out the possibility of keeping a check, which was important for the credibility of the work of the Commission, but such a check should be confined to essentials. It should relate chiefly to points on which the Special Rapporteur expressly committed the Commission, in other words, the passages in which, in practice, it was said that the Commission “concludes that”, “considers that”, “is of the view that”, and so on. Such formulations occurred quite often in commentaries relating, for example, to paragraph 2 of article 1, to articles 6 and 6 *bis*, and to articles 10 and 10 *bis*.

11. His own views were sufficiently in agreement with those set out in the commentaries for him to be able to accept them as a whole.

12. Mr. TOMUSCHAT said it was regrettable that there was no commentary on the concept of “injured State”.

13. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that the Commission had already adopted a definition of “injured State” in article 5.¹ That appeared to be sufficient.

Commentary to article 10 (Satisfaction) (A/CN.4/L.484/Add.6)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

¹ For the text and commentary of article 5 provisionally adopted at the thirty-seventh session, see *Yearbook... 1985*, vol. II (Part Two), pp. 25 *et seq.*

Paragraph (8)

14. Mr. BENNOUNA said that somewhere within the commentary it should be emphasized that the diplomatic practice alluded to had quite often involved a colonial-type international situation characterized by great inequality between the States involved. He believed that a statement along those lines belonged in the commentary to the article on satisfaction.

15. The CHAIRMAN pointed out that the question of abuses on the part of injured or allegedly injured States was discussed in paragraph (25) of the commentary, which specifically stated that "Powerful States have often managed to impose on weaker offenders excuses or humiliating forms of satisfaction . . .". That would appear to meet Mr. Bennouna's concern.

16. Mr. ROSENSTOCK said that care should be taken not to upset the balance of a text which had been carefully weighed by the Special Rapporteur, and that changes should be kept to a minimum.

Paragraph (8) was approved.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were approved.

Paragraph (12)

17. Mr. SHI said that, like some other members of the Commission, he thought there was no reason for satisfaction to be considered as punitive or afflictive in character. Consequently, the last two sentences of paragraph (12) should be deleted, as should paragraphs (18) and (21) to (23) for the same reason.

18. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the point was not a minor one. At the risk of displeasing some members, he wished to maintain the reference to the punitive character of satisfaction, for two reasons. To begin with, it had to be recognized that, in practice, States inflicted on one another "punishment" that was sometimes violent. There was no shortage of modern examples. Accordingly, he wondered whether jurists could think of completely ruling out that practice from the field of international law and whether it would not be better to codify it.

19. Again, if the slight punishment that States inflicted on themselves when they agreed to present their excuses to another State were denied, he wondered how the Commission could expect to move ahead the following year in its work on crimes, where the punitive element was central? The changeover from a regime of offences to one of crimes could well become problematical.

20. Mr. SHI replied that, while it was indeed true that some States gave others "lessons", the Commission should not simply confine itself to codifying existing law. It should also engage in progressive development. From that standpoint, it did not seem advisable to attribute a punitive function to satisfaction.

21. Mr. TOMUSCHAT said he fully shared Mr. Shi's view. He would go so far as to propose that the reference to "exemplary damages" should be deleted and that only the first lines of paragraph (12), up to "the injured State" should be retained.

22. Mr. ROSENSTOCK said it would seem that paragraph (12) was being completely misinterpreted. At no point was it to be inferred that "punitive expeditions" were acceptable. The Special Rapporteur was, in that paragraph, raising a legal point that seemed important. For his own part, he could, if necessary, agree to the deletion of the reference to "exemplary damages" in common law, but the last two sentences should be retained.

23. Mr. BENNOUNA said he shared Mr. Shi's view. Neither in doctrine nor in practice was it accepted that satisfaction was punitive in character. He was quite opposed to that idea, towards which the Special Rapporteur, on the contrary, seemed to be moving.

24. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in looking at satisfaction as an institution in international law, he did so both from the angle of codification and from that of progressive development of the law. Article 10 sought to deal with that institution, but the article had strictly nothing to do with punitive actions of any kind. Such actions fell under other provisions, above all, Article 51 of the Charter of the United Nations, concerning the right of self-defence, and then article 14 as proposed in 1984 by Mr. Riphagen² and by himself at the forty-fourth session.³ Consequently, anyone who thought that the commentary on satisfaction reflected complacency towards punitive actions was entirely wrong. Satisfaction was precisely one way of offering a decent, or less indecent, form of reparation for certain acts committed by States, and of preventing such States from being placed in a position that would warrant possible resort to armed force.

25. The CHAIRMAN drew attention to the proposal to delete the last two sentences, or at least the penultimate sentence, of the paragraph.

26. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the phrase "by distinguishing between compensatory and afflictive damages" could be deleted, with the remainder left unchanged.

27. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the proposal by the Special Rapporteur to delete that part of the penultimate sentence of paragraph (12).

It was so agreed.

28. Mr. TOMUSCHAT said he would like to know whether the notion of "exemplary damages", mentioned in the second sentence of paragraph (12) was equivalent to "punitive damages". The Commission was basing itself solely on the traditions of common law and speaking about a concept elaborated in the context of common law, something which was open to criticism.

29. Mr. YANKOV said that the inclusion of the expression "exemplary damages" had initially been envisaged at the time the article had been under consideration in the Drafting Committee. Ultimately, the expression had been deleted and replaced by "damages reflecting the gravity of the infringement". He referred to the ex-

² For the texts of draft articles 6 to 16 of part 2 referred to the Drafting Committee, *ibid.*, pp. 20-21, footnote 66.

³ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook* . . . 1992, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

planation he had given for that choice when he had proposed the draft articles the Drafting Committee had considered at the forty-fourth session, namely:

Paragraph 2 provided an exhaustive list of the forms of satisfaction. Subparagraphs (a) and (b) maintained forms of satisfaction proposed by the Special Rapporteur. Subparagraph (c) dealt with what was known in common law as "exemplary damages", in other words, damages on an increased scale awarded to the injured party over and above the actual loss, where the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. The purpose of that type of remedy was to set an example. The Drafting Committee had not used the term "exemplary damages" because the term did not seem to have an equivalent in other languages.⁴

30. Mr. SHI said he would point out that some members of the Drafting Committee had been opposed to the concept of "exemplary damages". In the light of Mr. Tomuschat's comments, he proposed that the phrase "they correspond to what in common law is known as 'exemplary damages' i.e." should be deleted in the second sentence.

31. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was formally opposed to such a deletion.

32. Mr. ROSENSTOCK cautioned against a deletion which, far from clarifying the text, would remove one of the historical factors that explained the position reached by the Commission.

33. Mr. KUSUMA-ATMADJA said it was to be inferred from the view expressed by Mr. Rosenstock that there was not unanimous agreement on Mr. Shi's proposal. Personally, he was in favour of keeping the phrase in question.

34. Mr. MAHIOU said that, since he had no training in the common law, he had confidence in those who referred to it. He proposed that the words "they correspond" should be followed by the words "in the opinion of some".

35. Mr. RAZAFINDRALAMBO said that, like Mr. Kusuma-Atmadja, he thought the phrase should be retained. It was a reference to a common-law concept and did not make the paragraph any less clear.

36. Mr. AL-BAHARNA said he was not opposed to retaining the text. Nevertheless, as a compromise, a reference could be made to exemplary damages in a footnote, which would make it possible to delete the phrase in dispute.

37. Mr. SHI said that, if members wished to retain the reference to exemplary damages, he would not press his proposal. However, Mr. Al-Baharna's proposal could then be adopted.

38. Mr. BENNOUNA said that, since it was divided, the Commission could consider a compromise, in the form of one of the proposals either by Mr. Mahiou or Mr. Al-Baharna.

39. Mr. KOROMA said he was ready to accept Mr. Mahiou's compromise proposal, but preferred that of Mr. Al-Baharna.

40. The CHAIRMAN said that a footnote would simply complicate matters and it was easier to take up Mr. Mahiou's compromise proposal.

41. If he heard no objection, he would take it that the Commission agreed to adopt the amendment proposed by Mr. Mahiou.

Paragraph (12), as amended, was approved.

Paragraphs (13) to (15)

Paragraphs (13) to (15) were approved.

Paragraph (16)

42. Mr. YANKOV proposed that the first sentence should be recast to read: "The opening phrase of paragraph 2 makes it clear that it provides an exhaustive list of forms of satisfaction which may be combined".

It was so agreed.

Paragraph (16), as amended, was approved.

Paragraph (17)

Paragraph (17) was approved.

Paragraph (18)

43. Mr. YANKOV said the fourth sentence clearly showed, in his opinion, that the various forms of satisfaction should not be punitive in character. Again, it was regrettable that the commentary did not deal sufficiently with article 10, paragraph 3, which was none the less important.

44. Mr. SHI proposed that paragraph (18) should be deleted for the reasons he had indicated earlier.

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was opposed to the deletion of the paragraph, but the Commission was free to decide.

46. Mr. MAHIOU said he thought paragraph (18) reflected the disagreement found in doctrine, jurisprudence and practice, but deleting the paragraph would not solve the problem. If difficulties did exist, they should in fact be brought to the notice of the Sixth Committee and of States. Perhaps the Commission could none the less tone down the conclusion which the Special Rapporteur had reached after undoubtedly very thorough research, but which some members were unable to share. As the footnote to paragraph (18) showed, there was virtually a balance between the writers who considered that satisfaction had a punitive character and those who thought that it had an exclusively compensatory character. It was the phrase "the prevailing doctrine considers and" that posed a difficulty, for it was not really possible to determine whether the balance swung one way or another. It should perhaps be stated that the debate was still open.

47. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked Mr. Mahiou for his efforts to reconcile differing views. He had sought in his fifth report (A/CN.4/453 and Add.1-3) to discuss the question of the compensatory or punitive character of the various forms of reparation. A considerable part of doctrine and some eminent writers considered that even forms of reparation such as restitution in kind and compensation did not play an exclusively compensatory role. The distinction was not quite as clear as might be supposed and, in that regard, he thought that the categorical attitude of some members of the Commission did not augur well for consideration, at

⁴ See *Yearbook* . . . 1992, vol. I, 2288th meeting, para. 57.

the forty-sixth session, of a possible set of draft articles on crimes to be elaborated on the basis of article 19 of part 1.⁵ Without wishing to turn the problem into a personal issue, he thought it useful to refer members to chapter II, section C, of his fifth report, which dealt with the distinction between civil responsibility and penal or criminal responsibility. The discussion also touched on the question of fault and it was difficult to see how the Commission could deal with crimes without speaking of *dolus*. The problem was indivisible. It was too easy to say that States could have no criminal intent. The whole of history, including present times, demonstrated the opposite.

48. The CHAIRMAN thanked the Special Rapporteur for those clarifications. He would none the less point out that the commentary should reflect what had been decided in the course of the discussion in the Commission, as well as the views that had been expressed.

49. Mr. BENNOUNA said that the text under consideration constituted a clear position taken by the Commission and emphasized a number of times in the paragraph, when there was in fact no agreement in the Commission. The only compromise formula possible would be to say that the Commission had noted there was a doctrinal debate about the afflictive or compensatory character of satisfaction and it considered that the debate had no decisive effect on the legal regime concerning satisfaction.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said he had no objection to finding a formulation expressing an opinion of the Commission, but he could not agree to a statement that there was a doctrinal debate. In his opinion, doctrine could not be clearer on that point. Again, he could not agree to changes in paragraph (18) implying that, as Special Rapporteur, he would be attributing to doctrine things that doctrine did not say. The thing that disturbed him was that any afflictive element in satisfaction should be condemned, whether *de lege lata*, on the grounds that that aspect did not form part of the law, or *de lege ferenda*, on the grounds that such condemnation would further the development of international law.

51. Mr. BOWETT said that, like the Special Rapporteur, he feared that by removing any reference to the afflictive character of satisfaction, the Commission might find itself in an awkward position when it came to dealing with that part of the draft relating to crimes. It would also be an incorrect presentation of the state of the law at the present time. Those who considered that international law should develop in that direction could easily draft a paragraph expressing their point of view.

52. Mr. AL-BAHARNA said the difficulty lay perhaps in the use of quite strong terms such as "prevailing" or "confirm". The proper compromise would be to say simply that "doctrine, jurisprudence and practice generally attributed an afflictive character to satisfaction, as a form of reparation".

53. Mr. TOMUSCHAT, after consultations with Mr. BENNOUNA and Mr. SHI, proposed that the first sentence of the paragraph should be replaced by: "A school of thought as well as the jurisprudence and prac-

tice of some States attribute to satisfaction, as a form of reparation, an afflictive nature distinct from compensatory forms of reparation such as *restitutio* and compensation".

54. Mr. ARANGIO-RUIZ (Special Rapporteur) said he entirely disagreed with such a change, from the standpoint of both *lex lata* and *lex ferenda*, but he would not object to the paragraph being adopted without being put to the vote.

55. Mr. ROSENSTOCK said he shared the Special Rapporteur's view, but would not object to adoption of the paragraph. However, it did not seem appropriate to speak of the jurisprudence and practice of "some States" and he proposed the formulation "Some jurisprudence and practice ...".

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

56. Mr. TOMUSCHAT, in agreement with Mr. BENNOUNA and Mr. SHI, proposed that the word "functional", in the first sentence, should be deleted.

57. Mr. ARANGIO-RUIZ (Special Rapporteur) said he entirely disagreed with the proposed deletion, but he would not object to the paragraph being adopted by consensus.

Paragraph (19), as amended, was approved.

Paragraph (20)

Paragraph (20) was approved.

Paragraphs (21) to (23)

58. Mr. TOMUSCHAT proposed that paragraphs (21) to (23) should be deleted.

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said it would be a mistake to delete the paragraphs in their entirety. It was difficult to see why, in paragraph (23), the three sentences preceding the quotation from Morelli—sentences that were difficult to challenge—should be deleted.

60. Mr. YANKOV said he too thought it was far too radical a solution purely and simply to delete paragraphs that reflected the discussion in the Commission and in the Drafting Committee. Before proceeding with a deletion of that kind, supporting arguments should be advanced in the case of each sentence in each of the three paragraphs.

61. Mr. ROSENSTOCK said he was of the same opinion as the Special Rapporteur and Mr. Yankov. Some adjustments were doubtless possible. For example, the words "do not seem to the Commission", in paragraph (22), could be replaced by "do not seem to some members of the Commission". In any event, deleting the three paragraphs in question would deprive the community of jurists of the interesting discussion that had taken place in the Commission on that issue.

62. Mr. VILLAGRÁN KRAMER said he supported Mr. Rosenstock's proposal and thought that account

⁵ For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook...* 1980, vol. II (Part Two), pp. 30 *et seq.*

should also be taken of the comments by the Special Rapporteur.

63. Mr. CALERO RODRIGUES said he did not think it wise to delete the paragraphs in question. They contained useful elements for interpreting the content of the article to which they referred. In that connection, the Commission admitted in the draft articles themselves that satisfaction was to some extent afflictive in nature. Changes such as the one proposed by Mr. Rosenstock might certainly be necessary, but simply deleting the three paragraphs seemed too radical a solution.

64. Mr. BENNOUNA explained that it had been decided after consultations to propose the deletion of paragraphs (21) to (23) because they constituted a particular stance, namely that satisfaction had an afflictive character. In paragraph (18), the phrase in which that afflictive character had been regarded as admitted in the "prevailing doctrine" had been deleted and it was therefore justifiable to delete paragraphs (21) to (23). The Special Rapporteur had taken a position, as he was entitled to, but the paragraphs in question did not adequately reflect the situation, namely, that a number of members of the Commission did not consider that satisfaction was afflictive in character.

65. Mr. PAMBOU-TCHIVOUNDA said that he endorsed Mr. Bennouna's remarks: there were divergencies in the Commission. The position of members who considered that satisfaction did not have an afflictive character should be stated.

66. The CHAIRMAN, noting the absence of consensus on the proposal to delete paragraphs (21) to (23), suggested that a working group, consisting of Mr. Bennouna, Mr. Calero Rodrigues, Mr. Rosenstock, Mr. Shi, Mr. Tomuschat and Mr. Yankov, should meet to propose at the next meeting a compromise formulation for those paragraphs, as well as for paragraph (24), to which Mr. Tomuschat would also like to make changes.

It was so agreed.

Paragraph (25)

67. Mr. ROSENSTOCK said that paragraph (25) could not be adopted without knowing what the content of paragraphs (21) to (24) would be. It started with the words "On the other hand" and was a counterpart to the paragraphs that preceded it.

68. The CHAIRMAN suggested that the Commission should postpone consideration of paragraph (25) until the working group had submitted a text for paragraphs (21) to (24).

It was so agreed.

69. Mr. TOMUSCHAT said that, in connection with an earlier article, he had regretted the fact that the commentary did not discuss the notion of the injured State. The same was true of article 10. In the light of article 5, which contained the definition of the injured State,⁶ it might be thought that any injured State was entitled, for example by virtue of a treaty on the protection of human rights, to demand excuses or token damages. The problem of the rights of injured States was, moreover, a gen-

eral one and did not arise simply in connection with satisfaction. Whether in the commentary to article 5 or elsewhere in the draft, there was a gap and it should be filled.

70. Mr. CRAWFORD said he endorsed Mr. Tomuschat's comments. The question could have been dealt with under article 5, in a more exhaustive commentary containing cross-references.

71. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the expression "injured State" appeared often in parts 2 and 3 of the draft. If explanations had to be provided every time, the commentaries would be a good deal more cumbersome. Once an overall view was gained of the articles that mentioned the injured State and it was possible to analyse for what purposes and in what sense it was injured, the definition of the expression in article 5 could be adjusted accordingly.

72. Mr. VERESHCHETIN, supported by Mr. ROSENSTOCK, said that the question of the rights of various injured States to the different forms of reparation, including satisfaction, was not sufficiently developed in the commentary, nor was it reflected in the work of the Drafting Committee. He therefore proposed that the Commission should indicate in its report that it intended to revert to the matter at a later stage in its work.

73. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to indicate in its report, for example in a footnote, that it intended to revert to the question of the rights of injured States at a later stage in its work.

It was so agreed.

74. Mr. JACOVIDES said that, for reasons beyond his control, he had been prevented from taking part earlier in the work of the session and he wished to make a few general comments on two topics in which he took a particular interest.

75. As to the first, State responsibility, and more particularly part 3 of the draft, he was in principle, and had always been, in favour of an effective, expeditious and binding procedure for third-party settlement of disputes. It was his hope that, with the change in doctrinaire ideological attitudes, that position of the principle would have a greater chance of prevailing.

76. As to the other topic, the statute for an international criminal court, it was gratifying that the Commission had responded quite rapidly to the General Assembly's request, thanks to the efforts and diligence of the Working Group on a draft statute for an international criminal court. The need for a permanent institution, besides ad hoc tribunals set up for particular situations, was recognized on all sides: at the World Conference on Human Rights⁷ and also in a recent editorial in the *New York Times*. If such an institution had already existed, the international community would have been spared many controversies about differing aims. Like several other members of the Commission, he would have preferred a court with compulsory and exclusive jurisdiction, tied, though not exclusively, to an appropriately slimmed down and hence more effective code of crimes against the peace and security of mankind. Codification

⁶ See footnote 1 above.

