Document:-
A/CN.4/SR.2362

Summary record of the 2362nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1994, vol. I

understanding that his decision would be subject to appeal.

82. Article 27, paragraph 1, provided for the case where the prosecutor considered that there was sufficient basis to proceed. He agreed that the provision could be spelt out in more detail. The question whether there was a *prima facie* case, which was a pure question of evidence in relation to the crime of which the suspect was accused, and the question whether the court should hear the case, which went beyond the question whether there was a *prima facie* case and involved other considerations, were obviously two different matters and it was right, in his view, that they should be the subject of two separate provisions, although he agreed that those provisions required coordination.

83. In his view, the definition of a "*prima facie* case" should not be included in the statute, since that would tie the hands of the court in an area where it would ultimately have to develop its approach in the light of experience. In any event, "*prima facie* case" was defined in the commentary and that definition was sufficiently broad, as the prosecutor would not only have to satisfy himself on paper that there was *prima facie* evidence, but would also have to make quite sure that the whole case "held together".

84. He agreed that, as Mr. Robinson had suggested, it should be made clear in article 27, paragraph 2, that, in arriving at the decisions referred to in subparagraphs (*a*) and (*b*), the presidency could have regard to the dossier. That could, however, simply be explained in the commentary. The presidency could, of course, always ask for further material in addition to the indictment itself.

85. It should also be made clear, either in the statute or in the commentary, what happened if the indictment was not confirmed: in that event, the prosecution lapsed and the accused, if in custody, had to be released.

86. "Probable cause", as referred to in article 28, paragraph 1 (*a*), should not, in his view, be defined in the body of the statute, any more than "*prima facie* case" should be and for the same reasons. There again, having regard to the diversity of cases, the officials responsible for running the system should have some degree of discretion. As to paragraph 3 (*b*), he agreed with Mr. Robinson that the two "special circumstances" referred to in the commentary were the ones that immediately sprang to mind and that they did not cover the whole range of situations which might arise in the future. None the less, apart from the fact that it was hard to imagine such other situations, that provision should not go into so much detail that it would make the text unduly cumbersome.

87. Similarly, in article 29, paragraph 1, it would be difficult to spell out the role of the "judicial officer". The "compensation" referred to in paragraph 3 of the article would be paid by the States parties.

88. The Working Group had decided that a paragraph 3 should be added to article 31, but it might revert to the matter.

89. With regard to article 32, it was obviously preferable for the place of the trial to be the seat of the court. It had been felt, however, that such a provision might be too rigid and it had therefore been decided in the interests of, among other things, cost, to provide, in paragraph 2 of the article, that the court could exercise its jurisdiction on the territory of any State.

90. The question of applicable law, which was the subject of article 33, had been discussed in great detail during the past two years. While he agreed with Mr. Thiam that the wording of the French version of subparagraph (*c*) was awkward and should be redrafted, he would insist on the need to retain a reference to national law in the article. It would, of course, have been possible to spell out, in the provision, the choice of law rules to which the court should refer, but a deliberate decision not to do so had been taken in order to maintain a degree of flexibility.

91. Article 35, which one member had proposed should be deleted and which Mr. Robinson has suggested should be confined to a general clause, was essential, in his view, because the conclusion had been reached, after two years' work, that it was impossible to confine the court's jurisdiction merely by defining the crimes it would have to try. In point of fact, the crimes in question covered a wide range of situations, some of them rather minor; and that was why the court must be vested with the additional power not to exercise jurisdiction. That would also meet a concern which had been widely expressed in the Sixth Committee.

92. With regard to article 37, he was glad to hear that the concern for the trial to be held in the presence of the accused was not confined only to common law countries, but also existed in China. At the same time, article 37 provided for an acceptable compromise, on a vexed issue, between different systems and left it to the court to decide whether or not the trial should take place in the absence of the accused.

93. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to conclude its general discussion on the draft statute for an international criminal court, on the understanding that, when the Working Group had reviewed the relevant commentaries, they would be adopted in conjunction with the adoption of the Commission's report.

It was so agreed.

The meeting rose at 1.15 p.m.

2362nd MEETING

Friday, 8 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda,

Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)* (A/CN.4/457, sect. C, A/CN.4/459,[1] A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS

1. The CHAIRMAN invited Mr. Bowett, Chairman of the Drafting Committee, to introduce the draft articles proposed by the Drafting Committee (A/CN.4/L.494 and Corr.1).

2. Mr. BOWETT (Chairman of the Drafting Committee) said that between 16 June and 1 July 1994 the Drafting Committee had allocated six meetings to the draft articles. He wished to thank the Special Rapporteur, Mr. Barboza, for his guidance and cooperation throughout the proceedings, as well as all the members of the Drafting Committee for their contributions and their spirit of cooperation, and also Mr. Calero Rodrigues, who had deputized for him during his brief absence from the Committee.