⁷ Held at Vienna from 14 to 25 June 1993.

and progressive development of international law none the less called for pragmatism and the result achieved by the Commission was a first substantial step towards the establishment of a permanent international criminal court once the formula adopted for the moment proved its worth. Many issues remained pending, as evidenced by the number of passages of the text that were in square brackets. On those matters, his view was that the court should be an organ of the United Nations and a permanent institution, even though it would only sit when required to consider a case submitted to it. The President would also act on a permanent basis. The court's jurisdiction should not be unduly restricted, and it should include crimes under general international law. The Security Council should have the right to bring crimes before the court and the court should have appropriately circumscribed jurisdiction *in absentia*. The rights of appeal and review should be recognized.

The meeting rose at 1.10 p.m.

2321st MEETING

Monday, 19 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Vaclav MIKULKA

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-fifth session (*continued*)

CHAPTER IV. *State responsibility* (*continued*) (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. *Draft articles of part 2 of the draft on State responsibility* (*continued*)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (*continued*) (A/CN.4/L.484/Add.2-7)

Commentary to article 6 bis (Reparation) (concluded) (A/CN.4/L.484/Add.3)

1. The CHAIRMAN recalled that, at the previous meeting, Mr. Tomuschat and Mr. Vereshchetin had raised the problem of differently injured States. In order to make their remarks applicable to all the articles on reparation, the Special Rapporteur had suggested the addition of a few words to what had originally appeared as

paragraph (6 *ter*) of the commentary to article 6 *bis*, a paragraph which the Commission had decided to turn into a footnote. The footnote would read:

“The possible implications for the provisions on reparation of the existence of a plurality of injured States, including the question of the so-called differently or indirectly injured States, will be considered at a later stage.”

2. If he heard no objections, he would take it that the Commission agreed to adopt that footnote.

It was so agreed.

The commentary to article 6 bis, as amended, was approved.

Commentary to article 10 (Satisfaction) (concluded) (A/CN.4/L.484/Add.6)

Paragraphs (21) to (25)

3. The CHAIRMAN invited Mr. Yankov to introduce the text proposed by the small working group assigned the task of finding a generally acceptable solution for paragraphs (21) to (24).

4. Mr. YANKOV said that the working group proposed the following text, which would form paragraphs (20 *bis*) to (24) of the commentary to article 10:

“(20 *bis*) The Commission, while agreeing on the content and formulation of the provisions of article 10, did not find it necessary to pronounce itself on the question of whether an afflictive nature should be attributed to satisfaction as a form of reparation, a question on which doctrinal opinions were divided.

“(21) It was argued that the afflictive nature of satisfaction was not compatible either with the composition or with the structure of a ‘society of States’ on the grounds that:

(a) Punishment or penalty does not ‘become’ persons other than human beings, and notably not sovereign States; and

(b) The imposition of punishment or penalty within a legal system presupposes the existence of institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon—if ever—in the ‘society of States’.

“(22) On the other hand, it was maintained that the very absence, in the ‘society of States’, of institutions capable of performing such ‘authoritative’ functions as the prosecution, trial and punishment of criminal offences committed by States makes even more necessary the resort to remedies susceptible of reducing, albeit in a very small measure, the gap represented by the absence of such institutions. The afflictive nature of satisfaction, according to this view, was not in contrast with the sovereign equality of the States involved. It was also considered that satisfaction is a matter of atonement.⁴¹ To confine the consequences of any international delict (whatever its gravity) to restitution in kind and compensation would mean to overlook the necessity of providing some specific remedy—having a preventive as well as an afflictive function—for the moral, political and juridi-

cal wrong suffered by the offended State or States in addition to, or instead of, any amount of material damage.

“(23) The Commission finds it all the more important to recognize the positive functions of satisfaction in the relations among States, as it is precisely by resorting to one or more of the various forms of satisfaction that the consequences of the offending State’s wrongful conduct can be adapted to the gravity of the wrongful act. This conclusion is of considerable importance as a matter of both codification and progressive development in this field.

“(24) On the other hand, the Commission finds it important to draw lessons from the diplomatic practice of satisfaction, which shows that abuses on the part of injured or allegedly injured States are not rare. Powerful States have often managed to impose on weaker offenders excuses or humiliating forms of satisfaction incompatible with the dignity of the wrongdoing State and with the principle of equality. The need to prevent abuse has been stressed by a number of authors.⁴² It underlies paragraph 3 of article 10, which, by making it clear that demands that would impair the dignity of the wrongdoing State are unacceptable, provides an indispensable indication of the limits within which a claim to satisfaction in one or more of its possible forms should be met by such a State.”

The footnote relating to paragraph (22) would read:

“⁴¹ In the words of Morelli:

Satisfaction is in some ways analogous to a penalty, which also fulfils a function of atonement. Again, satisfaction, like a penalty, is afflictive in character in that it pursues an aim in such a way that the subject responsible undergoes harm. The difference is that, while a penalty is harm inflicted by another subject, in satisfaction the harm consists of a particular kind of conduct by the subject who is responsible—conduct which constitutes, as in other forms of reparation, the content of the subject’s obligation.

Op. cit. (see footnote 4 above), p. 358.”

Footnote 42 would remain unchanged.

5. The working group had made an effort to preserve the integrity of the text, while at the same time reflecting in a balanced manner the different views expressed on the subject of the afflictive nature of satisfaction.

6. Paragraph (20 bis) of the proposed text was new. It emphasized the division of doctrinal opinions on the issue of the afflictive nature of satisfaction. Paragraph (21) set forth the trend of opinion which considered that the afflictive nature of satisfaction was not compatible with the composition or with the structure of the society of States. Paragraph (22) indicated the views of those who believed that satisfaction could have an afflictive character. Lastly, paragraphs (23) and (24) set out the Commission’s views. The text of paragraph (24) was that of original paragraph (25).

7. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the proposed formulation was an improvement over the earlier text. He still had objections, however, to the proposed paragraphs, especially, but not exclusively, to

paragraph (20 bis), but would not stand in the way of the adoption of the paragraphs.

8. Mr. YANKOV, thanking the Special Rapporteur for his cooperation, said that the proposed formula would not satisfy everyone on all points, but it reflected the general view of the Commission.

9. Mr. VERESHCHETIN said that, since two trends of doctrinal opinion were reflected in paragraphs (21) and (22), it would be appropriate to reword the opening sentence of each of those paragraphs so as to indicate clearly that they did reflect two trends.

10. Mr. YANKOV said that the opening words “It was argued . . .” in paragraph (21), and “On the other hand, it was maintained . . .”, in paragraph (22), were intended to indicate that some members favoured the first doctrinal trend and some the second. Those introductory formulas were used in order to avoid speaking of “some members” or “a number of members”. The purpose of paragraphs (21) and (22) was not to describe two sets of doctrinal opinions but rather to indicate the views expressed by the members of the Commission with regard to certain doctrines.

11. Mr. KOROMA pointed out that the afflictive nature of satisfaction was incompatible with the principle of the sovereign equality of States. That fact should be reflected more clearly in paragraph (21).

12. Mr. YANKOV drew attention to the words “society of States” and the reference to “sovereign States” in paragraph (21).

13. Mr. CALERO RODRIGUES proposed that, in order to meet the point raised by Mr. Koroma, the beginning of paragraph (21) should be altered to read: “It was argued that the afflictive nature of satisfaction was incompatible with the sovereign equality of States. It was not compatible either with . . .”

14. Mr. KOROMA said he agreed to that formula.

15. Mr. ROSENSTOCK said that he supported the proposal by Mr. Calero Rodrigues.

16. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to adopt paragraphs (20 bis) to (24) as introduced by Mr. Yankov, as amended by Mr. Calero Rodrigues.

Paragraphs (20 bis) to (24) (former paragraphs (21) to (25)), as amended, were approved.

The commentary to article 10, as amended, was approved.

Commentary to article 10 bis (Assurances and guarantees of non-repetition) (A/CN.4/L.484/Add.7)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraphs (4) and (5)

17. Mr. YANKOV said that the reason for using the words “where appropriate”, in article 10 bis, was a matter of some importance. The question of the inclusion of those words had been the subject of much discussion, but no explanation was given in the commentary. Actually, the purpose of those words was to introduce an el-

ement of flexibility and leave it to the judge or third-party adjudicator to determine whether it was justifiable to allow for assurances or guarantees of non-repetition. Grounds for granting such a remedy would be sought in the fact that there existed a real risk of repetition or that the claimant State had already suffered substantial injury.

18. Clarification of that point was important for the interpretation of article 10 *bis* and some elaboration of paragraph (5) of the commentary might be useful.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) said that some explanation was provided in paragraph (5), although the words "where appropriate" were clear enough. He would point out, however, that it was not only the judge or third-party adjudicator who was concerned by the words "where appropriate". It was also any conciliator or even a political body and, indeed, the States concerned themselves, that should realize what was appropriate and what was not. In any case, it was not essential to add anything on the subject, bearing in mind in particular the remarks already made with regard to the length of the commentaries.

20. Mr. VERESHCHETIN proposed that the examples contained in the first footnote to paragraph (4), should be deleted. They were taken from a distant past and illustrated an unsatisfactory phase of international law. He was thinking in particular of the reference to the capitulations and to the 1901 case of the Ottoman post offices.

21. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was true that some of the cases mentioned in that footnote were of historical interest, but they could still provide useful illustrations.

22. Mr. RAZAFINDRALAMBO said he strongly supported the retention of the examples in that footnote. The suggestion that cases of historical interest should not be cited would mean ignoring all examples taken from the colonial era.

23. Mr. VERESHCHETIN said it was unfortunate that Mr. Güney was absent, since he could have expressed an opinion as to the advisability of citing cases which concerned the Ottoman Empire. The Special Rapporteur was known for his opposition to colonialism and his respect for national sovereignty and could no doubt provide more recent examples as suitable illustrations of the question of assurances and guarantees of non-repetition.

24. Mr. SHI urged that at least some of the examples contained in that footnote should be deleted.

25. Mr. BOWETT pointed out that the examples were cases which had really happened. He saw no sense in trying to rewrite history. In order to meet Mr. Vereshchetin's objection, he suggested that a sentence should be inserted at the end of the footnote, reading: "These examples would not necessarily represent what would be 'appropriate' by today's standards (see para. (5) below)."

26. Mr. MIKULKA said that, while he was not opposed to Mr. Bowett's proposal, he found it regrettable that the rule governing assurances and guarantees of non-repetition had to be based on such old cases as those cited in the footnote. If it really was not possible to find one single up-to-date example of an assurance of non-

repetition, the continued validity of the rule should perhaps be called into question.

27. Mr. ROSENSTOCK said he sympathized with that view, but did not think the intention was to exclude all the examples. He therefore suggested that the word "all" should be added before the word "necessarily" in Mr. Bowett's proposed additional wording.

28. Mr. ARANGIO-RUIZ (Special Rapporteur), noting that Mr. Vereshchetin had suggested that the Commission might wish to have Mr. Güney's views on the reference to the 1901 case of the Ottoman post offices, said that, for his own part, he saw no point in inviting members' views on incidents in the past history of their respective countries.

29. As to the point raised by Mr. Mikulka, unfortunately he was not able at that point to produce modern examples of guarantees of non-repetition, but would remind the Commission that it was not only codifying but also progressively developing international law. Guarantees of non-repetition were important within the framework of the draft on State responsibility and he would therefore suggest that the Commission should move ahead without looking back unduly into history.

30. Mr. VERESHCHETIN said that it would be best, where possible, to do without the references to old cases. Since some members felt that those references were essential, however, he was prepared to agree to Mr. Bowett's proposed additional wording, as amended by Mr. Rosenstock, and, if that was acceptable to the Commission, would withdraw his objection.

31. He had in fact submitted his proposal on that and other questions to the Special Rapporteur in writing some 10 days earlier. What was of particular concern to him was that at a number of points in the commentary, particularly in the footnotes, examples taken from the distant past—including the slavery period in the United States, were cited in support of modern rules of international law. Such examples had no place in the commentaries, particularly since, as the Special Rapporteur had pointed out, the commentaries were long enough already.

32. Mr. KOROMA said that, as the Special Rapporteur himself recognized, it would be difficult to find an example to back up the proposition set forth in paragraph (4). Possibly, therefore, the footnote could be deleted. He did not think that would harm the text.

33. Mr. SHI said that the examples given in the first footnote to paragraph (4) of the commentary to article 10 *bis* would certainly be attacked by a number of delegations in the Sixth Committee.

34. The CHAIRMAN, observing that all the comments made by members would be reflected in the summary records, said that, if he heard no objections, he would take it that the Commission agreed to adopt paragraphs (4) and (5), together with the first footnote to paragraph (4), as amended by the proposals of Mr. Bowett and Mr. Rosenstock.

The commentary to article 10 bis, as amended, was approved.

Commentary to article 7 (Restitution in kind) (A/CN.4/L.484/Add.4)

Paragraphs (1) to (17)

Paragraphs (1) to (17) were approved.

The commentary to article 7 was approved.

Mr. Mikulka took the Chair.

Commentary to article 6 (Cessation of wrongful conduct) (concluded) (A/CN.4/L.484/Add.2)

Paragraph (10)

35. The CHAIRMAN invited the Commission to consider a text proposed by Mr. Tomuschat for insertion at the end of paragraph (10), to read:

“A more recent example is that of the *Vermeire* case, in which the European Court of Human Rights stated that by virtue of its former *Marckx* judgment, Belgium had been under an obligation to repeal the laws discriminating against children born out of wedlock.”

36. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to adopt paragraph (10) as amended by Mr. Tomuschat.

Paragraph (10), as amended, was approved.

Paragraph (10 bis)

37. The CHAIRMAN invited the Commission to consider a new paragraph, paragraph (10 bis), proposed by Mr. Tomuschat, to read:

“(10 bis) An illustration of the duty of cessation is also provided by the procedure under article 169 of the Treaty establishing the European Economic Community. Under this procedure, the Court of Justice of the Community can make findings that a State has breached its obligations under the Treaty. In most cases, the Court has to pronounce itself on national legislation allegedly contrary to a rule of Community law. If a finding of inconsistency is made by the Court, this implies the duty for the defendant State to repeal the legislative act concerned.”

38. Mr. PELLET said that it would be odd to place Mr. Tomuschat's proposed amendment, which referred to a specific procedure in the law of the European Community, in the middle of a commentary on a general rule of international law, for that would imply that the Commission had taken a position on Community law. As a matter of principle, the Commission should not cite examples from Community law without any prior discussion.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Tomuschat's proposal was quite innocent. Such self-contained regimes as the law of the European Community had been discussed by the Commission before, without any implication that the Commission was taking a position on such regimes.

40. Mr. VILLAGRÁN KRAMER, supported by Mr. CALERO RODRIGUES, said that, as he recalled, when the Commission had discussed the matter at an earlier meeting, Mr. Tomuschat had argued that the *De Becker* case was too old to be cited and that the Commission should refer to more recent examples.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, since the proposal was that of Mr. Tomuschat, any amendment should be left to him. Perhaps the example could be qualified by inserting “*inter alia*”. The amendment referred to a good example of the consequences of a wrongful act, an example which could be followed by States or international organizations with regard to the violation of international treaty obligations.

42. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to the amendment proposed by the Special Rapporteur.

Paragraph (10 bis) was approved.

The commentary to article 6, as amended, was approved.

Commentary to article 8 (Compensation) (A/CN.4/L.484/Add.5)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were approved.

Paragraphs (9) to (11)

43. Mr. VERESHCHETIN said that the issue of causality, which was dealt with in paragraphs (9) to (11), had not been discussed in sufficient detail in the Commission or the drafting group to justify the Special Rapporteur's rather categorical statement of the Commission's understanding of the problem. It was, of course, impossible to begin redrafting all the paragraphs at the present stage, and the Special Rapporteur had already softened his original wording by using the phrase “The Commission is thus inclined to think” instead of “The Commission thus concludes” in paragraph (11). The Commission should nevertheless return to the question on second reading, especially since the latter part of paragraph (13), beginning “In view of the diversity of possible situations . . .” seemed to contradict the more categorical statement in paragraph (11).

44. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the section of paragraph (13) to which Mr. Vereshchetin had referred dealt with concurrence of causation by third parties and external factors, whereas paragraph (11) was concerned with the general definition of causality and the causal link. Paragraph (11) still seemed acceptable in its present wording, but it was important to mention that everything would depend on the circumstances of the particular case. The question could, of course, be reconsidered on second reading, but there was no real contradiction between paragraph (13) and paragraph (11).

45. Mr. VILLAGRÁN KRAMER said that he shared Mr. Vereshchetin's reservations on the question. The reports of the Special Rapporteur concerning the articles had provided the Commission and the drafting group with a remarkable account of doctrine and a thorough analysis of jurisprudence. However, the drafting group had not taken all that information into account in its work on article 8 and had also introduced other considerations. Of course, it was impossible for a collegiate body to take all views fully into consideration, but some members had been trying to establish what the applicable existing law was, in an attempt to codify *lex lata* on

a strictly juridical basis. The commentary did not properly reflect the views of those members.

46. In particular, the painful legal precedents of the mixed claims commissions of the late nineteenth and early twentieth centuries in Latin America should not be used as the basis for the construction of contemporary law. His comments should not be taken as a personal criticism of the Special Rapporteur, who had done excellent work. However, he would suggest actual amendments to the text on second reading.

47. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (9), subject to the comments made by Mr. Vereshchetin and Mr. Villagrán Kramer, and paragraphs (10) and (11).

It was so agreed.

Paragraphs (9) to (11) were approved.

Paragraph (12)

48. Mr. BOWETT pointed out, with reference to the footnote to paragraph (12), that the only decision taken so far in the *Nauru* case concerned jurisdiction and applicability. He could not, therefore, understand the footnote.

49. Mr. PELLET said that he endorsed Mr. Bowett's comment. On a different point, the French version of the last sentence of paragraph (12) used the word *fautes* for "wrongdoing", whereas the term *fait internationalement illicite* (internationally wrongful act) would be more accurate. The French text needed to be tidied up in that respect in several places.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the footnote to paragraph (12) referred to the future decision which ICJ would probably take in the *Nauru* case. Perhaps the reference should be to the "pending decision".

51. The secretariat should not be instructed to replace *faute* by *fait internationalement illicite* everywhere in the French text, because in places he had used the term in a different sense.

52. The CHAIRMAN said that Mr. Pellet's objection to the word *fautes* had been restricted to its use in the third sentence of paragraph (12). His more general observation dealt with the need to standardize the French texts by replacing the words *acte internationalement illicite* by the words *fait internationalement illicite* throughout.

53. Mr. PELLET said that he had indeed been referring to paragraph (12) in suggesting that the word *fautes* should be deleted. Such a word was not appropriate in the case of *délits internationaux*, although it might be used in the case of *crimes*. He would also like to know whether "internationally wrongful act" was an accurate translation of *fait internationalement illicite*, since, in French, there was an important difference between *acte* and *fait*.

54. Mr. BOWETT suggested that the footnote to paragraph (12) should read "The pending ICJ decision in the *Nauru* case may provide useful analysis in this context".

55. The CHAIRMAN said that there were some reservations about the phrase "pending ICJ decision". Perhaps it would be better to speak of the "future decision of ICJ in the pending *Nauru* case".

56. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested that the footnote to paragraph (12) should read "The *Nauru* case, which is pending before ICJ, might provide useful indications in this context". That would stress the fact that the Court might or might not decide on the merits of the case.

57. In reply to Mr. Pellet, he said that the word "act" in English had always been acceptable in the context of State responsibility. Furthermore, the word *faute*, which was certainly appropriate when referring to imputability for a particular act, should not be eliminated entirely but should be used properly.

58. Mr. CALERO RODRIGUES said that the footnote to paragraph (12) could be deleted in its entirety. Why should the Commission waste time drafting a footnote on a case which might or might not be relevant?

59. Mr. ARANGIO-RUIZ said that there was no reason not to mention a pending case that might turn out to be relevant. Furthermore, the Commission was often criticized for citing cases that were out of date. Such criticism certainly could not be levelled in respect of the *Nauru* case.

60. Mr. BOWETT said that he endorsed the proposed wording for the footnote to paragraph (12).

61. Mr. CALERO RODRIGUES said that, while he would join the consensus on the footnote, he would prefer to refer to a case that already existed rather than to a case that was pending.

Paragraph (12) and the footnote thereto, as amended, were approved.

Paragraphs (13) to (15)

Paragraphs (13) to (15) were approved.

Paragraphs (16) and (17)

62. Mr. VERESHCHETIN drew attention to the fourth and fifth sentences of paragraph (16), which read: "It is true that compensation does not ordinarily cover the moral (non-material) damage to the injured State . . . It is not true, however, that compensation does not cover moral damage to the persons of nationals or agents of the injured State". In his view, the word "agents" should be deleted because, in the cases referred to, they were acting in their personal capacity. If the word "agents" was retained, then it should be made clear that reference was being made to cases where such agents were acting in their private capacity. Without that clarification, damage to agents would be the same as damage to the injured State.

63. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the meaning of those sentences was made clear by the phrase "moral damage to the persons of nationals or agents of the injured State", which distinguished it from damage to the injured State. Both the drafting group and the Commission had considered that distinction important. Perhaps paragraph (16) could be improved by inserting in the last sentence, after the words "moral dam-

age to the”, the words “persons of the”, which would highlight the distinction drawn.

64. Mr. VERESHCHETIN said that he would not insist on the deletion of the word “agent”. Nevertheless, in the Russian text, the phrase would have to be translated as “moral damage to natural and juridical persons and agents of the State acting in their private capacity”.

65. The CHAIRMAN said he wondered whether Mr. Vereshchetin’s reference to “natural and juridical persons” was an accurate reflection of the interpretation just given by the Special Rapporteur.

66. Mr. VERESHCHETIN said it was his understanding that the paragraph under consideration related only to natural persons. However, the Special Rapporteur had referred at other times to “natural and juridical persons”. During the debate he himself had stressed the need for a more accurate use of the word “national”, which pertained exclusively to natural persons in some cases and to both natural and juridical persons in others. The Special Rapporteur and other members had tried to convince him that the word “national” in English generally meant both natural and juridical persons.

67. The CHAIRMAN noted that the French text of paragraph (17) did not correspond to the English text.

68. Mr. PELLET said that, while he had no objections to the Special Rapporteur’s proposals, he did not agree with his explanations. In his view, both paragraphs (16) and (17) dealt with agents as persons, rather than with agents acting in their personal capacity (*agents agissant à titre privé*) which was the meaning of the French text in paragraph (17).

69. Mr. ROSENSTOCK proposed that, at the first mention of the word “agents” in paragraph (16), a note should be added indicating that in both paragraphs (16) and (17) the word “agents” should be understood as “agents in their personal capacity”.

70. Mr. ARANGIO-RUIZ said he had nowhere referred to “agents acting in their personal capacity”; furthermore, he agreed with Mr. Pellet that the phrase *agents agissant à titre privé* in the French version of paragraph (17) was incorrect. The individuals in question were not acting at all: they had sustained injury to their person. In English, that was correctly expressed by the phrase “the injury is sustained by . . . agents in their private capacity”, in the second sentence of paragraph (17).

71. The CHAIRMAN, speaking as a member of the Commission, suggested that a more simple formulation would be: “human beings who have been victims of bodily harm”.

72. Mr. ARANGIO-RUIZ said that it was not necessarily a question of bodily harm. As to the word “national”, he had used it in the text to mean both natural and juridical persons.

73. The CHAIRMAN said that discussion on paragraph (17) would be continued at the afternoon meeting.

CHAPTER VI. *Other decisions and recommendations of the Commission* (A/CN.4/L.486)

A. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Paragraph 12

Paragraph 12 was adopted with a minor drafting change in the French version.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

74. Mr. CALERO RODRIGUES said that it should be made clear when exactly the topic of “State succession and its impact on the nationality of natural and legal persons” had been identified by the Commission.

75. The CHAIRMAN said that point would be handled by the secretariat.

Paragraph 15 was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

76. Mr. CALERO RODRIGUES said that the word “conquered”, in the second sentence, was not very felicitous, even in the context of the First World War.

77. Mr. PELLET proposed that the word “conquered” should be replaced by the word “defeated”.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 22

Paragraphs 18 to 22 were adopted.

Paragraph 23

78. Mr. PAMBOU-TCHIVOUNDA said that the paragraph required closer examination. In particular, the first sentence should be drafted in more flexible terms to allow for future options with respect to the outcome of the Commission’s work on the topic, in addition to a study or a draft declaration to be adopted by the General Assembly.

79. The CHAIRMAN said that the Commission was engaged in the adoption of its report and so could not alter the substance of the paragraph.

80. Mr. RAZAFINDRALAMBO proposed that, to meet Mr. Pambou-Tchivounda’s point, the words “for example” should be inserted before “a study or a draft declaration”.

81. Mr. CALERO RODRIGUES said that the sense of that proposal was already covered by the word “could”,

in the first sentence. As he recalled the second sentence had been included specifically to make the first sentence more flexible. In his view, therefore, paragraph 23 not only reflected what had already been approved but its substance should go some way to meeting Mr. Pambou-Tchivounda's point of view—which also happened to be his own.

82. Mr. KOROMA suggested that the paragraph should be amended to provide that a decision on the outcome of the study would be taken at a later stage. That would give everybody more time to reflect on the matter.

83. The CHAIRMAN suggested that, to enable the Commission to proceed with its work, it should agree to Mr. Razafindralambo's proposal.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 36

Paragraphs 24 to 36 were adopted.

Section A, as amended, was adopted.

B. Cooperation with other bodies

Paragraphs 37 to 39

Paragraphs 37 to 39 were adopted.

Section B was adopted.

C. Date and place of the forty-sixth session

Paragraph 40

Paragraph 40 was adopted.

Section C was adopted.

D. Representation at the forty-eighth session of the General Assembly

Paragraph 41

Paragraph 41 was adopted.

Section D was adopted.

E. International Law Seminar

Paragraphs 42 to 48

Paragraphs 42 to 48 were adopted.

Paragraph 49

84. Mr. PELLET said he much regretted that France was not among the donors listed in the second sentence. He would endeavour to remedy that situation.

Paragraph 49 was adopted.

Paragraph 50

Paragraph 50 was adopted.

Paragraph 51

85. Mr. PELLET said that the French authorities had rightly been very shocked that interpretation had not

been systematically provided at the International Law Seminar. It was apparent from the list of participants that French-speaking candidates were gradually being discouraged by the complete domination of English in the Seminar. Obviously, if interpretation were to be eliminated, all French-speaking candidates would eventually be discouraged. That applied not only to France but also to many African countries.

Paragraph 51 was adopted.

Section E was adopted.

F. Gilberto Amado Memorial Lecture

Paragraphs 52 to 54

Paragraphs 52 to 54 were adopted.

Chapter VI, as a whole, as amended, was adopted.

The meeting rose at 1.15 p.m.

2322nd MEETING

Monday, 19 July 1993, at 3.10 p.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

The law of the non-navigational uses of international watercourses (concluded)* (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,¹ A/CN.4/451,² A/CN.4/L.489)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING³

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.489) containing the titles and texts of the draft articles adopted by the Committee on second reading.

* Resumed from the 2316th meeting.

¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

² Ibid.

³ The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

2. Mr. MIKULKA (Chairman of the Drafting Committee) said that the Committee had held a total of 37 meetings from 4 May to 13 July 1993. The membership of the Committee for consideration of the draft articles on State responsibility had been different from that for consideration of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law and the law of the non-navigational uses of international watercourses. The Committee had held two meetings, on 12 and 13 July, on the last mentioned topic and had adopted nine articles, which were reproduced in its report.

3. He recalled that, at the current session, the Commission had referred articles 1 to 10 to the Drafting Committee for second reading. The Committee had taken note of the views expressed by the Special Rapporteur and by many members of the Commission to the effect that the articles adopted on first reading had largely been found acceptable by Governments and that the main function of the second reading should therefore be one of "fine tuning". The Committee had therefore introduced changes in the articles only when it had been found necessary for clarity. There were also two matters which concerned the articles as a whole and called for preliminary explanations.

4. First, in accordance with the Special Rapporteur's recommendation, supported by many members of the Commission, the Committee had replaced the word "appreciable" by "significant" throughout the draft articles. The Drafting Committee held the view that the word "significant" had the same meaning with regard to watercourses as in the articles on international liability for injurious consequences arising out of acts not prohibited by international law, namely, that it meant something more than "measurable", but less than "serious" or "substantial". The second matter concerned the possible inclusion of confined groundwater in the scope of the articles. The Commission had requested the Special Rapporteur, Mr. Rosenstock, to undertake a feasibility study of that question and he had indicated that he would submit such a study in 1994. Consequently, the Drafting Committee recommended the nine articles it had adopted on the understanding that, should the Commission decide at its following session to include confined groundwater in the scope of the draft articles and it thus became necessary to amend the nine articles, the Drafting Committee would reconsider them.

5. The titles and texts of articles 1 to 6 and 8 to 10, as adopted by the Drafting Committee on second reading, read:

PART I

INTRODUCTION

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses 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 2. Use of terms

For the purposes of the present articles:

- (a) "international watercourse" means a watercourse, parts of which are situated in different States;
- (b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;
- (c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3. Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse 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 or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

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, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4. Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse 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 5. Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6. Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

- (a) geographic, hydrographic, hydrological, climatic, ecological 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 the watercourse in one watercourse State on other watercourse States;
- (d) existing and potential uses of the watercourse;
- (e) conservation, protection, development and economy of use of the water resources of the watercourse 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 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

...

Article 8. General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9. Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10. Relationship between different kinds of uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

6. Article 1 (Scope of the present articles) had been found acceptable both by Governments and by the Commission, and the only comment made in plenary had been that the concept of "management" developed in chapter 18 of Agenda 21,⁴ dealing with the protection of the quality and supply of freshwater resources, should be incorporated in the article. The Drafting Committee had felt that the inclusion of that concept in article 1 was useful, particularly as the question of management was dealt with in article 26.⁵ Its inclusion did not affect the scope of the articles, but defined it more clearly and

comprehensively. Accordingly, the only change made to article 1 was that the words "and management" had been added after the word "conservation" in paragraph 1.

7. With regard to article 2 (Use of terms) the Drafting Committee had felt that no changes were necessary. It had taken note of the fact that the definition of "pollution" currently contained in article 21, paragraph 2,⁶ would be moved to article 2, but had found it unnecessary to make that change in the immediate future, as article 21 had not yet been referred to the Committee.

8. In article 3 (Watercourse agreements), the Drafting Committee had replaced the word "appreciable" by "significant" in the English text, but had made no other change, as some members of the Commission had indicated that they preferred the existing text of paragraph 2 to the wording proposed by the Special Rapporteur in his first report (A/CN.4/451).

9. As no changes to article 4 (Parties to watercourse agreements) had been recommended in plenary, the Committee had again simply replaced "appreciable" by "significant" in paragraph 2 of the English text. As no changes had been suggested to the first two articles of part II, "General Principles", of the draft, namely, article 5 (Equitable and reasonable utilization and participation) and article 6 (Factors relevant to equitable and reasonable utilization), the Drafting Committee had left them as they stood.

10. The Committee had deferred consideration of article 7 to the following session. It was one of the most important articles of the draft and had been the subject of considerable discussion in plenary, with the Special Rapporteur raising four issues with respect to it. He had wondered, first, whether it would be appropriate to include an explicit reference to the concept of due diligence; secondly, whether it was justifiable to treat the problem of harm caused by pollution separately from harm resulting from other causes; thirdly, if it was decided to treat the problem of harm caused by pollution separately, whether there were any special circumstances which might allow for continued utilization, even though it caused pollution; and, fourthly, whether article 7 as it stood undermined the effective implementation of article 5. The Drafting Committee had discussed some of those issues, but, given the lack of time and considering the importance of article 7, it had decided to defer consideration of the article to the following session.

11. With regard to article 8 (General obligation to cooperate) the Drafting Committee had recommended no changes, since both Governments and members of the Commission had indicated that they approved of the wording.

12. Article 9 (Regular exchange of data and information) had also been favourably received by Governments and members of the Commission. However, during the Committee's consideration of the various language versions of the text of the article, it had become clear that the translation of the words "reasonably available", which had been taken from article 29, paragraph 1, of

⁴ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

⁵ See footnote 3 above.

⁶ *Ibid.*

the Helsinki Rules,⁷ presented a problem. The Committee had therefore replaced them by “readily available”, which had equivalents in the other languages and in no way affected the meaning of article 9 as it was intended purely to ensure consistency in the various language versions.

13. The last article in part II, article 10 (Relationship between uses), had been considered acceptable by both Governments and the Commission. However, the Drafting Committee had felt that the title could be improved. Some members of the Committee took the view that the title might be misleading as it seemed to suggest that the article dealt with the question of proportionality between different uses, which was not the case. To avoid any ambiguity, the Drafting Committee had replaced it by “Relationship between different kinds of uses”. Needless to say, that change in no way affected the content of the article.

14. The CHAIRMAN said he would take it that the Commission wished to take note of the articles adopted on second reading by the Drafting Committee as contained in its report and to defer adopting them until the relevant commentaries had been submitted.

It was so agreed.

15. Mr. VILLAGRÁN KRAMER asked how the Sixth Committee would be informed of the work done by the Drafting Committee.

16. The CHAIRMAN said that the document containing the articles adopted by the Drafting Committee would of course be made available to the Sixth Committee when it considered the Commission’s report.

17. Mr. VERESHCHETIN said that, in view of the wealth of material contained in the oral report of the Chairman of the Drafting Committee on the Committee’s work, the report should be made available to the members of the Commission. He asked whether the secretariat could make the necessary arrangements.

18. The CHAIRMAN said that, if the Chairman of the Drafting Committee agreed, his report to the Commission could be circulated to members, but in English only.

19. Mr. PAMBOU-TCHIVOUNDA expressed regret that the report could not be made available in French as well.

20. The CHAIRMAN said that, for a French version of the report, members could refer to the summary record of the meeting at which it had been presented.

Draft report of the Commission on the work of its forty-fifth session (continued)

CHAPTER III. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.483)

21. The CHAIRMAN invited the members of the Commission to consider chapter III of the Commission’s draft report on the work of its forty-fifth session (A/CN.4/L.483) paragraph by paragraph.

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

22. Mr. KOROMA said that the view recorded in paragraph 9 was that of the members referred to in paragraph 8 and proposed that the words “It was noted that” should be replaced by “Those members noted that”.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

Paragraph 12

23. Mr. PELLET proposed that, in the interest of accuracy, the words “relatively large” and “starting with” in the third sentence of the paragraph should be replaced respectively by “well established” and “illustrated by”.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 81

Paragraphs 13 to 81 were adopted.

Paragraph 82

24. Mr. PELLET said that, in the first sentence of the French text, the word *pas* should be inserted between *qui n’avaient* and *été consultés*.

It was so agreed.

Paragraph 82, as amended, was adopted.

Paragraphs 83 to 93

Paragraphs 83 to 93 were adopted.

Chapter III, as a whole, as amended, was adopted.

25. Mr. VERESHCHETIN said that, while he understood that the Commission could not adopt draft articles which were not accompanied by commentaries, he would like the report to show that the Drafting Committee had done a great deal of work during the session on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

26. The CHAIRMAN noted that paragraph 6 of chapter III of the draft report provided a fairly detailed account of the work of the Drafting Committee. The Committee’s work would also be mentioned in the Chairman’s report, as he was also of the view that the Sixth Committee should be informed of the progress it had made. Furthermore, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law would be made available to the members of the Sixth Committee for their information.

27. Mr. KOROMA wondered whether it might not be premature to transmit the articles to the Sixth Committee.

⁷ See 2312th meeting, footnote 14.

28. The CHAIRMAN recalled that that practice had already been adopted the preceding year in the case of articles which could not be adopted because they were not accompanied by commentaries.

29. Mr. GÜNEY asked whether the membership of the Drafting Committee had been specified.

30. The CHAIRMAN said that the membership was given in chapter I of the report.

31. Mr. CALERO RODRIGUES said that the question raised by Mr. Vereshchetin demonstrated that persons who were not members of the Commission might find it difficult to understand the internal structure of the report. He wondered, therefore, whether it might not be advisable to add in the second sentence of paragraph 6, after the words "at the conclusion of the discussion", something along the lines of "as summarized below in paragraphs 8 to 93", which would give an idea of the amount of work done by the Drafting Committee. Alternatively, a footnote could serve the same purpose.

32. The CHAIRMAN said that, if he heard no objection, he would take it that that suggestion was adopted. The Commission would leave it to the secretariat to decide on an appropriate wording.

It was so agreed.

CHAPTER IV. *State responsibility* (continued) (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. Draft articles of part 2 of the draft on State responsibility (continued)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (continued) (A/CN.4/L.484/Add.2-7)

Commentary to article 8 (Compensation) (continued) (A/CN.4/L.484/Add.5)

Paragraphs (16) and (17) (continued)

33. The CHAIRMAN recalled that the consideration of paragraphs (16) and (17) of the commentary to article 8 had been left pending at the preceding meeting, as Mr. Pellet and Mr. Vereshchetin had found unclear the words "moral damage to the persons of nationals or agents of the injured State", in the penultimate sentence of paragraph (16).

34. Mr. PELLET said that it should be made clear that it was the damage suffered by the persons of nationals or agents of the State as individuals that was meant.

35. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed adding the words *en tant que particuliers* after *agents de l'Etat lésé* at the end of the sentence in the French text.

36. Mr. VERESHCHETIN asked whether the Special Rapporteur could also formulate his proposal in English.

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the English version, the words "as private parties" or "as private persons" should be added after the words "injured State".

38. Mr. PELLET said that he would prefer the words *en tant qu'êtres humains* in the French text.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that that wording would apply to natural, but not to juridical persons.

40. Mr. CRAWFORD said that, in the English text, the word "persons" might be moved to the end of the sentence, which would then read "moral damage to nationals or agents of the injured State as persons".

41. The CHAIRMAN recalled that plenary meetings of the Commission were not the proper forum for drafting. He suggested, therefore, that Mr. Crawford, Mr. Pellet and Mr. Vereshchetin should agree on an appropriate wording with the Special Rapporteur. He also suggested that, as the problem also arose in paragraph (17), paragraphs (16) and (17) should be left pending.

It was so agreed.