3. At the forty-fifth session of the Commission, the then Chairman of the Drafting Committee, Mr. Mikulka, had presented to the Commission the texts of draft articles 1, 2, 11, 12 and 14 adopted by the Drafting Committee.[2] At the present session, the Drafting Committee had been able to complete its work on all of the articles dealing with the question of prevention in respect of activities with a risk of transboundary harm which had been referred to the Committee since 1988. Accordingly, the Commission now had before it a complete set of articles on prevention. The texts proposed by the Drafting Committee at the forty-fifth session had been retained without change, with the exception of article 14, in which a change had proved necessary owing to the formulation of subsequent articles.

4. The Committee had thought it useful to divide the articles into two chapters, one entitled "General provisions" and the other "Prevention". The designation of those chapters was provisional, and they were thus placed in square brackets. The provisional chapters would also make it clear that those articles dealt only with one aspect of the whole topic. The Commission had before it a document (A/CN.4/L.494 and Corr.1) which reproduced all of the articles adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions. Since articles 1, 2, 11 and 12 were unchanged, he had nothing to add to the statement of the Chairman of the Drafting Committee, Mr. Mikulka, at the previous session.[3]

CHAPTER I (General provisions)

ARTICLE 1 (Scope of the present articles)

5. The CHAIRMAN invited members to comment on article 1, which read:

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.

6. Mr. PAMBOU-TCHIVOUNDA said some clarification was needed of the words "or otherwise". They should be fully explained, at least in the commentary.

7. Mr. BOWETT (Chairman of the Drafting Committee) said that the phrase in question had been explained in some considerable detail by the Chairman of the Drafting Committee, Mr. Mikulka, at the previous session.[4] That explanation would presumably be reflected in the commentary to be drafted by the Special Rapporteur.

8. Mr. BENNOUNA said that, at the legal level, that part of the article was poorly drafted and certainly needed improving. What purpose was served by the words "or otherwise"? Could they not perhaps be deleted?

9. Mr. TOMUSCHAT said that article 1 was the most important one in the whole draft, and perhaps also the most problematical, for the exact scope of the draft was not defined with sufficient clarity. Article 1 gave a very general description of the scope, from which it was plain that some activities, for instance, the establishment of a nuclear power plant, fell within the purview of the draft articles, as might many other activities, such as a State's practice of permitting cars to be driven on its roads—an activity which undoubtedly could cause significant transboundary harm. It was thus important to specify what was envisaged, and that might not be made sufficiently precise in the commentary. Without proper clarification, the entire set of draft articles could well suffer from an inherent ambiguity, a possibility that he found disturbing.

10. The CHAIRMAN referred members to the statement made by the Chairman of the Drafting Committee at the previous session, Mr. Mikulka, which read:

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,

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* Resumed from the 2351st meeting.

[1] Reproduced in *Yearbook... 1994*, vol. II (Part One).

[2] *Yearbook... 1993*, vol. I, 2318th meeting, para. 58.

[3] Ibid., paras. 56-91.

[4] Ibid., paras. 59-69.

jurisdiction was determined in accordance with the relevant principles of international law.[5]

11. Speaking as a member of the Commission, he cited space activities as one example of activities carried out "otherwise under the jurisdiction or control of a State". Such activities could clearly lead to very significant transboundary harm. However, they were carried out, not in the territory of the State, but elsewhere, in a place otherwise under that State's jurisdiction or control.

12. Mr. BARBOZA (Special Rapporteur) said he endorsed the remark of the Chairman, speaking as a member of the Commission. It was important to specify that if the activity, although not carried out in the State's territory, was carried out otherwise under the jurisdiction or control of the State, it also fell within the scope of the articles.

13. Mr. BOWETT (Chairman of the Drafting Committee) pointed out that there were areas of the Earth's surface in relation to which no territorial title was generally recognized. Antarctica was a prime example. States could also construct artificial islands for purposes such as waste disposal. It would not have sovereignty over those islands, yet could carry out activities on them that involved a quite serious risk of harm to other States. The phrase was therefore important.

14. Mr. MAHIOU said that he too was not entirely satisfied with the wording of the article. Perhaps it should be stated in the commentary that some members had hoped that a better formulation than the ambiguous phrase "or otherwise" could be found before the draft articles were submitted for second reading.

15. Mr. de SARAM said that he had no difficulty with the expression "territory or otherwise under the jurisdiction or control". With regard to the very important question raised by Mr. Tomuschat, he favoured retention of the existing broad scope of the draft, since the adjective "significant", before "transboundary harm", placed reasonable limits on that scope. However, article 1 would read more smoothly if commas were inserted after the word "activities" and the word "State".