Paragraph (18)

42. Mr. PELLET said that he was completely opposed to the concept of "personal injury" referred to in the second part of the paragraph. To his knowledge, the only two categories of injury were material and moral injury. He noted that the same problem arose in paragraph (21).

43. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that, as he saw it, personal injury covered both material and moral injury inflicted on an individual, as opposed to patrimonial losses.

44. Mr. VILLAGRÁN KRAMER noted that, in the internal law of some countries, personal injury was synonymous with material injury suffered by an individual, as opposed to moral injury.

45. Mr. PELLET said that, while he understood the explanations of the Special Rapporteur, he did not see the need to include the concept of personal injury in paragraph (18). It would be quite easy to delete the words "Apart from the umpire's considerations regarding the damages under points (a) and (b), which are relevant with regard to the broader concept of 'personal injury' " after the indented quotation, so that the sentence would then begin "It is of interest".

46. Mr. VERESHCHETIN also took the view that the concept of "personal injury" would give rise to problems in paragraph (21), where it referred both to natural and to juridical persons. The idea that it expressed seemed in any event to be covered by the concept of moral damage. It would therefore be preferable to delete it from paragraph (18).

47. Mr. de SARAM said that he also supported Mr. Pellet's suggestion, which would eliminate the ambiguity in paragraph (18) and avoid further problems when paragraph (21) was taken up.

48. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (18) as amended by Mr. Pellet.

Paragraph (18), as amended, was approved.⁸

Paragraph (19)

49. Mr. PELLET said that he was categorically opposed to the last sentence of the paragraph. If the Com-

⁸ Subsequently, paragraph (18) was amended along with paragraphs (16), (17) and (21); see 2324th meeting, para. 1.

mission had refrained from expressly providing in article 8 for compensation of moral damage to nationals of the injured State, it had, in his opinion, made a mistake and he by no means shared that view.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that at least the last line of the sentence was unclear and should be recast with the help of the small ad hoc working group that had been set up.

51. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to postpone the adoption of paragraph (19) the last sentence of which was to be redrafted by the Special Rapporteur.

It was so agreed.

Paragraph (20)

Paragraph (20) was approved.

Paragraph (21)

52. Mr. VERESHCHETIN said that, if the Commission decided to retain the reference to "personal" damage in paragraph (21), he did not see how such personal damage could be applied to juridical persons. Such damage was described as being "caused to the said private parties", and the first sentence clearly stated that it was "persons, physical or juridical" that were referred to. However, it was debatable whether the types of damage mentioned in the last sentence could be inflicted on juridical persons.

53. Mr. PELLET said that, in that respect, there had been no inconsistency on the part of the Special Rapporteur. If there was agreement on the premises that he had stated, that is, if personal damage was taken to cover all damage caused to private persons—and not "parties"—whether physical or juridical, and if such damage could be either material or moral, it might be quite easy to amend the paragraph. The most important thing was to get rid of the idea that personal damage could be anything other than material or moral damage.

54. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that that point should be added to the three others already referred to the small ad hoc working group.

55. Mr. RAZAFINDRALAMBO said that the paragraph could be corrected without wholesale rewriting simply by deleting the words between dashes.

56. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to leave paragraph (21) pending and to ask the small ad hoc working group to revise the wording.

It was so agreed.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were approved.

Paragraph (24)

57. Mr. VERESHCHETIN said that the words "will normally require the awarding of interest" in the third sentence of the paragraph were too categorical, in view of the text of article 8, paragraph 2, which stipulated that compensation "may" include interest, and of the first

footnote of the paragraph, which rightly stated that doctrinal views on the point were divided. He proposed either deleting the third sentence entirely or taking up the idea expressed in the footnote and saying that some members of the Commission supported the conclusion in question, while others thought that it was premature at the current stage.

58. Mr. VILLAGRÁN KRAMER supported the proposal as it would get rid of the conflict between article 8, paragraph 2, and the commentary.

59. Mr. CRAWFORD said that, while the commentary should of course not appear to contradict the text of the article, at least the basic idea of the second half of the sentence should be kept, namely, that the payment of interest was a method often used in cases of damage arising out of the temporary immobilization of capital, since that was a fact. If the first half of the sentence was to be amended or deleted, it might be necessary to move the reference to the first footnote of the paragraph, or even to mention in the text of the paragraph that doctrine was divided on the point and quote writers in the footnote.

60. Mr. YANKOV supported the view expressed by Mr. Vereshchetin, but thought that it would be better, rather than simply deleting the third sentence, to recast the text so as to stress the non-automatic nature of the payment of interest.

61. Mr. ROSENSTOCK said that, regardless of doctrinal differences, the Commission must recognize the existence of a predominant State practice. However, the statement might be made less categorical by replacing the word "normally" by "often".

62. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the simplest solution would be to move the reference to the first footnote from the third sentence to the end of the second sentence and to amend the third sentence to read: "The Commission, however, recognizes that the awarding of interest seems to be the most frequently used method for compensating the type of loss stemming from the temporary non-availability of capital".

63. Mr. BOWETT said that he feared that too many reservations might dilute the substance of the commentary itself. The important point, which was not brought out clearly, was that interest could not be awarded in addition to compensation for losses in the case of a going concern, short of accepting that the same funds could be simultaneously in a bank, where they earned interest, and in the enterprise, where they produced profits.

64. Mr. de SARAM said that the point raised by Mr. Bowett was not brought out clearly in the wording of article 8, paragraph 2, and should therefore be included in the commentary.

65. Mr. ROSENSTOCK said that the wording of article 8, paragraph 2, stated explicitly that the awarding of both interest and compensation for losses was not a requirement in all cases, but remained a possibility. The compromise wording, which involved adding the words "where appropriate" to paragraph 2, had been adopted to take account of the time factor and of other considerations which had been discussed at length in the Drafting Committee. He could not accept a commentary which was nothing short of a rejection of the wording adopted in the draft article.

66. Mr. CRAWFORD said that paragraph (24) was linked with paragraphs (25) and (26), which dealt with a number of points raised during the discussion. With regard to the point raised by Mr. Bowett, it might be better dealt with in the discussion on paragraph (27).

67. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (24), as amended by the Special Rapporteur.

Paragraph (24), as amended, was approved.

Paragraph (25)

Paragraph (25) was approved.

Paragraph (26)

68. Mr. VERESHCHETIN said that the reasons advanced for amending the text of paragraph (24) could also be used to justify amending paragraph (26), by deleting the words "although normally justified".

69. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (26), as amended by Mr. Vereshchetin.

Paragraph (26), as amended, was approved.

Paragraph (27)

70. Mr. BOWETT, taking up the argument he had developed in the discussion on paragraph (24), proposed adding the following sentence to paragraph (27): "When loss of profits is awarded in relation to a capital investment in a 'going concern', it would not seem appropriate to award interest on the capital value of that investment over the same period of time for which loss of profits is awarded".

71. Mr. KUSUMA-ATMADJA said that Mr. Bowett's proposal seemed to place interest and loss of profits on the same plane, whereas paragraph (27) explained clearly that compensation for loss of profits was not as widely accepted as the payment of interest. It would be preferable to state simply that the two could not be cumulative, without affecting the order of precedence established in the paragraph.

72. Mr. VILLAGRÁN KRAMER said that it might be wiser not to go into the interpretation of article 8, paragraph 2, and not to focus on one method of compensation rather than another. The text of the draft articles used the words "may include" so as to leave it to the arbitrator or judge to decide on the appropriate method of compensation.

73. Mr. CRAWFORD said that the Commission appeared to be placing on Mr. Bowett's proposal a positive connotation which it did not have, since it was intended simply to rule out the cumulative application of the two methods of compensation.

74. Mr. BOWETT proposed that a simpler wording might be: "A claimant will not be entitled to recover both interest and loss of profits when deprived of a going concern. It will be for a tribunal to judge which is the appropriate remedy".

75. Mr. ROSENSTOCK said that that wording completely contradicted what was stated in article 8, para-

graph 2, and disregarded such considerations as the time factor, among others.

76. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the new wording proposed by Mr. Bowett did not stipulate that the simultaneous application of both methods was impossible in the case of the same object and the same time period, which would cover the point raised by Mr. Rosenstock.

77. The CHAIRMAN suggested that Mr. Bowett and Mr. Crawford should together prepare a new version of the sentence which Mr. Bowett proposed adding to paragraph (27).

The meeting rose at 6 p.m.

2323rd MEETING

Tuesday, 20 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-fifth session (*continued*)

CHAPTER IV. *State responsibility* (*continued*) (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. *Draft articles of part 2 of the draft on State responsibility* (*continued*)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (*continued*) (A/CN.4/L.484/Add.2-7)

Commentary to article 8 (Compensation) (continued) (A/CN.4/L.484/Add.5)

Paragraphs (16) and (17) (*continued*)

1. The CHAIRMAN said that certain points concerning paragraphs (16) and (17) were still pending and the Commission would revert to them later.

Paragraph (19) (*concluded*)

2. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the words "the relationship between the State and its nationals is a primary rule which has no place in the present context", in the last sentence, should be replaced by "this is part of the material damage to the State."

Paragraph (19), as amended, was approved.

Paragraph (27) (continued)

3. Mr. BOWETT proposed that two sentences should be inserted at the end of paragraph (27), reading: "A claimant will not be entitled to recover both interest and loss of profit over the same period of time when deprived of a 'going concern'. It will be for a court to judge which is the appropriate remedy."

4. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the proposed addition would meet the point raised the previous day by Mr. Crawford. At the same time, he had reservations about referring too often to the courts because that was not the most frequent way of settling disputes involving loss of profit.

5. Mr. BOWETT said that the second sentence of his proposed text could simply be left out.

6. Mr. ROSENSTOCK said that he did not favour the proposed amendment. It was not consistent with the Commission's general approach to the issue of interest and loss of profit, illustrated by paragraphs (26) and (38), in which it had simply made reference to the complexity of the issue and left the decision to the judge or other third party involved.

7. The proposed amendment basically asserted that the same loss should not be compensated twice. That was true of all forms of reparation, not only loss of profit. He preferred the original, albeit highly complex, formulation suggested by Mr. Bowett the previous day. The text just proposed was misleading and might give rise to unfortunate and unjust results by ruling out one solution or the other.

8. In his view, the Commission was making a mistake: thus far, it had chosen not to provide specific rules for third parties and to let them determine the remedy, whereas in the amendment under consideration, the Commission had suddenly taken the opposite tack and provided guidelines for one particular form of reparation.

9. However, he said that he would have no objection to the second sentence if the first sentence were acceptable, which it was not.

10. Mr. BOWETT said that Mr. Rosenstock had raised an important general question which pertained to that entire section of the report. As it stood, that section gave no guidance on the extremely important practical matter of loss of profit. Three questions, in particular, needed to be answered: the kind of claim for which loss of profit was recoverable; the period of time for which loss of profit was recoverable; and how loss of profit was to be calculated. The Commission had failed to answer any of those questions.

11. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he shared Mr. Bowett's views. However, the Drafting Committee had not wished to incorporate such details in the draft articles. Perhaps the commentary could provide the needed precision and he suggested that an informal working group should be appointed to redraft the proposed amendment to paragraph (27).

12. Mr. de SARAM said that he fully agreed with Mr. Bowett. The question under consideration was actually

quite general in scope. Accordingly, the proposed working group should be open-ended.

13. Mr. YANKOV said that, while endorsing Mr. Bowett's views, he also appreciated the merits of Mr. Rosenstock's argument. Practice varied greatly among States and it would be very difficult to arrive at a set of rules that would be universally acceptable. The Commission should not attempt to establish rules to cover all cases; rather it should stress that decisions should be arrived at through third-party settlement procedures.

14. The CHAIRMAN designated Mr. Arangio-Ruiz (Special Rapporteur), Mr. Bowett, Mr. Crawford, Mr. Rosenstock and, if they so wished, Mr. de Saram and Mr. Yankov, to form an open-ended working group to redraft the proposed amendment to paragraph (27).

Paragraphs (28) to (37)

Paragraphs (28) to (37) were approved.

Paragraph (38)

15. Mr. YANKOV said that the words "to state the general principle in quite flexible terms and" should be inserted after "It has therefore felt it preferable" in the second sentence. His proposal was based on views expressed in the Drafting Committee at the previous session.

16. Mr. BOWETT said that the solution did not lie in letting judges determine whether compensation for loss of profit should be paid. Without guidelines, they were not able to make informed and consistent decisions. It was incumbent on the Commission to clarify the law and provide guidance on that matter.

17. Mr. VILLAGRÁN KRAMER said that it would indeed be useful to clarify the law relating to compensation. He pointed out that paragraph (38) would have to be amended in the light of the final drafting of paragraph (27), which was to be completed by the newly established open-ended working group.

18. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the amendment to paragraph (38) proposed by Mr. Yankov could also be considered by the open-ended working group. He agreed with Mr. Bowett that compensation for loss of profit was an area in which clarification was needed. However, since practice provided no real guidance, the Commission would be engaged in progressive development rather than codification of the law.

19. Mr. YANKOV said that he appreciated the merit of Mr. Bowett's argument. In his view, paragraph 2 of article 8 did set forth a general principle that could serve as a guideline for the settlement of disputes relating to compensation. His intention in making the amendment had been to insert an implicit reference to that general principle in paragraph (38) of the commentary.

20. Mr. PELLET said he had a general reservation to make. As he saw it, the present debate was quite pointless. The Drafting Committee had decided not to enter into details in the text of the article. He himself did not approve of that course because he thought the Commission was called upon to do much more than that. However, that decision had been taken. The general formula-

tion adopted by the Drafting Committee could not now be supplemented by way of the commentaries.

21. Again, he said he was shocked at the frequent references in the commentary to the judge or other third party involved in the settlement of the dispute. Surely it was primarily for the parties concerned to arrive at a settlement: the Commission should provide them with guidance and should not simply be thinking of the possibility of judges or arbitrators.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that practically all the cases available from State practice involved decisions by third-party bodies. The point raised by Mr. Pellet was a valid one and the working group would no doubt take it into consideration.

23. Mr. TOMUSCHAT said that practically all the examples given in the commentary dealt with losses which affected capital assets. Actually, the rule in article 8 applied equally well to loss of working capacity. The commentary should include examples of compensation of individuals for loss of earnings.

24. Mr. ROSENSTOCK said he had no objection to the inclusion of further examples, but Mr. Tomuschat's point could be regarded as covered by paragraphs (22) and (23) of the commentary. The working group should not be asked to undo decisions taken at the previous session by the Drafting Committee, nor could it remedy any gaps left by those decisions.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that paragraphs (22) and (23) mentioned the case of the death of a private individual who was a national of the State concerned. If Mr. Tomuschat had any other examples in mind, he could perhaps make a specific suggestion.

26. There could certainly be no question of undoing what the Drafting Committee had done at the previous session, nor of filling gaps left by the Committee. He was confident that, in their wisdom, the members of the working group could avoid both pitfalls.

27. Mr. VILLAGRÁN KRAMER suggested that Mr. Tomuschat should indicate a few specific examples of loss of working capacity. Cases of expulsion obviously came to mind.

28. Mr. SHI pointed out that article 8 laid down the general rule in the matter of compensation. In his opinion, the text of the article was sufficient and it was neither practicable nor desirable to try to supplement it by means of commentaries. A commentary could not fill a gap in the text of the article.

29. The whole subject of compensation was very complex. All the examples given in the commentary related to cases settled by arbitral tribunals or by mixed commissions. None were taken from the very rich practice of bilateral settlements. He was thinking, among others, of the settlement agreements after the Second World War, most of which had been bilateral in character, especially the lump sum agreements of that time. Under those agreements, it had been left to each party's internal commission to handle the question of distribution among its nationals. Such examples were worth mentioning.

30. He saw no need for a working group and urged that the commentary should be left as it stood. In any case, if the working group were to produce a text, he was certain

that it would lead to a further lengthy and unprofitable discussion.

31. The CHAIRMAN invited Mr. Tomuschat to submit a text for incorporation in the commentary in order to cover the point raised by him.

32. Mr. TOMUSCHAT said that he would submit a few sentences to deal with the cases he had in mind. The examples to be mentioned would include treaties signed by Germany with a number of countries immediately after the Second World War, dealing with compensation to persons persecuted on racial grounds.

33. The CHAIRMAN said that, while waiting for the issue to be reported on by the open-ended working group, he invited the Commission to consider, paragraph by paragraph, chapter IV, sections A and B.

A. Introduction (A/CN.4/L.484)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.484 and Add.1)

Paragraphs 9 to 87 (A/CN.4/L.484)

Paragraphs 9 to 87 were adopted.

Paragraphs 1 to 51 (A/CN.4/L.484/Add.1)

Paragraphs 1 to 51 were adopted.

Section B was adopted.

The meeting rose at 11.15 a.m.

2324th MEETING

Wednesday, 21 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-fifth session (*continued*)

CHAPTER IV. *State responsibility (concluded)* (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. Draft articles of part 2 of the draft on State responsibility (*concluded*)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (*concluded*) (A/CN.4/L.484/Add.2-7)

Commentary to article 8 (Compensation) (concluded) (A/CN.4/L.484/Add.5)

Paragraphs (16) and (17), (18) and (21) (*concluded*)

1. Mr. CRAWFORD, reading out the amendments proposed by the working group to settle the problems posed by paragraphs (16), (17), (18) and (21), said that the phrase "to the persons of nationals or agents of the injured State", in paragraph (16), would be replaced by "to the persons of the injured State's nationals or agents as human beings". The expression "as human beings" would also be inserted after the words "the injured State's nationals or agents", in the last sentence. In paragraph (17), the expression "in their private capacity", in the second sentence, would be replaced by "as human beings". The phrase "which are relevant with regard to the broader concept of 'personal injury'" in paragraph (18), would be deleted. In paragraph (21), the phrase "the 'personal' damage—other than 'moral' damage—" would be replaced by "the personal injury".

Paragraphs (16), (17), (18) and (21), as amended, were approved.

Paragraph (27) (*concluded*)

2. Mr. BOWETT proposed that the following text should be added at the end of paragraph (27):

"If loss of profits are to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest and notionally employed in earning profits at one and the same time. However, interest would be due on the profits which would have been earned—but which have been withheld from the original owner. The essential aim is to avoid 'double recovery' in all forms of reparation."

3. Mr. TOMUSCHAT said that the second sentence proposed by Mr. Bowett should be deleted because it entered into too much detail.

4. Mr. ROSENSTOCK said that the second sentence could not be deleted if the first was retained.

Paragraph (27), as amended by Mr. Bowett, was approved.

New paragraph (30 *bis*)

5. Mr. TOMUSCHAT, arguing that the commentary should not be confined to cases involving companies but should also mention cases concerning private individuals, proposed that the commentary should include a new paragraph, paragraph (30 *bis*), to read:

"(30 *bis*) A right to compensation for loss of earnings may also arise when individuals are deprived of making use of their working capacity, either as self-employed or as employed persons. This situation can occur, in particular, when an alien is unlawfully deported from his country of residence. In two judgments the European Court of Human Rights affirmed in principle that the reparation owed to the victim of such a measure also included compensation for loss of earnings, although in both cases it found that a causal link had not been established."

The new paragraph would be accompanied by the following footnote:

"Judgments of 21 June 1988, *Berrehab*, Publications of the European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 138, p. 17; and Judgment of 18 February 1991, *Moustaquim*, *ibid.*, vol. 193, p. 21."

6. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the word "naturally" should be added at the beginning of Mr. Tomuschat's proposed text, to give more force to an idea already expressed more generally in the commentary.

New paragraph (30 bis), as proposed by Mr. Tomuschat and amended by the Special Rapporteur, was approved.

Paragraph (38) (*concluded*)

7. Mr. BOWETT proposed that the following text should be inserted after the first sentence of the paragraph:

"The relative uncertainty in the case-law discloses three questions which give rise to controversy:

- (a) In what cases are loss of profits recoverable?
- (b) Over what period of time are they recoverable?
- (c) How should they be calculated?

As regards the first question it seems fairly clear that the problem arises with 'going concerns' which have a profit-making capacity. The major uncertainty relates to the question whether loss of profits are recoverable for a lawful, as opposed to unlawful, taking (this is the uncertainty reflected in the difference of emphasis in *Amoco International Finance Corp. v. Iran* as compared with the *Phillips* case). As regards the second question, the central question, again unsettled, is whether that period of time ends at the date of judgement or should be extended to the original termination date for the contract or concession which has been terminated. The third question raises the whole question of the method of calculation, in particular whether the DCF (Discounted Cash Flow) method is appropriate. The state of the law on all these questions is, in the Commission's view, not sufficiently settled and the Commission, at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them."

8. Furthermore, he proposed that the second sentence of paragraph (38) should be altered to read:

"It has therefore felt it preferable to leave it to the States involved or to any third party involved in the

settlement of the dispute to determine in each case whether compensation for loss of profits should be paid.”

Paragraph (38), as amended, was approved.

The commentary to article 8, as amended, was approved.

Chapter IV, as a whole, as amended, was adopted.

9. Mr. PELLET said he had not wished to oppose the adoption of chapter IV of the draft report, but in his opinion draft articles 6 to 10 *bis* had been considerably toned down in comparison with the text proposed by the Special Rapporteur, which had in itself been insufficiently precise, so that the result proposed by the Drafting Committee was extremely general and failed to provide potential users with the guidelines they were entitled to expect from the Commission. The fact that problems were difficult or that the law was not settled was no reason not to suggest solutions. The commentaries to the draft articles were scarcely more satisfactory, in that to make up for the general nature of the articles themselves they dealt with things which did not appear in the articles. The purpose of the commentaries was to comment on the draft articles adopted by the Draft Committee and not those initially proposed by the Special Rapporteur.

10. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that the Drafting Committee had adopted the draft articles in question some years after the corresponding reports had been submitted. The superficial character of the draft articles noted by Mr. Pellet could also be explained perhaps by the tendency among a number of members of the Commission to produce rapid results at all costs, as well as the tendency of some to prefer the brevity of the articles proposed by the previous Special Rapporteur. Lastly, it was unfortunately a very common practice for the members of the Drafting Committee not to take part in the Committee's work with sufficient regularity. Consequently, they did not follow closely enough the developments in the questions the Committee was considering. This regrettable phenomenon had been particularly pronounced—not without consequences—during the work on articles 11 and 12 at the present session.

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.482 and Add.1 and Add.1/Corr. 1 and A/CN.4/L.482* and Add.1*)

11. The CHAIRMAN said that chapter II of the draft report of the Commission (A/CN.4/L.482 and Add.1 and Add.1/Corr.1) had been reissued for technical reasons and bore the symbols A/CN.4/L.482* and Add.1*.

12. Mr. BENNOUNA, supported by Mr. ARANGIO-RUIZ, Mr. PAMBOU-TCHIVOUNDA and Mr. RAZAFINDRALAMBO, said that the documents A/CN.4/L.482* and Add.1* reissued “for technical reasons”, were a veritable revision of the initial documents and no longer reflected the discussion in plenary. He would therefore like the Commission to revert to the initial documents.

13. Following a procedural discussion in which Mr. de SARAM (Rapporteur), Mr. CALERO RODRIGUES, Mr. ROSENSTOCK, Mr. PELLET, Mr. MAHIOU, Mr.

CRAWFORD, Mr. BOWETT, Mr. VERESHCHETIN, Mr. TOMUSCHAT, Mr. MIKULKA, Mr. KOROMA, Mr. THIAM (Special Rapporteur) and Mr. AL-KHASAWNEH took part, the CHAIRMAN suggested that the Commission should instruct the Rapporteur, with the Rapporteur's agreement, to prepare with the help of the secretariat a further document on the basis of documents A/CN.4/L.482 and Add.1 and Add.1/Corr. 1 and A/CN.4/L.482* and Add.1*, in the light of the discussion in plenary.

It was so agreed.

The meeting rose at 1.15 p.m.

2325th MEETING

Wednesday, 21 July 1993, at 3.10 p.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued)* (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,² A/CN.4/449,³ A/CN.4/452 and Add.1-3,⁴ A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

REVISED REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

1. The CHAIRMAN recalled that, at its 2298th plenary meeting, on 17 May 1993, the Commission decided to convene the Working Group on a draft statute for an international criminal court,⁵ in accordance with the mandate contained in paragraphs 4, 5 and 6 of General Assembly resolution 47/33. He invited Mr. Koroma, the Chairman of the Working Group, to introduce its revised report (A/CN.4/L.490 and Add.1).

* Resumed from the 2303rd meeting.

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook... 1993*, vol. II (Part One).

³ *Ibid.*

⁴ *Ibid.*

⁵ The Commission, at its 2300th meeting on 25 May 1993, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called “Working Group on a draft statute for an international criminal court”.

Assembly resolution 47/33. He invited Mr. Koroma, the Chairman of the Working Group, to introduce its revised report (A/CN.4/L.490 and Add.1).

2. Mr. KOROMA (Chairman of the Working Group on a draft statute for an international criminal court) said that the revised report contained a preliminary version of a draft statute for an international criminal tribunal. The Working Group had begun by examining a series of draft provisions dealing with the more general and organizational aspects of a draft statute but had decided, in order to expedite its work, to create three subgroups to deal with jurisdiction and applicable law, investigation and prosecution, and cooperation and judicial assistance. The subgroups had been chaired by Mr. Crawford, later replaced by Mr. Tomuschat, by Mr. Calero Rodrigues and by Mr. Yankov, respectively. The reports of the subgroups had contained specific draft provisions and some preliminary comments. After considering the reports, the Working Group had requested the subgroups: (a) to incorporate into the draft articles, to the extent possible, the observations made in the Working Group, and (b) to consider a number of issues identified as possible additional matters for a statute.

3. On the basis of the further papers prepared by the subgroups, the Working Group had produced the draft statute and the commentary currently before the Commission. Square brackets in the text indicated that the Working Group had not yet agreed either on the content or on its formulation. In numerous instances the commentary to the draft articles explained the special difficulties encountered in drafting certain provisions. The Working Group recommended that the Commission should indicate in its report that the views of the General Assembly on such provisions would be welcome. The Working Group had been guided by the recommendations made by the Commission and by the report of the Working Group at the previous session,⁶ but it had also taken into account the views expressed thereon by Governments.

4. Part 1 of the draft statute (arts. 1 to 21) dealt with the establishment and composition of the Tribunal. The brackets around the two paragraphs of article 2 reflected two divergent views in the Working Group, and indeed in the plenary discussion, about what the relationship of the Tribunal to the United Nations should be. Some members wanted the Tribunal to be an organ of the United Nations, while others advocated a different kind of link, such as a treaty of cooperation, similar to those between the United Nations and the specialized agencies. Article 4, paragraph 1, reflected the virtues of flexibility and cost-reduction advocated in the report of the Working Group at the previous session. The Tribunal would be a permanent institution, but it would sit only when required to consider a case submitted to it.

5. Article 5 laid down the overarching structure of the international judicial system to be created, which was called the "Tribunal", and its component parts: the "Court", or judicial organ, the "Registry", or administrative organ, and the "Procuracy", or prosecutorial organ. The three organs had to be considered in the draft statute as constituting an international judicial system as

a whole, notwithstanding the independence which had to exist between the judicial and prosecutorial branches. Articles 6 to 11 dealt with the Court and its composition and with the status of the judges and the Bureau of the Court. The relatively long term of office of 12 years (art. 7, para. 6) was regarded as a trade-off for the prohibition on the re-election of judges. In contrast to ICJ, the special nature of an international criminal institution argued against the possibility of re-election. The only exceptions were set out in article 7, paragraph 7, and article 8.

6. It was, of course, desirable to ensure the independence of judges (art. 9), but the Court was not to be a full-time body and, in accordance with article 17, the judges would be paid not a salary but simply a daily allowance and expenses. Accordingly, article 9, without ruling out the possibility of a judge performing other salaried functions, endeavoured to define the criteria for determining activities which might compromise the independence of judges. In cases of doubt, the Court would decide.

7. The Registrar (art. 12) was the Court's principal administrative officer and, unlike the judges, was eligible for re-election. He performed important functions under the statute, such as notification, receipt of declarations of the Court's jurisdiction, and so on. The Working Group had been strongly of the opinion that the Procuracy (art. 13) should be independent in performing its functions and kept separate from the structure of the Court. The Prosecutor and the Deputy Prosecutor were therefore to be elected not by the Court but by a majority of the States parties to the statute. Article 13, paragraph 4, also provided that the Procuracy should not seek or receive instructions from any Government or any source.

8. Articles 14 to 18 dealt with matters related to the beginning and termination of the judges' functions and to the work of the judges and the Court and the performance of their functions. Articles 19 and 20 were concerned with the making of rules: the rules of the Tribunal relating to pre-trial investigations and the conduct of the trial itself (art. 19) and the rules necessary for the internal functioning of the Court (art. 20). Most members of the Working Group placed great emphasis on the distinction between the two kinds of rule, although some were unconvinced that a substantive distinction existed.

9. The place of article 21 (Review of the Statute) was still provisional, and it might be included in the final clauses. Subparagraph (b) had a special link with Part 2 of the statute, on jurisdiction and applicable law, as it would provide the basis for enlarging the strand of jurisdiction contained in article 22, which brought new conventions within the scope of the statute, including the draft Code of Crimes against the Peace and Security of Mankind.

10. Part 2 of the draft Statute (arts. 22 to 28) was in fact very important. Articles 22 to 26 laid down two basic strands of jurisdiction rooted in a distinction made by the Working Group between treaties which defined crimes as international crimes and treaties which merely provided for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaty was the International Convention against the Taking of Hostages, and examples of the second category were the 1963 Convention on Offences and

⁶ *Yearbook... 1992*, vol. II (Part Two), p. 58, document A/47/10, annex.

Certain Acts Committed on Board Aircraft and all treaties dealing with drug-related crimes.

11. Article 23 offered the Commission three alternatives with regard to the ways in which States might accept the Court's jurisdiction over the crimes listed in article 22. Alternative A was an "opting in" system, under which a State did not automatically confer jurisdiction on the Court by becoming a party to the statute but needed to make a special declaration. Some members of the Working Group thought that such a method best reflected the consensual basis of the Court's jurisdiction and the flexible approach to that jurisdiction recommended in the report of the Working Group at the previous session. Other members did not believe that such considerations necessarily led to the kind of system set out in alternative A. They preferred a system whereby a State, by becoming a party to the statute, automatically conferred on the Court jurisdiction over the crimes listed in article 22, although they would have the right to exclude some crimes ("opting out" system). Alternatives B and C were based on that approach. The Working Group recommended that the alternatives should be transmitted to the General Assembly with a request for guidance.

12. Article 24 specified the States which had to accept the Court's jurisdiction in a given case under article 22. The general criterion, set out in paragraph 1 (a), was that the Court had jurisdiction over a crime provided that any State which would normally have jurisdiction under the relevant treaty to try the suspect before its own courts had accepted the Court's jurisdiction under article 23. The paragraph should be read in conjunction with article 63 (Surrender of an accused person to the Tribunal) and the commentary thereto. If the suspect was not in the territory of any State with jurisdiction under the relevant treaty but present on the territory of the State of his nationality or of the State where the alleged offence was committed, then the consent of one of the latter two States was also necessary in order for the Court to have jurisdiction.

13. Article 25 did not constitute a separate strand of jurisdiction but rather broadened the category of subjects able to bring to the Court the crimes referred to in article 22 and article 26, paragraph 2, by investing that right additionally in the Security Council. The Working Group felt that such a provision was necessary in order to enable the Security Council to use the Court, as an alternative to establishing ad hoc tribunals.

14. Article 26 laid down the second strand of jurisdiction referred to earlier, allowing States to confer jurisdiction in respect of two other categories of international crime not covered by article 22. The first category (para. 2 (a)) covered "crimes under general international law", that is to say crimes having their basis in customary international law which would otherwise not fall within the Court's jurisdiction *ratione materiae*, such as aggression, which was not defined by treaty, genocide in the case of States not parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, or other crimes against humanity not covered by the Geneva Conventions of 12 August 1949 for Protection of War Victims. The Working Group did not think that, at the present stage of development of international law, the international community would create an inter-

national criminal court without giving it jurisdiction over such crimes.

15. The second category (para. 2 (b)) related to the distinction referred to in paragraphs (1) and (2) of the commentary to article 22 between treaties which defined crimes as international crimes and treaties which merely provided for the suppression of crimes under national law, such as laws on drug-related crimes giving effect to a multilateral treaty which regarded the offence in question as exceptionally serious. Given the process whereby the question of an international criminal court had been sent to the Commission by the General Assembly, the Working Group wished to emphasize that article 26, paragraph 2 (b), constituted a provision whereby the Court could acquire jurisdiction to deal with drug-related offences. However, in order to prevent the Court from being overwhelmed with minor cases, the category was limited to crimes which "having regard to the terms of the treaty constitute exceptionally serious crimes".

16. The Working Group recommended two criteria for the consent required for the jurisdiction of the Court to be effective under article 26. For crimes under national law giving effect to a multilateral treaty to suppress such crimes, the only consent required was that of the State on whose territory the suspect was present and which had jurisdiction under a treaty to try the suspect in its own courts. For crimes under general international law, the criterion was more restrictive, requiring the consent both of the State on whose territory the suspect was present and of the State on whose territory the act in question occurred.

17. Article 27 set out the relationship between the Security Council and the Court. If an act of aggression occurred, the responsibility of an individual would presuppose that a State had been held to be guilty of aggression; such a finding would be for the Security Council to make. The consequential issues of whether an individual could be indicted as having acted on behalf of that State and in such a capacity as to have played a part in the planning of the aggression would be for the Court to decide. The proposed relationship would apply not only in prosecutions on the initiative of the Security Council (art. 25) but also to prosecutions in which charges of aggression could be brought by a State (art. 26, para. 2 (a)). Article 28, on the applicable law, was very streamlined and almost self-explanatory.

18. Part 3 of the draft statute (arts. 29 to 35), entitled "Investigation and commencement of prosecution", set out the mechanism for invoking the Tribunal, namely a complaint, and the procedures to be followed in the investigation of a complaint and the commencement of a prosecution. It established the general powers of the Procurator and the Court at the investigation and pre-trial stages. The Working Group had considered limiting resort to the Tribunal to States parties to the statute but had concluded that a universal mechanism available to all States would be more consistent with the interest of the international community in prosecuting, punishing and deterring international crimes. It had also felt that the Security Council should be authorized to invoke the judicial mechanism when situations so required and in accordance with the Charter of the United Nations. The complaint (art. 29) might be referred to the Court by the Security Council or by any State having jurisdiction over

the crime and accepting the jurisdiction of the Court. A State must have jurisdiction over the crime under a treaty listed in article 22, under customary law or its own national law. The State must also have accepted the jurisdiction of the Court with respect to the crime either as a State party to the statute or as a State not a party to the statute, in accordance with article 23.

19. In conducting the investigation (art. 30) the Prosecutor would have the power to question witnesses, collect evidence and make on-the-spot inquiries. He could request the Court to issue orders and could seek the cooperation of States in the investigation. The rights of the suspect must be fully respected in any investigation. On completion of the investigation, the Prosecutor must decide whether there were sufficient basis to proceed and inform the Bureau of his decision. At the request of the complainant State or the Security Council, the Bureau could review a negative decision and direct the Prosecutor to commence a prosecution. If there were sufficient basis to proceed, the Prosecutor would prepare the indictment. The Court could order provisional arrest of a suspect prior to indictment if there were sufficient grounds to believe that he might have committed the crime and that his presence at trial could not otherwise be assured.

20. Under article 32, the Court would examine the indictment and supporting documentation and confirm whether the indictment provided sufficient information for a *prima facie* case. The Court could then issue an arrest warrant or pre-trial orders. It would be required immediately to notify all States parties to the statute and transmit the indictment and other relevant documents to the State where the accused was believed to be (art. 33). The Court might order a State which had accepted its jurisdiction to notify the accused in person of the indictment and comply with any arrest or detention order. It might also request a State party which had not accepted its jurisdiction to cooperate in those procedures. If the accused was believed to be in the territory of a State not party to the statute, the Court could invite that State to cooperate. The Court could prescribe an alternative method of informing the accused of the charges if personal notification was not achieved within 60 days of the indictment. Once the accused was in custody, the Court had to decide whether he should be released on bail pending trial (art. 35).

21. Part 4 of the draft Statute (arts. 36 to 54) related to the trial proceedings, the powers of the Court and the rights of the accused. Trials would take place before a Chamber consisting of five judges selected by the Bureau who were not from the complainant State nor the State of nationality of the accused (art. 37). That flexible procedure allowed the expertise of the individual judges to be taken into consideration. Under article 37, several Chambers might be established and sit concurrently to hear different cases, so that the whole Court would not have to sit on a case. The Chamber would decide where the trial was to take place and the language or languages of the oral proceedings and written documentation (arts. 36 and 39). The Court must be satisfied that it had jurisdiction and rule on any jurisdictional challenges raised by the accused in accordance with article 38.

22. The Chamber must also ensure that the trial was fair and expeditious and conducted with full respect for

the rights of the accused and for the protection of victims and witnesses (arts. 40 to 46). The statute set out the rights of the accused under the International Covenant on Civil and Political Rights and required respect for the fundamental principles of *nullum crimen sine lege* and *non bis in idem*. Subsequent trials before national courts would be precluded only when the Court had actually exercised jurisdiction and reached a determination on the merits. The conflicting views in the Working Group about trials *in absentia* were reflected in the commentary to article 44. Trials were to be held in public unless the Court decided otherwise, in accordance with articles 40 and 46. The powers of the Chamber and the procedures to be followed during the hearings, as well as certain fundamental procedural and evidentiary rules, were set out in articles 47 to 49.

23. At the conclusion of the trial, the Chamber was required to issue a written judgement in open court (art. 51). If the accused was found guilty, the Chamber must hold a separate sentencing hearing, after which it might impose a sentence in accordance with articles 52 to 54. In determining the length of a term of imprisonment the Court must consider the law of the State of nationality of the perpetrator, of the State on whose territory the crime had been committed, and of the State which had custody of and jurisdiction over the accused (art. 53). In imposing a penalty commensurate with the crime, the Court must also take into consideration any aggravating or mitigating factors, as required by article 54.