16. Mr. PAMBOU-TCHIVOUNDA said that the important elements of article 1 were, first, the location of the activity, and second, the relationship of imputability that must be established between the State and the activity, if that activity did not take place in the State's territory. With a view to reducing the number of words that might give rise to difficulties, he suggested amending the phrase to read "and carried out in the territory or under the control of a State ...".

17. Mr. ROSENSTOCK said that, for the reasons set forth by Mr. Tomuschat, it was exceedingly difficult to accept the articles piecemeal. Article 1 pointed the way to their scope, as did article 2, but it did not really answer the question Mr. Tomuschat had raised, namely, whether the scope of the draft articles would extend to the construction of a nuclear power plant or to the construction of a highway. He recognized that in a previous quinquennium the Commission had decided, for understandable reasons, not to elaborate a list of hazardous activities. However, the problem of making a distinction remained unsolved, and although the word "significant" was helpful in a non-finite context, it left one nervous in a finite context. Consequently, Mr. de Saram's remark did not solve the problem. Perhaps, when they became available, it would be seen that the commentaries provided proper guidance as to whether the articles covered pollution from a nuclear power plant, or automobile pollution—which, very arguably, could be said to create a risk of causing harm other than disastrous harm. It was none the less a heavy burden to place on the commentaries. Until such time as it had had an opportunity to scrutinize the draft articles in their entirety, the Commission's acceptance of article 1 must be more than usually provisional. In any event, the issue raised by Mr. Tomuschat must be resolved at some point.

18. Mr. RAZAFINDRALAMBO said that the doubts expressed about the wording of article 1, initially raised by Mr. Pambou-Tchivounda, seemed principally to apply to the French version, since English speakers had said they were satisfied with the wording. What French expression was usually employed in conventions to translate the English formulation, and would it be appropriate to use it in the present case? The purpose of the expression was clearly to contrast activities carried out in the territory of a State with activities carried out only under the jurisdiction or control of that State. As a tentative suggestion, it might be possible to remove some of the ambiguity in the French formulation by using the phrase ... *sur le territoire ou tout au moins sous la juridiction ou le contrôle*.

19. Mr. BARBOZA (Special Rapporteur) said he did not really understand Mr. Tomuschat's concern. Two different problems arose: first, a distinction must be drawn between activities which created a risk of causing transboundary harm, and activities which, in the normal course of operations, actually did cause such harm. Cars constituted a continuous source of pollution, and did not therefore fall within the scope of the articles. Then there was the second, different, problem raised by Mr. Rosenstock, namely, which hazardous activities were included in the scope of the articles. Article 1 constituted a first attempt to answer that question. Mr. Rosenstock was right to say that the Commission should work on a sharper definition of activities falling within the scope of the articles. He himself had proposed drawing up a list of activities and substances, along the lines of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the European conventions. The Commission had rejected the idea of such a precise scope. A working group should be set up to address the issue next year. Meanwhile, article 1 attempted to separate the activities that actually caused transboundary harm from the activities that might cause such harm as a result of an accident. Continuous pollution from cars constituted quite a different hypothesis from that of hazardous activities that might cause harm, and the words "create a risk of causing" were simply a first approach to the question. The Commission would subsequently have to attempt to come up with a precise definition of the activities that fell within the purview of the articles.

[5] Ibid., para. 63.

20. Mr. BENNOUNA said that it was a question of form, not substance, that was giving rise to doubts about article 1. In its present form, the French version was ambiguous, and it was unfair to expect readers to turn to the commentary for clarification. The difficulty lay in the expression *d'une autre façon* (otherwise), which could be wrongly interpreted to mean that some activities were being carried out in a manner different from activities which were being carried out in the territory of the State. To compound the problem, that expression appeared elsewhere in the draft articles, including in article 11.

21. Any activities which were carried out in the territory of a State were by definition under its jurisdiction and control. However, a State might also have under its jurisdiction and control other activities that it was carrying out elsewhere than in its territory. It had to be made clear that the draft articles applied in both circumstances. He proposed therefore that, in the French version, the words *s'exercent sur le territoire ou d'une autre façon sous la juridiction ou le contrôle* should be replaced by *s'exercent sur le territoire et/ou sont sous la juridiction ou le contrôle*.

22. It was important to examine article 1 in the light of article 2, which defined the terms and expressions used in the draft. The two articles were complementary and should probably be considered together.

23. The CHAIRMAN said that the Drafting Committee was not entirely responsible for the manner in which the scope of the articles had been defined. He recalled in that connection, at the forty-fourth session, the Commission had decided that attention should be focused for the time being on drafting articles in respect of activities having a risk of causing transboundary harm and that it should not deal at the present stage with other activities which caused transboundary harm.[6] The draft articles as they now stood were an accurate reflection of that decision. The commentary should explain that the articles currently under consideration represented the first phase of the work and that other activities would be dealt with later on.