24. Part 5 of the draft Statute (arts. 55 to 57) related to the right of appeal and review. The convicted person might appeal a decision of the Court on any of the grounds set out in article 55 and might also apply to the Court for revision of the judgement on the basis of a new fact that could have been decisive in the judgement (art. 57). Appeals would be heard by an Appeals Chamber established in accordance with article 56, but revisions would in principle be heard by the Chamber which had taken the initial decision. The Working Group planned to return to the question of the extent to which the Prosecutor should also be entitled to initiate appellate or review proceedings.

25. The effective functioning of the Tribunal would depend on the international cooperation and judicial assistance of States, matters that were dealt with in Part 6 (arts. 58 to 64). States parties to the statute had an obligation to cooperate with the Prosecutor and respond without undue delay to any request or order of the Court. Any request or order must be accompanied by sufficient explanation and appropriate documentation, as required by article 61. Article 63 provided for the surrender of an accused person, under three different circumstances: (a) a State party which had accepted the jurisdiction of the Court with respect to the crime in question must take immediate steps to arrest and surrender the accused to the Court; (b) a State party which was also a party to the treaty establishing the crime in question but which had not accepted the Court's jurisdiction over that crime must arrest and decide whether to prosecute the accused; and (c) a State party which was not a party to the relevant treaty must consider whether its internal law permitted arrest and surrender of the accused. Requests from the Court would be given priority over extradition requests from other States.

26. The rule of speciality would apply to persons delivered and a similar limitation would apply to evidence tendered to the Court, subject to a waiver by the State concerned, in accordance with article 64.

27. States parties were required, at the request of any other State party, to enter promptly into consultations concerning the application or implementation of the provisions on international cooperation and judicial assistance, in accordance with article 60. States not parties to the statute were also encouraged to cooperate with the Court and provide judicial assistance pursuant to article 59.

28. Part 7 of the draft statute (arts. 65 to 67) dealt with enforcement of the judgements and penalties imposed by the Court. States parties to the statute must recognize and give effect to judgements of the Court and, where necessary, enact the national legislative and administrative measures to do so. Prison sentences imposed by the Court were to be served in a State designated by the Court, or in the absence of such a designation, in the Tribunal's host country, and in both instances would be subject to the supervision of the Court. The statute recognized the possibility of pardon, parole or commutation of sentence.

29. It was for the Commission to decide how it wished to consider the Working Group's report and how it would be reflected in the Commission's own report. He wished to express his appreciation to all the members of the Working Group, in particular, to Mr. Crawford, Mr. Calero Rodrigues, Mr. Yankov, and to Mr. Thiam, the Special Rapporteur, for their hard work and cooperation.

30. The CHAIRMAN said he wished to thank the Chairman of the Working Group for his lucid and comprehensive presentation of its report. Mr. Koroma had been too modest about his own contribution, which had undoubtedly been decisive.

31. Mr. CRAWFORD said that he wished to echo the Chairman's tribute to Mr. Koroma. Thanks should also go to Mr. Thiam, the Special Rapporteur, whose wholehearted acceptance of the method of work had greatly facilitated the Working Group's task; the Special Rapporteur's draft statute contained many ideas which had been taken up in the present draft report.

32. As the present session left little time for a thorough examination of the report, it would be unfair and unrealistic to expect the Commission to adopt the Working Group's report as a whole as a report of the Commission. The goal now was to elicit views from the Sixth Committee, on the important issues contained in the report, which reflected the five basic decisions on the structure of the statute of the Tribunal that had been accepted in principle by the Commission in 1992.⁷ At its next session, the Commission could work out the details of that structure.

33. He proposed that, for the time being, the Commission should take note of the report and refer it to the General Assembly for comment.

34. Mr. SHI said that the Working Group, guided by its Chairman, had done an excellent job in a short period of time, demonstrating that the Commission could oper-

ate with great efficiency when its work was carefully and properly organized. The Special Rapporteur's excellent eleventh report (A/CN.4/449) and the discussions on it in plenary had no doubt greatly facilitated the Working Group's task.

35. Article 2 of the draft statute devised by the Working Group concerned the relationship of the Tribunal to the United Nations. The square brackets around the two paragraphs of the article reflected the fact that two views existed about that relationship. The Special Rapporteur's eleventh report clearly endorsed the view that the Tribunal should be a judicial organ of the United Nations, while the Working Group's revised report seemed to favour some form of association short of the status of a judicial organ. While he personally had no objection to the Tribunal being a judicial organ of the United Nations, such an approach could give rise to several problems: it might require an amendment to the Charter; it might meet with political obstacles from Member States; and it might imply that Member States would *ipso facto* be parties to the statute of the Court. He was therefore inclined to favour the wording of the second paragraph of article 2, which merely linked the Tribunal with the United Nations.

36. With regard to qualifications (art. 6), he believed that the judges should have experience not only in criminal law but also in international law, including international humanitarian law and human rights law, since the Court would be trying perpetrators of crimes under international law. Article 6 did not, however, require each member of the Court to have experience in both criminal and international law, and spoke only of taking "due account" of such experience in the "overall composition of the Court". The Commission would have to examine that issue further at its next session.

37. He endorsed the substance of article 9, on the independence of judges, which appeared to draw on Article 16 of the Statute of ICJ. Further commentary should be added to article 9 to clarify the issue of whether a member of the Court could properly serve as a judge in the criminal division of his own country.

38. There was no clear need for the presidency of the Court to be a full-time position. In the early stages, criminal proceedings before the Court would probably be infrequent, but as provided under article 12, a Registrar should be available on a full-time basis. There was nothing in the wording of article 10 to prevent the President from acting in a full-time capacity if required by the circumstances.

39. He would agree that, as stated in paragraph (3) of the commentary to article 13, the Procuracy should be independent in performing its functions and should be separate from the Court's structure. Hence, the Prosecutor and Deputy Prosecutor would not be elected by the Court. It might, however, be appropriate for the Prosecutor to appoint the staff of the Procuracy, in consultation with the Bureau of the Court: unlike some members of the Working Group, he believed that consultations would serve as a necessary check on the possible biases of the Prosecutor, thereby ensuring the independence and impartiality of the Procuracy.

40. Part 2, dealing with jurisdiction and applicable law, was, as rightly recognized by the Working Group,

⁷ Ibid., p. 16, para. 104.

the core of the draft Statute. That part, and the articles on the jurisdiction of the Court in particular, would determine whether States accepted or rejected the idea of an international criminal court. The universally recognized principles of *nullum crimen sine lege* and *nulla poena sine lege* called for precise definitions of punishable crimes and their penalties. The conventions referred to in the draft articles did not set out penalties and, accordingly, the Working Group had incorporated in the draft statute a provision to that effect.

41. He had no objection to the idea of two strands of jurisdiction referred to in paragraph (1) of the commentary to article 22. He wondered, however, whether the Court's jurisdiction should not be restricted to the most serious international crimes, the ones which destroyed the very foundations of civilization, namely, the crimes listed in the draft Code of Crimes against the Peace and Security of Mankind. The Commission should give full consideration to that issue at the next session. He himself was doubtful about the wisdom of extending the Court's jurisdiction to crimes other than the most serious. States tended to be most unwilling to waive their criminal jurisdiction and it was only in connection with serious international crimes, where the action of individual States was of practically no value, that States might be willing to accept the jurisdiction of an international criminal court. In his view, the Court's jurisdiction should be restricted, at least for the time being, to those crimes listed in the draft Code of Crimes against the Peace and Security of Mankind, something which would also serve to make the Code a meaningful legal instrument.

42. Alternative A for article 23 reflected the view, widely held in the Commission, that being a party to the statute did not mean that the State accepted *ipso facto* the Court's jurisdiction; under alternative A, a State party could, by making a declaration, accept the Court's jurisdiction for one or more of the crimes listed in article 22. At the same time, he agreed that being a party to the statute would be more meaningful if such status automatically conferred jurisdiction on the Court for the crimes listed in article 22, as provided for in alternatives B and C. Alternative A was none the less the more realistic formulation and would probably encourage States to become parties to the statute, while alternative B or C might dissuade States from doing so. At present, acceptance by States should prevail over other considerations.

43. Article 24 defined which States were required to give consent to the Court's jurisdiction in relation to the crimes listed in article 22. The main emphasis was on the consent of the State on whose territory the alleged offender was found. Consent by the suspect's State of nationality or by the State on whose territory the crime was committed was not necessarily required: the Court could operate most effectively in regard to accused persons who were actually before it and, consequently, jurisdiction should be linked to a procedure that would generally ensure the transfer of alleged offenders to the Court. At the same time, prosecution and a fair trial would be impossible without a proper investigation, which often required the close cooperation of the suspect's State of nationality or of the State on whose territory the crime was committed. The importance of acceptance of the Court's jurisdiction by States in those two categories should not be overlooked and, in fact,

specific provision to that effect had been made in the draft statute for an international criminal court.⁸ Moreover, the Special Rapporteur had endorsed such an approach in his report. The issue was complex and merited further consideration.

44. The issue of whether international organizations should have the right to submit cases to the Court needed to be examined carefully. Article 25 wisely and realistically restricted itself to the possibility of submission of cases to the Court by the Security Council, which was expressly provided for in article 29. Those two articles had the merit of sparing the Security Council the need to set up an ad hoc tribunal in the future.

45. Article 27, which dealt with charges of aggression, was in line with General Assembly resolution 3314 (XXIX), containing the Definition of Aggression. The draft Code of Crimes against the Peace and Security of Mankind, provisionally adopted on first reading at the forty-third session,⁹ included a provision which was similar to article 27.

46. In respect of article 30, on investigation and preparation of the indictment, he agreed that the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation. Furthermore, since the rights of the suspect and those of the accused did differ in some respects, it was important to have separate provisions on them. The Commission needed to re-examine the last sentence of paragraph 1 of article 30, which provided that, at the request of the complainant State or the Security Council, the Bureau would have the power to review the decision by the Prosecutor not to proceed with a case. Some members of the Working Group had legitimately thought that such a provision might compromise the independence of the Prosecutor. He himself did not yet have a clear position on the matter.

47. In paragraph (4) of the commentary to article 37, the Working Group invited the Commission and the General Assembly to comment on the issue of how members of the Chambers of the Court were to be selected. While the article did not make any express provision to that effect, the commentary presented three alternatives: selection of judges by the Bureau, selection based on the principle of rotation, and selection based on objective criteria set forth in the rules of the Court. To his mind, the second and third methods were the most worthy of consideration, the first being too subjective. In considering that issue, the Commission should bear in mind the methods used by ICJ for selecting judges.

48. Article 38 dealt with challenges to the Court's jurisdiction by States parties and by the accused. In his opinion, to avoid unnecessary interference with the Court's normal functioning, the right to challenge its jurisdiction should be accorded only to States having a direct interest in a particular case, although that right might theoretically be granted to other States, for example, all of the States parties to the Statute. In reality, it would be very rare for a State not directly interested in a

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

⁹ See footnote 1 above.

case to challenge the Court's jurisdiction; in such cases, the accused would in all likelihood also challenge the Court's jurisdiction. It was therefore of paramount importance that the accused should be guaranteed the right to challenge not only the Court's jurisdiction at any stage of the trial but also its jurisdiction and the adequacy of its indictment at the pre-trial stage. If impartiality was to be ensured, such challenges should be decided not by the Bureau but by a chamber established at the pre-trial stage. He could hardly endorse the view that the limited institutional structure of the Court could not, in financial terms, afford hearings on pre-trial challenges. While financial considerations were certainly important, they should not prejudice the impartiality of the Court or the rights of the accused.

49. Article 40, dealing with fair trial, emphasized due regard for the protection of victims and witnesses. In that regard, he wondered whether the article should not make explicit provision for the immunity of witnesses from prosecution for any incriminating testimony about conduct in which they themselves were involved, as was provided for in the statutory acts of some States. With the exception of the provision relating to trials *in absentia*, article 44 reflected the fundamental rights of the accused set forth in article 14 of the International Covenant on Civil and Political Rights. He had always maintained that the right to be present at the trial was a fundamental right of the accused, but had recently had second thoughts on the matter. The failure of the accused to appear might be a deliberate attempt to escape justice and it might also be the result of refusal by the State concerned to surrender the accused, which was particularly true of cases of aggression in which high-level State bodies were criminally responsible. Requiring the suspect to be present under such circumstances meant either that the accused had to be brought before the Court by armed force directed at the State concerned, on order of the Security Council, which would no doubt result in harm being done to innocent victims, or that no trial could be held at all, which would result in a loss of authority and prestige for the international system of criminal justice. Furthermore, trials *in absentia* might have a deterrent effect. In view of those and other considerations set out in paragraph (3) of the commentary to article 44, he believed that the Commission should give serious consideration to the advantages and disadvantages of trials *in absentia*. Such trials would, of course, give rise to provisional judgements and, should the accused appear before the Court at a later stage, the case would be reopened and a new trial would take place.

50. As to the *non bis in idem* rule (art. 45), he agreed with the position taken by the Working Group that the Court should not be allowed to review the trial proceedings of national courts, for such a review would be an encroachment on State sovereignty. Rules of evidence were very complex but the statute should nevertheless include some basic provisions, and the provisions in article 48 represented a very minimum in the matter. In particular, he welcomed the provision on the inadmissibility of evidence obtained directly or indirectly by illegal means.

51. Concerning judgement, article 51 made no provision for the possibility of separate or dissenting opinions, although, in a judgement pronouncing an accused

person guilty, such opinions could be extremely important to the defendant for the purposes of appeal against the conviction. On the other hand, a dissenting opinion in the case of a judgement of acquittal could have a devastating effect on the psychology of the acquitted person and on his life and career in society. On balance, the Working Group had been right in its decision.

52. In the matter of applicable penalties, the principle *nulla poena sine lege* required that the statute should at least provide a general range of terms of imprisonment for the crimes it listed. Paragraph 1 of article 53 attempted to meet the requirements of that important principle of criminal law. However, for the sake of uniformity of penalties for the same crimes, the Court should determine the appropriate punishment in a particular case without having regard to the penalties provided for by the national laws of the States indicated in paragraph 2 of article 53, despite the fact that the commentary made it clear the Court was free to consider the relevant national law of the States in question, but was not obliged to follow the law of any one of them.

53. On the subject of appeal and review, he shared the concern of some members of the Working Group about allowing the Prosecutor to appeal against a decision of the Court, notably on acquittal. In the interest of a fair trial, however, exceptions should be made in very limited circumstances so as to allow the Prosecutor to appeal against a decision of the Court as indicated in paragraph (3) of the commentary to article 55. He did not approve of the idea of appeal chambers. Since trials were conducted in Chambers, appeals should be heard by the Court in plenary, except for the judges who had participated in the contested judgement of the trial Chamber.

54. Lastly, he considered the draft Statute, which was of a preliminary character, to be a remarkable achievement. It would serve as a useful basis for further work on the subject.

55. Mr. YANKOV proposed that the following text should be added to the report of the Commission:

"The Commission considered that the report of the Working Group represented a substantial advance over last year's report on the same topic presented to the forty-seventh session of the General Assembly, in 1992. The present report placed the emphasis on the elaboration of a comprehensive and systematic set of draft articles with brief commentaries thereto. Though the Commission was not able to examine the draft articles and proceed to their adoption at the current session, it felt that, in principle, the proposed draft provides grounds for their examination by the General Assembly at its forthcoming forty-eighth session.

"The Commission welcomed comments by the General Assembly and Member States to specific questions as well as to the draft articles as a whole. These comments certainly would provide guidance for the subsequent work of the Commission with a view to completing the elaboration of the draft statute at the forty-sixth session of the Commission, in 1994, as contemplated in its plan of work."

56. The following footnote would be attached to the words "specific questions", at the beginning of the second paragraph: "See list of specific draft articles to

which the Commission would seek the comments by the General Assembly and Member States.”

57. The CHAIRMAN invited the Commission to consider the procedural proposals by Mr. Crawford and Mr. Yankov.

58. Mr. CRAWFORD said that the two proposals were not different in principle and, that they could be conveniently combined. He noted that the proposal by Mr. Yankov implied that the Working Group's report would be attached to the report of the Commission for the present session.

59. Mr. BENNOUNA said that the excellent report under consideration was suitable for transmittal to the General Assembly, with the formula proposed by Mr. Yankov, which he fully endorsed. If it was successful it would help to remedy a gap in international law in the world of today: namely, the absence of an international criminal court capable of solving certain deadlocks in international relations. The draft would offer a court made to measure for States which, for one reason or another, were unable to settle certain questions that arose in the relations between them.

60. With some reservations he could support the draft, the essential element of which was to be found in Part 1, in which he strongly favoured the second alternative of article 2 (Relationship of the Tribunal to the United Nations). The formula “The Tribunal shall be linked with the United Nations . . .” was preferable, for the Tribunal could not be “a judicial organ of the United Nations”. An organ of the United Nations could not create a “judicial organ of the United Nations” by means of a resolution.

61. With reference to article 9, further thought should be given to the problem of how to ensure the independence of the judges when the judges did not hold permanent office. The issue was tied in with the provisions of article 17 (Allowances and expenses), in particular. The proposed formula regarding the relationship between the statute and the Code of Crimes against the Peace and Security of Mankind, and with a list of crimes, was provisionally acceptable but the question should be examined in greater depth, inasmuch as the statute of the Court departed from the Code of Crimes and was becoming an autonomous instrument. Furthermore, the question would have to be looked at in conjunction with the work on State responsibility at the next session, with particular reference to article 19 of part 1 of the draft on State responsibility¹⁰ and the distinction drawn between crimes and delicts—a distinction which was not found in the statute of the Court. He accordingly entered a reservation on that point.

62. In connection with article 25 (Cases referred to the Court by the Security Council), he totally disagreed with the idea of involving the Security Council with the Tribunal. The Security Council was a political body and its characteristics prevented it from interfering in the work of a judicial organ. For example, nationals of States possessing the right of veto in the Security Council, or persons protected by one of those States, would never be

prosecuted. The Security Council, as a political body, took political steps, not judicial steps, for the maintenance of peace. Indeed, in the interests of the Security Council itself, its political character should be respected.

63. Mr. GÜNEY said that he would not enter into details, since he had been a member of the Working Group and some—but not all—of his views had been taken into account in the report.

64. He unreservedly supported the procedural proposals made by Mr. Crawford and Mr. Yankov to the effect that the Commission should take note of the Working Group's report. It should be specified that the report had faithfully followed the guidelines adopted at the previous session and also that the Commission had to complete the work on the Court at its next session.

65. Mr. PELLET said that the draft statute had the merit of coherence, but it could not, of course, be accepted as it stood. That was not in itself important, because the Commission was not called upon at the present stage to adopt the statute. He himself agreed with the proposal that the Commission should take note of it.

66. However, he had some remarks to make on a number of points which were of concern to him. He would point out that, as a matter of terminology, the term *cour* was used in the French version where the term *tribunal* should be used, and vice-versa. That terminological confusion should be remedied.

67. The statute had been praised for flexibility in regard to the functioning of the Court but in his opinion it was not flexible enough and further work should be done in that direction.

68. With regard to article 22 (List of crimes defined by treaties), he was not satisfied with the explanations given in paragraph (1) of the commentary, nor had he been further enlightened on that point by the explanations given by the Chairman of the Working Group. As he saw it, two notions must be distinguished, on the one hand, international crimes and, on the other, crimes against the peace and security of mankind. Only international crimes could be tried at the international level. Surely, the Court was competent to judge the most serious crimes, which meant crimes against the peace and security of mankind.

69. The International Criminal Court would not provide a suitable forum to judge equally and jointly all international crimes. Thus, as regards drug-related crimes, the work was highly specialized and besides, a quantitative problem would arise. Such crimes would give rise to a large number of cases while cases of aggression, which caused very difficult problems, would on the contrary be few in number. Trial by chambers would not provide a sufficient solution. Article 26, paragraph 2 (b), attempted to solve the matter with the aid of the very subjective criterion of “exceptionally serious crimes”—a criterion which applied to other offences as well. The formula was practically meaningless. He was strongly in favour of the establishment of an international court to deal with drug-related crimes, but the Working Group's solution for the problem of such crimes was not adequate.

70. Article 22 represented a great step backwards in another respect. He felt strongly that, in 1993, it was wrong to give pride of place to treaties in the definition of inter-

¹⁰For the texts of articles 1 to 35 of part 1 provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

national crimes. For example, the crime of genocide existed independently of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. As long ago as 1945, international crimes had been held punishable independently of any definition by treaty.

71. In that connection, a serious difficulty was created by the reference in article 26, paragraph 1, to "crimes not covered by article 22" and by the distinction drawn with regard to States not parties to treaties which established international crime. The commentary to article 26 was inadequate on that point. The position, surely, was that international custom constituted the heart of the law in the matter of international crimes. The question, for example, of whether a particular State had or had not signed the Convention on the Prevention and Punishment of the Crime of Genocide was irrelevant for the purpose of determining whether that State had committed the crime of genocide, which was punishable under customary international law.

72. He had reservations about article 28 (Applicable law), which provided little or no guidance on the respective roles of treaties, international custom, the rules and principles of general international law and, particularly, national law. Greater precision was needed in those matters. Articles 25 and 27 on the role of the Security Council introduced a useful idea, which he himself approved. It was necessary, however, to specify that the Court was bound by the Definition of Aggression adopted by the General Assembly—a point which was not clarified either by article 25 or the commentary thereto.

73. He welcomed the Working Group's position on judgement *in absentia*, as seen from paragraph 1 (h) of article 44 (Rights of the accused). That provision was, of course, taken from article 14 of the International Covenant on Civil and Political Rights. In that connection, he drew attention to the erroneous interpretation of that article of the Covenant, in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993),¹¹ according to which judgement *in absentia* was prohibited by article 14. In fact, that article merely stated the right of the accused to be present at his trial but did not rule out judgement *in absentia* in the event of deliberate absence. The commentary should draw attention to that mistaken interpretation.

74. Although his reaction to the work of the Working Group was on the whole positive, it seemed to him that the Commission was quite far from a consensus on certain important points. The best course, therefore, would be for the Commission to take note of the Working Group's report and to seek the Sixth Committee's views on the matter. Mr. Yankov's proposed text, with which he agreed, should be included in the Commission's report to the General Assembly. Furthermore, if a list of the main subjects on which the Commission would like to have the General Assembly's comments could be agreed before the end of the session, that should be indicated in a footnote. For his own part, he would like the questions of the applicable law, the definition of crimes, and judgement *in absentia* to be included in such a list.

75. His approach to the question of procedure was more robust than that of Mr. Crawford. His own pro-

posal would be that the Commission should discuss the report of the Working Group paragraph by paragraph at its forty-sixth session in the light of the reactions in the Sixth Committee and that only thereafter should the report be referred back to the Working Group to produce a final report for consideration by the Commission.

76. Mr. TOMUSCHAT, congratulating the Special Rapporteur and the Chairmen of the Working Group and its three subgroups on their invaluable work, said that, while his main concern was that the statute of the proposed Court should be adopted as soon as possible, it would be unfortunate if it ultimately became clear, from the statements made by members, that the Commission was not in agreement on the substance of the articles. He therefore considered that Mr. Yankov's proposal, which he supported, should be adopted, although it should perhaps be recast somewhat. There was certainly not enough time to examine all the articles paragraph by paragraph.

77. The Working Group had adopted a prudent approach, in line with what had been decided at the Commission's previous session. States would, however, have to ratify the statute as a first step and would then have to submit to the jurisdiction of the Court. That would be a slow and difficult process and the statute might remain a dead letter, not just for years but for decades. In the circumstances, some thought should perhaps be given to the possibility of including a provision on an international criminal court in the Charter of the United Nations; that could perhaps be done in the context of the current review of the Charter. An indication should perhaps also be given, either in Mr. Yankov's proposal or in the report itself, to the effect that an amendment to the Charter was entirely feasible.

78. Mr. Pellet had argued that, by virtue of positive customary law, there now were, and there had been since 1945, a number of crimes that were punishable. In that connection, two options had been provided for in the draft Statute, under article 22 (List of crimes defined by treaties) and article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22). If priority was accorded to crimes punishable under international conventions, it was to give priority to the written law, which, in criminal matters, occupied a special place. It was always somewhat questionable to punish someone on the basis of customary law alone. Indeed, in 1945, that whole approach had been challenged, and the question had subsequently arisen whether the lessons of Nürnberg were really valid. There had been no practice since the time of the Nürnberg and Tokyo Tribunals, so there was every reason to be doubtful about the nature of positive law and of the Nürnberg principles. That was why reference was had in the first place to the written law, which was particularly legitimate, in criminal matters.

79. While he was in general agreement with the solutions at which the Working Group had arrived, he disagreed entirely with article 67, which accorded a certain importance to the State of imprisonment. In his view, the law of such a State should not have an influence on a sentence handed down by an international court.

80. Mr. THIAM (Special Rapporteur), referring to Mr. Pellet's remarks, said that he had himself raised the question of terminology at the outset, pointing out that a

¹¹ Document S/25704 and Corr.1 and Add.1.

court could not be placed in a position inferior to that of a tribunal. The point had been discussed at length, but the Working Group had taken the view that it was above all necessary, to define the terms, as indeed the Commission would have to do eventually.

81. He agreed with Mr. Pellet on the question of drug trafficking and had in fact stated in the Working Group that it was a ridiculous state of affairs that, although the Commission had been requested to set up a tribunal to deal with drug trafficking, the draft statute barely referred to the matter.

82. The questions of general principles and of custom had both been raised in his first report,¹² and discussed, but general agreement had never been reached on them. At the next session, therefore, an attempt should be made to reach agreement in particular on the applicable law. It was obviously not possible to disregard the general principles of law, any more than custom, and he had in fact placed the concept between brackets to prompt further discussion on the matter.

83. He agreed that the Working Group's report could not be discussed in detail at the present late stage in the session. Instead, at its next session, the Commission should start with a debate on the most important questions involved and should then set up a working group to consider the whole question in the light of that debate.

84. Mr. VILLAGRÁN KRAMER said that Mr. Yankov's clear proposal would facilitate the submission of the Working Group's report to the Sixth Committee and would thus enable the Commission to have the benefit of the very positive comments of Member States.

85. Nothing in the report of the Working Group was new. Everything had been discussed at the previous session. The parameters for a statute of the court had been established, and its possible structure agreed. The General Assembly had been consulted on the matters on which guidance had been deemed necessary, and had expressed its satisfaction. At the present session, the Working Group had also had before it a number of Security Council documents, and it had also considered the contributions of various distinguished jurists. It was therefore well aware of the limitations by which it was bound, as well as of the material available to it.

86. It was a matter of regret to him, however, that contributions had not also been forthcoming from certain members of the Commission, who had been absent from Geneva, particularly on the question of drug trafficking. In that connection, there was a problem for Latin American countries because the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances imposed an obligation on States to incorporate penalties in their domestic legislation. In the light of the maxim *nulla poena sine lege*, Latin American countries could not apply penalties that were not already provided for under their legislation. It was important therefore for them to be able to rely on penalties laid down in positive law. That kind of problem called for a solution.

87. The majority of the members of the Commission had served on the Working Group and were satisfied

with its report. They believed that the report should be referred to the General Assembly so that the Commission could take account of the Assembly's comments and carry on with its work on the matter. As a member of the Working Group, he supported Mr. Yankov's proposal.

88. The CHAIRMAN said that the Commission might wish, at that point, to take a decision on Mr. Crawford's proposal, as amplified by Mr. Yankov's proposal. Any members wishing to make substantive statements on other aspects of the report could do so later. Accordingly, he would suggest that the Commission should take note of the report, annex it in its entirety to the report of the Commission to the General Assembly, and include in the latter report the paragraph proposed by Mr. Yankov.

89. Mr. CRAWFORD said that he agreed with Mr. Pellet's suggestion concerning procedure. As to Mr. Yankov's proposal, he proposed that, in the last sentence of the first paragraph, the words "grounds for their examination" should be replaced by the words "a basis for examination".

90. Mr. KOROMA, also referring to Mr. Yankov's proposal, proposed that the words "in detail" should be inserted after the words "the draft articles", in the last sentence of the first paragraph.

91. Mr. ROSENSTOCK said that he could agree to the procedure suggested by the Chairman and also to Mr. Yankov's proposal, on the understanding that agreement was reached on the footnote to that proposal concerning a list of specific questions.

92. Mr. PELLET said that he too could agree to the Chairman's suggestion, provided members would be free to speak on substantive aspects of the report later. There remained, however, the question of the footnote in Mr. Yankov's proposal. It was important, in his view, to pinpoint the main issues to which the attention of the Sixth Committee should be drawn. Members wishing to make proposals in that connection should, however, do so as quickly as possible, so that the proposals could be incorporated in the report.

93. Mr. YANKOV said that he agreed with Mr. Pellet on the need to pinpoint the main issues.

94. Mr. VERESHCHETIN said that, while he supported Mr. Yankov's proposal as amended, he doubted that there would be enough time to prepare a list of questions to which the General Assembly's attention should be drawn. In any event, the Working Group had already drawn attention to certain questions in the commentaries. He therefore proposed that the footnote should be deleted and that members of the General Assembly should be allowed to decide for themselves what was or was not important.

95. While he fully agreed that the Commission should hold a discussion at the next session on the report of the Working Group, it should not engage in a general debate again but should use the report as a basis for making specific drafting proposals with a view to settling the matter quickly.

96. Mr. BENNOUNA said he did not think that the Commission would have time to agree on a list of special questions before the end of the session because that would involve a substantive debate. He therefore sup-

¹² *Yearbook*... 1983, vol. II (Part One), p. 137, document A/CN.4/364.

ported Mr. Vereshchetin's proposal to delete the footnote.

97. Mr. MAHIU said that, so far as the question of a list of special questions was concerned, there was no need to add to the three clear indications already given in the Working Group's report: first of all, certain points on which the comments of the General Assembly were sought had been placed between square brackets in the report; secondly, in certain instances, as in the case of article 23, various options were given and it would be for the General Assembly to determine which was the preferred option; and, thirdly, the Working Group had itself requested the General Assembly's opinion on certain matters, such as article 11, concerning disqualification of judges.

98. There were, however, two very important questions on which the Commission might wish to indicate that it would like to have the reaction of the Sixth Committee: the list of crimes, dealt with in article 22, and the question of jurisdiction, dealt with in articles 23 to 26.

99. Mr. KUSUMA-ATMADJA, supported by Mr. KOROMA, said that the words "and proceed to their adoption", in the first paragraph of Mr. Yankov's proposal, were not really necessary. He therefore proposed that they should be deleted.

100. The CHAIRMAN suggested that the Commission should take note of the report of the Working Group on a draft statute for an international criminal court, and should agree that the report should be annexed in its entirety to the report of the Commission to the General Assembly on the work of its forty-fifth session. He further suggested that the text proposed by Mr. Yankov, as amended by Mr. Crawford, Mr. Koroma, Mr. Kusuma-Atmadja and Mr. Vereshchetin should be included in the report of the Commission to the General Assembly.

It was so agreed.

The meeting rose at 6.10 p.m.

2326th MEETING

Thursday, 22 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (concluded) (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,² A/CN.4/449,³ A/CN.4/452 and Add.1-3,⁴ A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

REVISED REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (concluded)

1. Mr. FOMBA said that the Working Group's report revealed a proper concern to strike an overall balance between the rigour of criminal law and the necessity for flexibility in the light of political imperatives. The report was, in the main, satisfactory and he held no appreciably different views from the Working Group's consensus positions on basic questions. Nevertheless, he did sometimes have a differing or more qualified view of certain issues, such as the question of trial *in absentia*, a solution he favoured because of its deterrent effect, or again, the choice between "selective participation" by States in the court and "automatic participation", which was better because it gave the Court more legal consistency and rigour. He was none the less fully alive to the fact that the Working Group had chosen the possible, rather than the desirable, by adopting an approach which better reflected the requisite consensus basis for the Court's jurisdiction and which was marked by flexibility.

2. He reserved the right to comment on other points at the next session, bearing in mind, however, the reservations expressed more particularly by Mr. Bennouna and Mr. Vereshchetin about the usefulness of a further general discussion.

3. Mr. VERESHCHETIN said he wished to clarify a point which was by no means the most important but had been mentioned more especially by Mr. Pellet, namely, the reasons why the Working Group had decided to describe the proposed jurisdiction as a "Tribunal" and not a "Court".

4. The Working Group had been faced with a dilemma. They had to decide how to call, on the one hand, the entity consisting both of the procuracy, the judges and the registry, and on the other, the trial body itself.

5. The problem lay in the fact that, in the various languages, different terms were used for a court of first instance. The Special Rapporteur, had explained that, for example, in the French system the word *tribunal* was used for a court of first instance. In Russia and in other countries, the word "tribunal" was used exclusively for a military court. Hence there had been no unanimity about which term to use, more particularly because of the differences in the legal systems, and it had proved necessary to take a number of other factors into account in making the choice. The first factor, not by far the most important, had been the need to distinguish the future court from ICJ at The Hague. To use the same term

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook* ... 1991, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook* ... 1993, vol. II (Part One).

³ Ibid.

⁴ Ibid.

for both jurisdictions might well have opened the way to lasting confusion in the minds not only of students but also of all those who, subsequently, would seek to distinguish between the proceedings of the two bodies. The second factor was the tradition that had been established since the time of the Nürnberg Tribunal and had been continued with the body set up by the Security Council in connection with the situation in the former Yugoslavia, a body which had also been called a tribunal. The term "tribunal" therefore carried on a certain tradition in which the word meant a body that tried persons and not States.

6. The third factor had been the lack of consistency in the use of particular terms in the various legal systems. For that reason, the Working Group had arrived at what was not perhaps the best solution but one which seemed to be the best in view of the circumstances: calling the entity the "Tribunal" and using the term "Court" for the part of that entity that would hand down judgement.

7. It was useful to recall those arguments, for it was a point that could give rise to misunderstanding. The Chairman or the person who would be presenting the results of the Working Group's work to the Sixth Committee should mention them.

8. Mr. RAZAFINDRALAMBO said that, as a member of the Working Group, he agreed with the draft statute as a whole. However, he had been unable to attend the Group's early meetings at which Part I of the draft statute had been adopted, and he therefore wished to enter certain reservations, more particularly with regard to the provisions on the status of the Tribunal (art. 4) and the independence of judges (art. 9). In those two matters, the draft statute proposed by the Working Group did not, in his opinion, meet the basic criteria for a permanent and stable court or those to ensure that the judges were equal, independent and impartial.

9. To begin with, no organ of the proposed court operated on a permanent basis. The Court's seat and premises alone were permanent. It was a kind of permanent court of arbitration with criminal jurisdiction, the only difference being that its members were elected. It did not, therefore, have any genuine stability, for it depended on the availability of judges, who would work for the court only intermittently. The judges must in fact continue to perform other paid duties in order to earn a living. If, for example, they still had national judicial duties generally regarded as enough to ensure that they were independent, they would not, for all that, be free of interference in their international mandate. Actually, if they were elected, they would be dependent on their electors, and if they were appointed by the Executive, they would still have a subordinate place in a hierarchy. Accordingly, their impartiality could not be properly guaranteed.

10. Consequently, the judges would not enjoy equality in terms of remuneration, for judges from third-world countries would be in a worse position than their colleagues from wealthy countries, something that was inconsistent with a democratic judicial organization. Lastly, the fact that the judges would continue to engage in their normal activities might well expose them to serious security problems, since the statute provided for the protection of witnesses and victims, but afforded no

guarantee of safety of the judges. The risks were particularly great if, for example, drug trafficking was added to the list of crimes falling within the court's jurisdiction *ratione materiae*. Indeed, when they travelled on behalf of the Court the judges would not even be protected by belonging to their national administration.

11. In the circumstances, he thought that Governments or public or private organizations would not be inclined to allow their nationals to forsake their duties for periods that might prove to be very long if one bore in mind the trials for crimes against peace and crimes against humanity such as the Barbie or Noriega cases.

12. Mr. MIKULKA said that he fully endorsed the overall course taken in the proposed draft. Nevertheless, even though it was warranted to some extent by the fact that the subject was topical, unfortunately the Commission was, at the end of the present session as at the previous session, sending to the General Assembly a text that had not been sufficiently discussed in the Commission itself. Furthermore, some remarks were called for on issues relating to the Court's jurisdiction *ratione materiae*, which were dealt with in article 22 and article 26, paragraphs 2 (a) and 2 (b).

13. First, he was not convinced that article 26, paragraph 2 (b), which related to "crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty", had a place in the draft. The Commission had decided that only crimes under international law should fall within the jurisdiction of the Court, something that was not reflected in the introductory phrase in paragraph 2. However, some international treaties regulated inter-State cooperation in the prosecution of individuals for criminal acts that did not necessarily fall into the category of international crimes. In other words, despite the existence of a treaty, some criminal acts covered by the provisions of article 26, paragraph 2 (b), were still crimes under internal law. The question should be re-examined very closely.

14. The other provisions relating to jurisdiction *ratione materiae* were spread quite artificially between article 22, which listed crimes defined by treaties, and article 26, paragraph 2 (a), which was concerned with crimes that were prohibited exclusively under customary international law. There was nothing to warrant favouring one form of jurisdiction over another, and therefore the provision should form the subject of two separate paragraphs in one single article; in other words, the content of article 26, paragraph 2 (a), could form paragraph 2 of article 22. The result would be logical from the standpoint of acceptance of jurisdiction, for the difference at the present time between the provisions of article 23 and those of article 26, paragraph 1, was not very clear.

15. Such a rearrangement of the provisions concerning the Court's jurisdiction *ratione materiae* would also have positive effects for the interpretation of article 25. While it was obviously not the Working Group's intention, a reading of article 25, concerning cases referred to the Court by the Security Council in the context of the two provisions on jurisdiction *ratione materiae*, could give the impression that, so far as jurisdiction under article 26 was concerned, acceptance of jurisdiction was a *sine qua non* for the Security Council to be able to sub-

mit a case to the Court. It was a defect in drafting that would have to be discussed, but could easily be corrected.

16. Mr. PELLET said there were two problems of immediate importance that were of concern to him and on which no real decision had been taken.

17. The first was the name of the jurisdiction, something that was not fundamental but was important enough to be examined. The arguments, recalled by Mr. Vereshchetin, that were supposed to explain the Working Group's choice seemed indeed to plead in favour of the opposite, since the Working Group had ultimately decided to use the word *Cour* (Court) to describe something which, in French, and apparently in English as well, ought reasonably and logically to be called a "Tribunal". Again, *Tribunal* was used for what should logically be called a *Cour* (Court).