24. Mr. TOMUSCHAT said that there was no clear dividing line between activities which caused transboundary harm and activities which created a risk of causing transboundary harm. In fact, in many instances harm could even be avoided by using appropriate environmental impact assessment procedures, as provided for in draft article 12. Consequently, the distinction between the two types of activities was to a large extent artificial.

25. Mr. CRAWFORD said that the decision mentioned by the Chairman had proved to be unfortunate, thus confirming the view he had held at the time. As to the wording of the article, he proposed that the phrase "carried out in the territory or otherwise under the jurisdiction or control of a State" should be replaced by "carried out either in the territory of the State or in places under its jurisdiction or control", which would have the advantage of corresponding to the language used in article 2.

26. Mr. BARBOZA (Special Rapporteur) said that the English version of article 1 seemed clear enough: when an activity was being carried out in the territory of a State, it was by definition under the jurisdiction or control of the State. That activity could also be carried out in other places while still being under the jurisdiction or control of the State, but in a different manner. It appeared that only the French version needed modification and, to that end, he suggested that a small group of French-speaking members might agree on the wording in French that best corresponded to the English.

27. Mr. ROSENSTOCK said that he agreed with the Special Rapporteur. The English version of article 1 was acceptable in its present form.

28. Mr. BENNOUNA said that it was best not to redraft article 1 in French because that would then require changes in the English version. He would, therefore, prefer to retain the present wording in French, even though it was not entirely satisfactory, and perhaps provide some explanation in the commentary.

29. Mr. EIRIKSSON pointed out that, in elaborating the draft articles, the Drafting Committee had taken into account the wording of the United Nations Convention on the Law of the Sea.

30. Mr. BARBOZA (Special Rapporteur) said that the United Nations Convention on the Law of the Sea used the expression "under the jurisdiction or control" and did not make any reference to territory. However, some members of the Drafting Committee had considered it essential to include in the draft articles some reference to activities carried out in the territory of the State, reasoning that a case might arise in which territorial jurisdiction might prevail over another sort of jurisdiction. Article 1 as it stood thus represented a compromise solution. In his own view, the reference to territory was superfluous, as the expression "under the jurisdiction or control" included, by definition, activities carried out in the territory of a State.

31. Mr. EIRIKSSON said that, in drafting article 1, the Drafting Committee had begun by defining the articles as applying to activities being carried out under the jurisdiction or control of the State. It had subsequently decided to add the explicit reference to the territory of the State, which had therefore made it necessary to add the word "otherwise".

32. Mr. MAHIOU said that, in the French version, the words *ou d'une autre façon sous la juridiction* should be replaced by *ou à un autre titre sous la juridiction*, which corresponded more closely to the English version. His colleagues, Mr. Bennouna and Mr. Pambou-Tchivounda, would presumably support his proposal.

33. The CHAIRMAN said that, as he understood it, Mr. Mahiou's proposal would not require any amendment to the English text.

34. Mr. de SARAM proposed that, in the English version, the words "otherwise under the jurisdiction or control" should be replaced by "elsewhere under its jurisdiction or control".

35. The CHAIRMAN said that, since the proposed amendment to the French version appeared to be accept-

[6] *Yearbook... 1992*, vol. II (Part Two), para. 346.

able to the Commission, there appeared to be no need to alter the English version.

36. Mr. HE said that the word "otherwise" appeared at first glance to be ambiguous. A full explanation should therefore be provided in the commentary. He would have preferred the word "elsewhere". The commentary to article 1 should also make it clear that the word "risk" meant that the activity might cause harm.

37. Mr. ROSENSTOCK said that using the word "elsewhere" would give rise to difficulties because it implied that the physical location of the activity was somehow relevant to the legal situation of jurisdiction or control. The English version should remain as it stood, while the French version could be amended as had been suggested.

38. Mr. HE said that it might be preferable to place the word "otherwise" in square brackets.

39. The CHAIRMAN said that, in the light of the discussion, such a course would not seem appropriate.

40. Mr. PELLET said that, in the French text, the expression *qui créent un risque de causer* was redundant and, moreover, was not the way the idea would normally be expressed in French. He accordingly proposed that it should be replaced by *qui risque de causer.*

41. The CHAIRMAN said that, as he had already mentioned, the Commission's decision on the scope of the articles had been taken at the forty-fourth session.[7]

42. Mr. PELLET said that he had no reservations about the scope of the articles, which was accurately reflected in the French version of article 1 by the words *un risque de causer un dommage.* Rather, his concern was with the expression *créent un risque*, which was not the best translation of the English.