18. As to the risk of confusion with ICJ, the fact that a "Court" had been established as the principal judicial organ of the United Nations showed that the term designated something that was most "dignifying" in the international system. To choose the word *Tribunal* meant, quite illogically, reversing the order of things, all the more so since it had none the less been decided to establish a Court (*Cour*) and the risk of confusion had not therefore been removed.

19. The second argument, based on tradition, was no more convincing. In the case of the two bodies that had been mentioned, the word "tribunal" had been used precisely because they had been or were temporary jurisdictions, whereas the Working Group's draft was concerned with the establishment of a permanent body, and it was the "court" concept that highlighted the idea of permanence. When the idea had arisen of an international tribunal in CSCE and the question had been raised at the initiative of a number of countries, the term "tribunal" had been used precisely to confer on another future permanent jurisdiction the dignity of the word "Court".

20. Nevertheless, it was not too late to reverse the terms if the Commission agreed to do so. Conversely, if the proposed terminology was used, there was a possibility of unending confusion.

21. As to the list of subjects, no decision had really been taken and, in his view, the variants and the passages appearing in square brackets in the report itself related not to the major points but in fact to relatively secondary issues. Actually, the important thing for the Commission was to have the General Assembly's view not so much on formulations as on basic options. He continued to think that the fundamental problem was that of jurisdiction and that trial *in absentia* was something important on which it would be better to obtain the views of politicians. He therefore hoped that those two subjects would appear on the list, on the understanding of course that if some members considered other subjects to be important they could be added. Failing such a list, representatives on the Sixth Committee might speak only of matters that were of interest to them, and perhaps of little interest to the Commission. Furthermore, an indication of the points on which the Commission considered that there was a problem which needed consultation would make for a structured debate.

22. Lastly, he cordially yet completely disagreed with Mr. Razafindralambo, whose reservations about some aspects of the draft applied, with the exception perhaps of those relating to safety, to all judges, particularly to a number of present international tribunals whose status was halfway between that of a permanent court and the list of the Permanent Court of Arbitration. That was true, in particular, of international administrative tribunals.

23. Mr. CRAWFORD said that the choice of the word "tribunal" also posed problems in English, for it brought to mind a non-permanent and semi-judicial, even administrative, body, whereas the "courts" were genuine judicial organs. In matters pertaining to the criminal law, he would have preferred the term "court".

24. The CHAIRMAN said that the problem of terminology also existed in Spanish.

25. Mr. MAHIOU said that it was perhaps a problem of translation, one that each language group could settle by adopting the usual word in the language in question. He continued to think that it would be useful to advise the General Assembly of the important issues on which its views were sought. As to the report itself, the Working Group had produced remarkable results, even though some articles did pose problems of substance and principle, matters to which he would revert at the next session.

26. The CHAIRMAN pointed out that the Commission had decided at the previous meeting to take note of the Working Group's report and to submit it to the General Assembly in the form of an annex to its own report, adding the paragraph proposed by Mr. Yankov and deleting the second footnote, which in fact contained the questions to the Assembly. The Commission could not alter the Working Group's report, but terminology or other problems could be indicated in the Commission's report itself, or in the statement he would be making in the Sixth Committee.

27. Mr. ROSENSTOCK said that it would be a serious mistake to let the Sixth Committee embark on a "tribunal/court" terminological discussion. If the matter was to be raised, the Commission should state very clearly that the problem was strictly one of terminology.

28. Mr. de SARAM said that, like Mr. Pellet and Mr. Crawford, he thought the word "court" would be better for the proposed body. He too was of the opinion that the Commission should categorize the problems and indicate to the Sixth Committee which were the most important.

29. Mr. KOROMA urged the Chairman not to bring up the question of terminology in the Sixth Committee, so that the Committee could give its views on more important issues. The Commission could take note of the points raised by Mr. Pellet and consider them at the next session.

30. Mr. TOMUSCHAT proposed that the Commission, if it decided to raise the question, should incorporate the following text in its report:

"At its next session, in 1994, the Commission will revert to the question of whether to preserve the term provisionally used for the jurisdictional mechanism for which the Working Group elaborated a statute. In the Working Group's report, the institution as a whole was called the Tribunal and the trial organ, which is one of its constituent elements, is called the Court. It

would perhaps be desirable, in accordance with the terminological usage in some of the official languages of the United Nations, to change these two terms and use the name International Criminal Court for all of the system covering the Chambers, the Registry and the Procuracy. The Commission emphasizes that this terminological problem is of no substantive importance."

31. Mr. VERESHCHETIN said that the third sentence of the proposed text prejudged the Commission's decision and should be deleted.

32. Mr. CALERO RODRIGUES said that, in its report, the Commission included only a few sentences on the submission of the report by the Working Group, and the text proposed by Mr. Tomuschat could well place too much emphasis on the matter. The best course would be to include the text in the commentary and, since all members of the Working Group were present, they might agree to making that change in their report. If that approach was adopted, the proposal to delete the third sentence should also be adopted, so as to avoid inconsistency in the commentary.

33. The CHAIRMAN suggested that the Commission should adopt the solution proposed by Mr. Calero Rodrigues, namely to add to the commentary in the Working Group's report the text proposed by Mr. Tomuschat, without the sentence which Mr. Vereshchetin had suggested should be deleted.

It was so agreed.

34. Mr. BOWETT said that the Commission should perhaps ask Member States for their written comments on the proposed draft statute.

35. Mr. YANKOV proposed that the second paragraph of the text the Commission had adopted the previous day should include an additional sentence reading: "The written comments of Member States would also be welcome".

36. Mr. BENNOUNA said that it was premature to ask Governments to take a formal position on a text which, after all, was only the report of a working group, not a document formally approved by the Commission.

37. Mr. ROSENSTOCK said Mr. Bowett's proposal, in the form suggested by Mr. Yankov, was perfectly justified in view of the urgent need to respond to the expectations of the international community.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt Mr. Yankov's proposal.

It was so agreed.

Draft report of the Commission on the work of its forty-fifth session (continued)

CHAPTER V. The law of the non-navigational uses of international watercourses (A/CN.4/L.485)

39. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, chapter V of the draft report, on the topic of the law of the non-navigational uses of international watercourses (A/CN.4/L.485).

Paragraphs 1 to 17

Paragraphs 1 to 17 were adopted.

Paragraph 18

40. Mr. BENNOUNA said that paragraph 18 did not take full account of the discussion in plenary and the phrase "in view of the flexibility of the legal instrument under preparation" should be inserted after the words "The comment was made that", at the beginning of the third sentence. Again, a sentence should be inserted at the end of the paragraph, reading: "Moreover, it was argued that the draft already provided in Part III for a set of consultation procedures intended precisely to avoid disputes between parties".

Paragraph 18, as amended, was adopted.

Paragraphs 19 to 21

Paragraphs 19 to 21 were adopted.

Paragraphs 22 and 23

41. Mr. AL-KHASAWNEH proposed that paragraph 22 should be recast to read:

"22. According to another view, the elasticity of the substantive rules made it indispensable to provide for compulsory fact-finding and conciliation and binding arbitration and judicial settlement".

Paragraph 23 would be deleted.

It was so agreed.

Paragraph 22, as amended, was adopted, and paragraph 23 was deleted.

Paragraphs 24 to 50

Paragraphs 24 to 50 were adopted.

Paragraph 51

42. Mr. GÜNEY said he had consulted members whose working language was French and it seemed to them, as it did to him, that the translation of the English word "significant" by the French word *sensible* was not satisfactory.

43. The CHAIRMAN, speaking as a member of the Commission, said that the adverse effect alluded to in article 3, paragraph 2, was not "insignificant", but it was not "substantial" either.

44. Mr. ARANGIO-RUIZ, supported by MR. BENNOUNA, MR. PAMBOU-TCHIVOUNDA and MR. MAHIOU, said that "significant" could perhaps be translated by *significatif*.

45. Mr. GÜNEY said that, in the course of the consultations, Mr. Pellet had expressed reservations about using the word *significatif* in a legal text. For his own part, however, he was willing to accept the term.

46. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed that, in the draft articles and the commentaries, the English word "significant" should be translated in the French version not by *sensible* but by *significatif*.

Paragraph 51, as amended in the French version, was adopted.

Paragraphs 52 to 76

Paragraphs 52 to 76 were adopted.

Paragraph 77

47. Mr. THIAM said that the formula *il a été noté* (it was noted) in the second line of the paragraph was not particularly felicitous, for it failed to indicate whether it was the opinion of the Commission or of only some members.

48. Mr. ROSENSTOCK (Special Rapporteur) said the question appeared to be one of translation, for the English expression was well established in the terminology of reports and also appeared in countless paragraphs in the document under consideration.

49. The CHAIRMAN, speaking as a member of the Commission, proposed that the words *il a été noté* should be replaced by *la remarque a été faite*.

It was so agreed.

50. Mr. BENNOUNA, said that the use of the expression *diligence voulue* meant virtually nothing in French and it was preferable to keep the English expression, namely "due diligence".

It was so agreed.

Paragraph 77, as amended in the French version, was adopted.

Paragraphs 78 to 82

Paragraphs 78 to 82 were adopted.

Chapter V, as a whole, as amended, was adopted.

The meeting rose at 1 p.m.

2327th MEETING

Friday, 23 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-fifth session (concluded)

CHAPTER I. Organization of the session (A/CN.4/L.481 and Corr.1)

A. Membership

B. Officers)

C. Drafting Committee

D. Working Group on a draft statute for an international criminal court

E. Secretariat

F. Agenda and

G. General description of the work of the Commission at its forty-fifth session

Paragraphs 1 to 20

Paragraphs 1 to 20 were adopted.

Sections A to G were adopted.

Chapter I, as a whole, was adopted.

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (concluded)* (A/CN.4/L.482 and Corr.1 and A/CN.4/L.482/Add.1/Rev.1)

1. The CHAIRMAN said that the text of chapter II of the draft report was contained in documents A/CN.4/L.482 and Corr.1 and A/CN.4/L.482/Add.1/Rev.1. The latter document, whose paragraphs are numbered 1 to 49, was a revised version of documents A/CN.4/L.482/Add.1 and Corr. 1 which contained paragraphs 32 to 109 of chapter II. He suggested that the meeting should be suspended to give the members of the Commission time to read the documents.

It was so agreed.

The meeting was suspended at 10.15 a.m. and resumed at 10.45 a.m.

A. Introduction (A/CN.4/L.482 and Corr. 1)

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.482 and Corr.1)

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

1. ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (A/CN.4/L.482 and Corr. 1)

Paragraphs 15 to 31

Paragraphs 15 to 31 were adopted.

* Resumed from the 2324th meeting.

B. Consideration of the topic at the present session (concluded)
(A/CN.4/L.482/Add.1/Rev.1)

1. ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraphs 9 and 10

2. Mr. BENNOUNA said that the reference to a “subsidiary organ” of the United Nations in paragraph 9 was incorrect; the term should be “judicial organ”. The fourth sentence of the paragraph was confusing because some members of the Committee thought that the International Criminal Court could be established by a resolution of the General Assembly or of the Security Council without an amendment of the Charter of the United Nations being required. The reference to an amendment of the Charter should therefore be deleted.

3. Mr. PELLET said he did not agree with Mr. Bennouna. According to the Special Rapporteur, if the Court was not to be a subsidiary organ, then either an amendment of the Charter or a resolution of the General Assembly or of the Security Council would be needed. The text reflected what a number of members of the Commission had actually stated.

4. Mr. VILLAGRÁN KRAMER said that the text offered the option of: (a) an amendment of the Charter; or (b) a resolution of the General Assembly or of the Security Council. Therefore the problem presented by Mr. Bennouna did not arise.

5. Mr. THIAM (Special Rapporteur) said that Mr. Bennouna was right: as Special Rapporteur he had spoken of a “judicial organ”, having in mind the description of ICJ, in Article 1 of the Statute, as “principal judicial organ”.

6. Mr. ARANGIO-RUIZ pointed out that the report made only passing mention of the mode of creation of the Court, in paragraph 8. The question was whether the Commission wanted the Court to be a subsidiary or a principal organ of the United Nations. All the principal organs could create subsidiary organs. For example, the Security Council, provided that it was directly engaged in a military operation, had the power to create within its military establishment a military tribunal. Mr. Bennouna was therefore right.

7. The CHAIRMAN said that the Commission could not now add to what had been said in the discussion of the point. The report must accurately reflect the discussion, and the Special Rapporteur had just said that “judicial organ” was correct.

8. Mr. de SARAM said that if the discussion was going to be reopened, he too would have something to say. His position was that the Court should be established by an inter-State treaty with close links to the United Nations.

9. Mr. TOMUSCHAT endorsed the comment made by the Chairman, but pointed out that the report must reflect all the views expressed in the discussion, not just those of the Special Rapporteur.

10. Mr. ARANGIO-RUIZ said that, in the discussion, he had insisted that the Court could not be a subsidiary body of the United Nations. Unless the report reflected that view, he would have to enter a reservation.

11. Mr. CALERO RODRIGUES suggested that any member who had spoken in the discussion and wished to have a view reflected in the report should submit an appropriate text to the secretariat.

12. Mr. PELLET said that with the deletion of “subsidiary”, the text would reflect his view. The opposite views of other members of the Commission were already set out in paragraph 10. Any other opinions expressed in the discussion could, of course, be inserted in the report if members so wished.

13. Mr. BENNOUNA said that the present wording of the paragraph was contradictory. Some members thought that a juridical basis for the creation of the Court already existed in the Charter. Others thought that an amendment of the Charter would be needed. It would not be sufficient to delete the word “subsidiary”, because the Special Rapporteur had in fact used the term “judicial organ”. Perhaps the best solution would be to amend the paragraph to make it clear that the Special Rapporteur favoured a judicial organ, while other members of the Commission thought that the Court should be a subsidiary organ.

14. Mr. ROSENSTOCK said that it did not make much difference what term was used. There was no need to qualify “organ” in any way. Paragraph 9 reflected one set of views, and paragraph 10 another. Perhaps the solution was to add something to paragraph 10.

15. Mr. PELLET said that the solution proposed by Mr. Bennouna would not work. The term “judicial” was a description of the function of the organ; a judicial organ could be either a principal or a subsidiary organ.

16. The CHAIRMAN suggested that the Commission should set up a working group consisting of Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Pellet, Mr. Rosenstock and the Special Rapporteur, Mr. Thiam, to redraft paragraphs 9 and 10.

It was so agreed.

Paragraphs 11 to 41

Paragraphs 11 to 41 were adopted.

Paragraph 42

17. Following a brief discussion on terminology, with particular reference to the expression “investigation procedure” (*de l'instruction ou de l'enquête*), the CHAIRMAN pointed out that that part of the report had been prepared by Mr. Thiam, the Special Rapporteur for the topic, who was an expert in French law. He therefore suggested that, as a question of translation was involved, it should be left to the secretariat to bring the English version into line with the French.

It was so agreed.

Paragraph 42 was adopted.

Paragraphs 43 and 44

Paragraphs 43 and 44 were adopted.

2. ESTABLISHMENT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Paragraphs 45 and 46

Paragraphs 45 and 46 were adopted.

3. OUTCOME OF THE WORK CARRIED OUT BY THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Paragraph 47

Paragraph 47 was adopted.

Paragraph 48

18. Mr. PELLET proposed that the words "at its forthcoming forty-eighth session" should be amended to read "at its forthcoming session" or "at its forty-eighth session".

It was so agreed.

Paragraph 48, as amended, was adopted.

Paragraph 49

Paragraph 49 was adopted.

The meeting was suspended at 11.30 a.m. and resumed at noon.

Paragraphs 9 and 10 (concluded)

19. The CHAIRMAN invited one of the members of the working group appointed earlier in the meeting to re-examine the wording of paragraphs 9 and 10 to report on its conclusions.

20. Mr. BENNOUNA said the working group proposed, first, that, in the second sentence of paragraph 9, the words "a subsidiary organ" should be replaced by "an organ". The rest of that paragraph would remain unchanged. Secondly, in paragraph 10, the words "unlike the establishment of the court by the General Assembly", in the fourth sentence, should be deleted. Lastly, the fifth and last sentence of the English text did not appear, owing to a technical error, in the French text. He suggested that the French text should be brought into line with the English text in that respect.

It was so agreed.

Paragraphs 9 and 10, as amended, were adopted.

Chapter II, as a whole, as amended, was adopted.

The draft report of the Commission on the work of its forty-fifth session, as a whole, as amended, was adopted.

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

[Agenda item 6]

PROGRAMME OF WORK OF THE COMMISSION AT ITS FORTY-SIXTH SESSION

21. Mr. CALERO RODRIGUES asked, with regard to the programme of work of the Commission for the beginning of its next session, whether the Drafting Committee would be meeting first, as it had done at the present session.

22. The CHAIRMAN said that the Drafting Committee was not scheduled to meet at the start of the session. The Commission would begin, in plenary, with consideration of the report on the law of the non-navigational uses of international watercourses.

23. Mr. PELLET, supported by Mr. GÜNEY, said it had been implicitly understood that the Commission would begin its work by considering, article by article, the report of the Working Group on a draft statute for an international criminal court. The Working Group would be able to revise the text on the basis of the views expressed in plenary.

24. Mr. ARANGIO-RUIZ (Special Rapporteur on State responsibility) said that, in order to complete the section of his report dealing with crimes, he would need, by the end of next May at the latest, members' views on that issue as it related to the topic of State responsibility.

25. Mr. MAHIOU, supported by Mr. Thiam, said he, too, thought that the Commission should begin the next session with plenary meetings, since three main topics were in need of consideration. He agreed with Mr. Pellet that the Working Group on a draft statute for an international criminal court would certainly need to hear the views expressed in plenary before it could revise its report.

26. Mr. ROSENSTOCK said that it was entirely appropriate for the Commission to take up the draft statute as the first item on its agenda for the forty-sixth session. That discussion should, in principle, not be too lengthy and the Commission would then be able to turn to other matters. In planning its programme of work, the Commission should bear in mind the need to use the time available as effectively as possible. He therefore proposed that the Commission should meet in plenary as often as possible, thus providing the Drafting Committee or the Working Group with adequate material on which to work.

27. Mr. CRAWFORD said that, in its consideration of the draft statute, the Commission clearly would not be acting as a drafting committee; its purpose would be to discuss, article by article, the questions of principle involved, something which should not take longer than one week. Thus, it would still have time to provide guidance to the Special Rapporteur on State responsibility.

28. The CHAIRMAN said there was general agreement that the Commission should begin by considering

** Resumed from the 2317th meeting.

the draft statute, to be followed by the draft Code of Crimes against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses. The order of the latter two topics would be determined by the availability of the documentation and other considerations. The details of the Commission's programme of work could be worked out at the start of the session.

29. Mr. CALERO RODRIGUES proposed that the Commission should meet twice a day during the first two weeks of its next session.

30. Mrs. DAUCHY (Secretary to the Commission) said she was not certain whether the Commission could

meet every afternoon and would have to check on the availability of conference services.

31. Mr. BENNOUNA said that the schedule of plenary meetings should be decided at the beginning of the next session.

Closure of the session

32. After the usual exchange of courtesies, the CHAIRMAN declared the forty-fifth session of the International Law Commission closed.

The meeting rose at 12.55 p.m.

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