43. Mr. BARBOZA (Special Rapporteur) said that Mr. Pellet's point was relevant only to the French version. In English and Spanish, the idea of activities which "create a risk" was acceptable.

44. Mr. BENNOUNA said that, while the phrase *qui créent un risque de causer* was perhaps not the most elegant French, it was consistent with article 1 and article 2, subparagraph (*a*), of the English text, in which the word "risk" was used as a noun.

45. Mr. PELLET said that, in view of Mr. Bennouna's comment, he would propose as an alternative that the words *qui créent un risque de causer* should be replaced by *qui comporte un risque de causer.*

46. Mr. de SARAM said that it would be preferable for article 1 to speak of activities which "have a risk", rather than "create a risk", of causing harm. The former expression reflected the wording used in the Commission's decision. However, if a satisfactory solution had already been decided on, he would not press his proposal.

[7] Ibid.

47. Mr. FOMBA said that if risk was considered to be inherent in the dangerous nature of the activity, creation of the risk could also be considered as stemming from the dangerous nature of the activity. On that basis, he did not think that the words *qui créent un risque* were appropriate, and he would favour some wording along the lines proposed by Mr. Pellet.

48. The CHAIRMAN suggested that the word "create" should be replaced by "involve" or its equivalent in other languages.

It was so agreed.

Article 1, as amended, was adopted.

ARTICLE 2 (Use of terms)

49. The CHAIRMAN invited members to comment on article 2, which read:

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.

...

50. Following a point raised by Mr. PELLET, Mrs. DAUCHY (Secretary to the Commission) said that the French version of the article was unsatisfactory and should be redrafted.

51. Mr. BENNOUNA said he noted that, whereas subparagraph (*b*) referred to "the territory of or in places under the jurisdiction or control of a State other than the State of origin", subparagraph (*c*) spoke of "the State in the territory or otherwise under the jurisdiction or control of which the activities". The language of the two subparagraphs should therefore be harmonized.

52. Mr. EIRIKSSON said that the word "places" in subparagraph (*b*) should be amended to read "other places". As to the difference in the wording of article 1 and article 2, subparagraph (*b*), it should be noted that, whereas the former was concerned with the attribution of an activity to a State, the latter was concerned with the geographical context. A ship or an aircraft might be covered, therefore, but not the water over which or the air through which they passed, since the global commons were excluded. The position would, however, no doubt be fully explained in the commentary.

53. Mr. MAHIOU asked whether there was any special reason for the difference in wording of the reference in subparagraph (*b*) to "places" or, as rightly suggested, "other places", and the reference in subparagraph (*c*) to jurisdiction or control. That remark applied to both the French and the English versions of the article.

54. Mr. BARBOZA (Special Rapporteur) said that, as already pointed out by Mr. Eiriksson, the wording of subparagraph (*b*) dealt with the geographical aspect: the harm in question was done not to the jurisdiction of a State as such but to the places under its jurisdiction. On the other hand, subparagraph (*c*), which used the same wording as that employed in article 1, was concerned with the actual consequences of an activity.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 2 subject to any necessary drafting changes in the French text.

It was so agreed.

Article 2 was adopted on that understanding.

CHAPTER II (Prevention)

ARTICLE 11 (Prior authorization)

56. The CHAIRMAN invited members to comment on article 11, which read:

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.

57. Mr. EIRIKSSON said he was pleased to note that the Commission had reached the stage at which it could consider the adoption of a comprehensive set of articles on a significant part of the topic and could submit those articles to the General Assembly. While he supported the substance of the articles in chapter II, he considered that, in some of them, more direct language could have been considered.

58. Article 11 should, in his view, have been combined with article 13 in a single article dealing with authorization and not just with prior authorization.

59. Mr. RAZAFINDRALAMBO, referring to the French text, proposed that article 11 should be brought into line with article 1 by replacing the words *d'une autre façon* by *à un autre titre*.

It was so agreed.

60. Mr. PAMBOU-TCHIVOUNDA, also referring to the French text, said that he was concerned about the words *visées à l'article premier*, for article 1 was a neutral article and did not spell out the activities with which the draft was designed to deal. Consequently, article 11 made reference to activities that were not mentioned anywhere. He wondered whether some better term could be found to reflect the content of article 1.

61. The CHAIRMAN pointed out that the wording in question had been agreed in the Drafting Committee, and it would be difficult to reopen a discussion on the question at the present stage.

62. After a brief discussion in which Mr. CALERO RODRIGUES, Mr. MAHIOU and Mrs. DAUCHY (Secretary to the Commission) took part, Mr. PAMBOU-TCHIVOUNDA said that he would not press the point.

63. Mr. PELLET said that the second sentence of the article contemplated a change in activity only when that activity involved risk from the outset. It thus left out of account an activity that did not involve risk at the outset but did involve risk following a major change. The sentence should therefore be redrafted to provide that authorization would also be required when a major change in an activity of any kind was planned and such change meant that the activity would involve risk.

64. The CHAIRMAN suggested that a small group, consisting of Mr. Bowett (Chairman of the Drafting Committee), Mr. Barboza (Special Rapporteur) and Mr. Pellet, should meet informally to agree on a suitable wording for the second sentence.

The meeting was suspended at 11.45 a.m. and resumed at noon.

65. Mr. BARBOZA (Special Rapporteur) said that, following the informal meeting with Mr. Bowett and Mr. Pellet, he would propose that the second sentence of article 11 should be reworded to read "Such authorization shall also be required in cases where major changes in activities are planned".

66. Mr. MAHIOU said that, normally, an activity would fall within the scope of the articles only if a change in that activity created a risk of transboundary harm. The reference to activity in the second sentence must be qualified, failing which it would open the door to all other activities.

67. Mr. BENNOUNA proposed that the second sentence should be deleted as it added nothing to the article and merely created confusion.

68. Mr. BARBOZA (Special Rapporteur) said that Mr. Bennouna's proposal required further reflection. He therefore suggested that a decision on it should be postponed.

69. The CHAIRMAN suggested that the second sentence of article 11 should be placed between square brackets and that the Commission should revert to the matter at a later meeting.

It was so agreed.

ARTICLE 12 (Risk assessment)

70. The CHAIRMAN invited members to comment on article 12, which read:

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.

71. Mr. de SARAM said that the phrase "risk of the activity causing significant transboundary harm", in the first sentence, seemed to refer only to existing activities and not to future activities.

72. Mr. BARBOZA (Special Rapporteur) said the meaning of the sentence was that the State would ensure that an assessment was undertaken to ascertain whether in effect an activity presented a risk of causing harm.

73. Mr. de SARAM said that, in that case, he would propose that the words "the risk of the activity causing significant" should be replaced by "the risk of the activity's causing significant". He would not press the point, however, if his proposal was not acceptable to the Chairman of the Drafting Committee.

74. Mr. BOWETT (Chairman of the Drafting Committee) said that the article did not specify whether the activity was already in existence or whether it was being planned. In his view, therefore, it was broad enough to cover both circumstances.

75. Mr. PAMBOU-TCHIVOUNDA said that, with a view to the harmonization of the French text, he would suggest that the word *présente* should be replaced by *comporte*, which was used in the amended form of article 1. Alternatively, the word *présente* should be used both in article 1 and in article 12.

76. Mr. TOMUSCHAT said that the expression "activity causing significant transboundary harm", in the first sentence, was inconsistent with the corresponding definition of that term.

77. Mr. BARBOZA (Special Rapporteur) said that, in his view, the expression was correct in the context.

78. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Tomuschat had raised a valid point: it was not clear to him whether the assessment made would be of the risk or of the activity or of both.

79. Mr. de SARAM suggested that the difficulty could be solved by replacing the words "such activities" by "the activity".

80. Mr. ROSENSTOCK said that Mr. de Saram's suggestion would work up to a point, but the provision would still be concerned only with the assessment of risk. The assessment should be broader than that.

81. Mr. BARBOZA (Special Rapporteur) said that Mr. de Saram's suggestion made the text even clearer. The point raised by Mr. Rosenstock was answered in the second part of the article, from which it was plain that the assessment should cover actual harm as well as risk of harm.

82. Mr. PELLET said that he could accept Mr. de Saram's suggestion, but could not endorse Mr. Rosenstock's point because the notion of risk related to an activity which was not yet being carried out.

83. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt Mr. de Saram's suggestion.

It was so agreed.

84. Mr. EIRIKSSON said that, in his view, the only authorization required by article 12 was prior authorization for pre-existing activities, a matter dealt with in article 13.

85. Mr. PELLET said that the second sentence had not been in the Special Rapporteur's original proposal. It did make the first sentence clearer but was badly drafted: the phrase "of other States" clearly applied to "persons", "property" and "the environment", but the text could not properly talk of persons or property of other States.

86. The CHAIRMAN suggested that the phrase should be amended to read "in other States".

It was so agreed.

Article 12, as amended, was adopted.

ARTICLE 13 (Pre-existing activities)

87. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 13, which read:

Article 13. Pre-existing activities

If a State, after becoming bound by these articles, ascertains that an activity involving a risk of causing significant transboundary harm is being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending such compliance, the State may permit the continuation of the activity in question at its own risk.

88. Mr. BOWETT (Chairman of the Drafting Committee) said that the pre-existing activities dealt with in the article were activities undertaken prior to the entry into force of the articles for the State of origin. When the State learned of the existence of an activity of that sort, it should direct those responsible for carrying out the activity to obtain the necessary authorization. The expression "necessary authorization" meant the permit required under the domestic law of the State so as to implement its obligations under the articles.

89. Obviously, a period of time might be needed for the operator of the activity to comply with the authorization requirements. The Drafting Committee was of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator went through the process of obtaining authorization should be left to the State of origin. If it chose to allow the activity to continue, it did so at its own risk. The expression "at its own risk" was a compromise which replaced the Special Rapporteur's original wording to the effect that, during the interim period, the State of origin would be liable for the damage if an accident occurred. However, the Drafting Committee felt that, since the regime of liability proposed in the Special Rapporteur's tenth report (A/CN.4/459) had not yet been examined by the Commission, the Committee could not prejudge the issue of liability. At the same time, in the absence of any form of language indicating possible repercussions, the State of origin would have no incentive to comply with the requirements. The expression "at its own risk" was intended to leave the possibility open (*a*) for any liability which the future draft articles on the topic might impose on the State of origin in such circumstances, and (*b*) for the application of any other rule of international law on liability. The title of the article remained unchanged.

90. Mr. BENNOUNA suggested that the phrase "after becoming bound by these articles" should be deleted from the first line, since it went without saying that the draft articles applied to States parties.

91. Mr. PELLET said that he had initially been of the same opinion as Mr. Bennouna on that point. However, if the phrase was deleted, the article would have no point

because it applied only to activities existing before the entry into force of the draft articles.

92. Mr. EIRIKSSON, Mr. GÜNEY and Mr. TOMUSCHAT said that they endorsed Mr. Pellet's remark.

93. Mr. BENNOUNA said that he was not convinced by Mr. Pellet's argument, since the article could cover unauthorized activities which had started after the entry into force of the draft. However, the problem was one of form rather than substance and he would not press his proposal. It might make things clearer if the first sentence, by analogy with articles 11 and 12, spoke of an activity "referred to in article 1".

94. Mr. ROSENSTOCK said he agreed that it would be better to retain the phrase "after becoming bound by these articles", but the article would be irrelevant unless the draft eventually took the form of a treaty. The Commission had deferred its decision on that point. At the very least, the situation must be explained in a footnote. The Commission must constantly remind itself of the possibility that it might be producing something other than a draft text to be sent to the General Assembly with a view to the convening of a diplomatic conference.

95. Mr. EIRIKSSON said that he endorsed Mr. Bennouna's second proposal. He had himself been going to propose the following text for article 11, with a footnote as suggested by Mr. Rosenstock: "States shall also require authorization for activities referred to in article 1 which are being carried out upon their becoming bound by these articles".

96. Mr. Bennouna had also raised the question of activities which were being carried out without, for a number of possible reasons, prior authorization being obtained. The draft articles must cover cases in which it was too late to authorize an activity because it was already under way by providing that authorization must be obtained for the continuation of the activity. He suggested a formulation that would read: "States which permit the continuation of the activity pending the obtaining of such authorization do so at their own risk".

97. Mr. BARBOZA (Special Rapporteur) said that it was important to maintain the distinction between activities started after entry into force of the draft articles (art. 11) and pre-existing activities (art. 13). Therefore, either the present text should remain unchanged or the phrase "after becoming bound by these articles" in article 13 should be replaced by a reference to activities carried out before entry into force.

98. He disagreed with Mr. Rosenstock that article 13 would be relevant only if the draft articles took the form of a treaty. In fact, the wording of the draft articles would not be substantially affected by the Commission's decision on that point. The Commission had never proceeded in the way Mr. Rosenstock was suggesting with regard to any other set of draft articles.

99. Mr. BENNOUNA said that Mr. Eiriksson's first proposal made the meaning of the article much clearer and should be adopted.

100. Mr. BOWETT (Chairman of the Drafting Committee) said that neither of Mr. Eiriksson's proposals involved any change of substance in the present text. There was no point in redrafting just for the sake of redrafting.

101. Mr. de SARAM said that he agreed with the Chairman of the Drafting Committee. The phrase "after becoming bound by these articles" was needed in the first sentence of article 13 precisely because of the second sentence. With that second sentence, the Commission was raising the important question of allocation of risk between the parties involved, that is to say the question of liability, a matter with which the article was not concerned. One solution would be to delete "after becoming bound by these articles" from the first sentence and to eliminate the whole of the second sentence. The issue raised in the second sentence should be dealt with in the commentary.

102. Mr. TOMUSCHAT said that he did not agree with the Chairman of the Drafting Committee that Mr. Eiriksson's proposals involved no change of substance. Article 13 spoke of a State "ascertaining" that an activity was being carried out, but the Commission was trying to draft objective provisions which did not depend on ascertainments made by States. States had a general duty to exercise due diligence, but article 13 introduced an element of uncertainty in that requirement. In any event, the whole issue was subject to the interpretation of article 1. The draft articles would not be workable unless their scope as defined in article 1 was clear and limited.

The law of the non-navigational uses of international watercourses (*continued*)** (A/CN.4/457, sect. E, A/CN.4/462,[8] A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

[Agenda item 5]

Consideration of the draft articles on second reading and draft resolution proposed by the Drafting Committee (*concluded*)***

103. The CHAIRMAN said that, when the Commission had adopted the draft articles on the law of the non-navigational uses of international watercourses on second reading[9] and a draft resolution on confined groundwater (A/CN.4/L.492/Add.1)[10] he had indicated that he would in due course invite the Commission to take a decision on the recommendation to be addressed to the General Assembly with respect to what was to be done with the draft articles and the resolution. The officers of the Commission had agreed on the following draft recommendation:

> "The Commission, in conformity with article 23 of its Statute, decides to recommend the draft articles on the law of the non-navigational uses of international

** Resumed from the 2356th meeting.

*** Resumed from the 2355th and 2356th meetings respectively.

[8] Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

[9] For the titles and texts of articles 1 to 33 as adopted by the Drafting Committee on second reading, see 2353rd meeting, para. 46.

[10] See 2356th meeting, para. 38.

watercourses and the resolution on confined groundwater to the General Assembly with a view to the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries."

104. If he heard no objection, he would take it that the Commission agreed to include that text in the relevant chapter of its report under the heading "Recommendation of the Commission".

It was so agreed.

The meeting rose at 1.05 p.m.

2363rd MEETING

Tuesday, 12 July 1994, at 10.20 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Tribute to the memory of Mr. José María Ruda

1. The CHAIRMAN said that it was his sad duty to inform the members of the Commission of the death, on 8 July 1994, of Mr. José María Ruda, who had been a member of the Commission from 1964 to 1973 as well as its Chairman in 1968. Mr. Ruda had been elected in 1973 to ICJ where he had served for two consecutive terms and over which he had presided from 1988 to 1991. An experienced diplomat who had represented his country in many international forums, Mr. Ruda had also published a number of valuable studies on matters of international law. Special mention should be made of the course Mr. Ruda had given in 1975 at the Hague Academy of International Law on reservations to treaties,[1] which would undoubtedly be extremely valuable to the Commission in its forthcoming consideration of the topic.

At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. José María Ruda.

2. Mr. BARBOZA said that he was particularly saddened by Mr. Ruda's death, not only as a member of the international legal community, but also as a compatriot and a friend. He had been co-holder of a chair at Buenos Aires University with Mr. Ruda before Mr. Ruda had become Under-Secretary for Foreign Affairs and then representative of Argentina to the United Nations Security Council and General Assembly at a delicate time in his country's history. Mr. Ruda had always been noted for his integrity and his dedication to the public interest both at the national and international levels.

3. Having risen through the hierarchy of the Department of Legal Affairs of the United Nations, he had then sat as a judge at ICJ for 18 years. His whole life had been devoted to diplomacy, teaching and writing, and it set an example for future generations.

4. Mr. THIAM said that he too wished to pay a tribute to Mr. Ruda, who had been his colleague for one year on the Commission before he had become a judge at the Court. He would stress in particular Mr. Ruda's human and social qualities, his keen mind and his special interest in relations between Africa and Latin America.

5. The CHAIRMAN said that, on behalf of the Commission, he would address a letter of condolences to Mr. Ruda's family and enclose a copy of the summary record of the meeting.

Statement by the Under-Secretary-General, Director-General of the United Nations Office at Geneva

6. The CHAIRMAN said that it was his pleasure to welcome the Under-Secretary-General, Director-General of the United Nations Office at Geneva, who had been associated throughout his career with United Nations efforts to develop international law and thus improve international relations and whose work was held in high esteem by the entire international legal community.

7. Mr. PETROVSKY (Under-Secretary-General, Director-General of the United Nations Office at Geneva) said that he first wished to convey to the Commission the wishes of the Secretary-General, who had himself been a member of the Commission.

8. It was an honour for him to speak before the Commission, which had established its reputation as the world's leading body in the field of international law-making and included in its membership some of the best experts in that field. Fourteen multilateral conventions had been concluded on the basis of drafts prepared by the Commission. At the current time, in the new international environment, the Commission continued to make a vital contribution to the strengthening of international law through its involvement in a number of important topics, such as the preparation of a statute for an international criminal court, State responsibility, 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.

[1] "Reservations to Treaties", *Collected Courses of The Hague Academy of International Law, 1975-III* (Leiden, Sijthoff, 1977), vol. 146, pp. 95-218.